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United States Fidelity and Guaranty Co. v. A&S Manufacturing Co.: Realignment of Parties in Diversity Jurisdiction Cases

> "*The Judicial Power shall extend . . . to Controversies . . . between Citizens of different States.*"[1]

It is difficult to imagine that the Founding Fathers intended these words to allow deep-pocketed insurance companies to utilize the federal courts to their advantage. Insurance companies and other large corporations have consistently preferred the treatment of the federal courts and have relied on diversity jurisdiction to be heard in the forum of their choice.[2] Suits involving multiple parties and complicated litigation have flooded the federal dockets, and many federal judges have struggled to unravel the complex issues presented in these cases.[3] Motions for realignment of parties in diversity cases have forced the federal courts to devise methods to properly position the parties around the controversies presented.[4]

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1. U.S. CONST. art. III, § 2.

2. EDWARD A. PURCELL, JR., LITIGATION AND INEQUALITY 262-64 (1992); Richard D. Allen, *Forum Battles From the Insurer's Perspective*, COVERAGE, Nov.-Dec. 1994, at 27, 35.

3. *See* JUDICIAL CONFERENCE OF THE U.S., REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 40-41 (1990) [hereinafter FEDERAL COURTS STUDY] (citing diversity cases as constituting "about half the civil trials in federal court, . . . making them more time-consuming and expensive to process" and referring to a 1988 study which found that diversity cases cost the federal court system $131 million annually, over one-tenth of the federal judicial budget); RICHARD A. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 59-93 (1985). Posner documented a 250% increase in the federal district court caseload from 1960 to 1983, from 80,000 to 280,000 cases, and an increase of 686% in courts of appeals cases, from 3,765 in 1960 to 29,580 in 1983. *Id.* at 63-64; *see also* ABA STANDING COMM. ON FED. JUDICIAL IMPROVEMENTS, THE UNITED STATES COURTS OF APPEALS: REEXAMINING STRUCTURE AND PROCESS AFTER A CENTURY OF GROWTH 40 (1989) (concluding that "[g]rowth in the federal courts of appeals has been in only one direction in recent years: toward more cases and more cases of greater complexity"); Paul L. Langer, *Significant Current Developments in Environmental Insurance Coverage*, *in* 1 ENVIRONMENTAL INSURANCE COVERAGE CLAIMS AND LITIGATION 1994, at 129, 131 (PLI Comm. Law & Practice Course Handbook Series No. A4-4450, 1994) (referring to insurance litigation explosions in federal and state courts and the resulting inconsistent and conflicting decisions).

4. Because diversity jurisdiction requires all parties on one side of a suit to be completely diverse from all parties on the other side of the suit, Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267 (1806), parties often dispute on which side of a suit they fall, using motions for realignment in order to defeat diversity jurisdiction.

Two distinct tests for realignment evolved from the Supreme Court's seminal decision in *City of Indianapolis v. Chase National Bank*[5]*—the substantial controversy test and the primary purpose test.*[6] *The Fourth Circuit recently endorsed one of these two realignment tests in United States Fidelity and Guaranty Co. v. A&S Manufacturing Co.*,[7] following the lead of about half of its sister circuits and ratifying the primary purpose approach as its method for assessing realignment.[8]

This Note details the Fourth Circuit's recent realignment decision in *United States Fidelity and Guaranty*.[9] In order to clarify the issues raised in realignment cases, this Note summarizes the historical development of diversity jurisdiction[10] and outlines *City of Indianapolis v. Chase National Bank*, the leading Supreme Court decision on realignment.[11] This Note then describes the interpretations given to *Indianapolis* by the various circuit courts and illustrates the methods the circuits have employed to determine whether realignment of parties is proper.[12] The methods used by the circuit courts, the substantial controversy and primary purpose approaches, are then catalogued according to their merits and weaknesses.[13] Next, this Note discusses alternatives to the two controlling realignment tests, including a third approach and the abolition or limitation of diversity jurisdiction.[14] Finally, this Note concludes that while the Fourth Circuit's adoption of the primary purpose test in *United States Fidelity and Guaranty* correctly interpreted the text of *Indianapolis*, that decision itself did not present an acceptable result.[15]

United States Fidelity & Guaranty Company (USF&G), Federal Insurance Company (Federal), and Hartford Accident and Indemnity Company (Hartford) were insurance carriers for A&S Manufacturing Company (A&S) on various A&S sites in Maryland and New Jersey.[16] A&S was involved as a defendant in an action by the United States Environmental Protection Agency (EPA) for violations of the Com-

5. 314 U.S. 63 (1941).
6. *Id.* at 69; *see infra* notes 60-78 and accompanying text.
7. 48 F.3d 131 (4th Cir. 1995).
8. *Id.* at 133.
9. *See infra* notes 16-49 and accompanying text.
10. *See infra* notes 50-59 and accompanying text.
11. *See infra* notes 60-78 and accompanying text.
12. *See infra* notes 79-116 and accompanying text.
13. *See infra* notes 117-44 and accompanying text.
14. *See infra* notes 145-61 and accompanying text.
15. *See infra* notes 162-68 and accompanying text.
16. United States Fidelity & Guar. Co. v. A&S Mfg. Co., 839 F. Supp. 347, 348 (D. M. 1993), *aff'd*, 48 F.3d 131 (4th Cir. 1995).

prehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA).[17] Charging A&S with violating CERCLA[18] by causing environmental contamination, the EPA sought recovery of the cost incurred in mitigating the property damage caused by the contamination.[19] A&S petitioned its insurance carriers for indemnification and/or payment of its defense in the EPA action, but all three carriers refused to pay.[20]

USF&G initiated a declaratory judgment action in the United States District Court of Maryland to determine the rights and liabilities of A&S's insurance carriers under the policies on A&S sites.[21] USF&G named A&S, Federal, and Hartford as defendants and based jurisdiction solely on diversity pursuant to 28 U.S.C. § 1332.[22]

A&S filed a motion for realignment of the parties and a motion to dismiss due to lack of subject matter jurisdiction.[23] A&S argued that all of the insurers in the declaratory judgment action should be aligned as plaintiffs because the dispositive issue in the action was whether any of A&S's insurance carriers were obligated to indemnify and defend A&S in the EPA suit.[24] The requested realignment of all insurance carriers as plaintiffs would destroy complete diversity be-

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17. *Id.*

18. 42 U.S.C. §§ 9601-9626 (1994).

19. *United States Fidelity & Guar.*, 839 F. Supp. at 348. The environmental contamination claim resulted from the release of hazardous substances at the Maryland, Sand, Gravel & Stone quarry, and the EPA sought recovery from A&S, as well as several other defendants, for present and future costs associated with the clean up and property damage. *Id.*

20. *Id.; see* United States v. Maryland Sand, Gravel and Stone Co., No. HAR 89-2869, 1994 U.S. Dist. LEXIS 14035 (D. Md. Aug. 9, 1994) (unpublished) (detailing the EPA action against A&S and other defendants).

21. *United States Fidelity & Guar.*, 839 F. Supp. at 348.

22. *Id.*

23. *Id.* at 348-49. In order to hear a case, a federal court must find subject matter jurisdiction under either 28 U.S.C. § 1331 or § 1332. Because there was no federal question under § 1331, the requirements of § 1332 had to be met in order for this suit to proceed. Section 1332 provides in relevant part:

> (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $50,000, exclusive of interest and costs, and is between—
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> (1) citizens of different States;
>
> (2) citizens of a State, and citizens and subjects of a foreign state;
>
> (3) citizens of different States and in which citizens or subjects of a foreign state are additional parties;
>
> (4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

28 U.S.C. § 1332(a) (1994).

24. *United States Fidelity & Guar.*, 839 F. Supp. at 348.

cause A&S and Federal are both citizens of New Jersey, compelling a dismissal for lack of subject matter jurisdiction.[25]

The District Court of Maryland granted A&S's motion for realignment and dismissed the case, basing its decision on the principles set forth in *City of Indianapolis v. Chase National Bank*.[26] The Supreme Court in *Indianapolis* held:

> To sustain diversity jurisdiction there must exist an "actual," "substantial," controversy between citizens of different states, all of whom on one side of the controversy are citizens of different states from all parties on the other side. . . . Whether the necessary "collision of interests" exists . . . must be ascertained from the "principal purpose of the suit" and the "primary and controlling matter in dispute."[27]

The district court in *United States Fidelity and Guaranty* interpreted this language to require application of a "primary purpose" test,[28] which involves identifying the primary issue in the suit and "determin[ing] whether a real dispute exists between opposing parties over that issue."[29] Applying this test to the issues in the case, the district court determined that the primary issue in dispute was whether A&S was entitled to indemnification or the cost of its defense from its insurance carriers.[30] Thus, the court found that all of the insurers' interests were adverse to A&S and that the parties should be realigned to reflect the primary issue in dispute.[31]

USF&G appealed the decision to a panel of the Fourth Circuit, contending that the district court erred in applying the primary pur-

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25. *Id.* at 348-49. Chief Justice Marshall, in Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267 (1806), required complete diversity for an action to fall within the statutory grant of diversity jurisdiction. *Id.* at 267. Complete diversity requires that no party on one side of the suit be from the same state as any party on the opposite side of the suit. *Id.*; *see* 28 U.S.C. § 1332 (1993); 1 JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 0.71[5.-2] (2d ed. 1995). The parties involved in *United States Fidelity & Guar.* were all corporations, and under § 1332, "a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business . . . ." 28 U.S.C. § 1332(c)(1) (1994). USF&G was incorporated in Maryland and, therefore, was a citizen of Maryland. A&S and Federal had their principal places of business in New Jersey and were both citizens of New Jersey for diversity purposes. Hartford was incorporated in the state of Connecticut and, therefore, was a citizen of Connecticut. *United States Fidelity & Guar.*, 839 F. Supp. at 348-49.

26. *United States Fidelity & Guar.*, 839 F. Supp. at 348-49 (citing City of Indianapolis v. Chase Nat'l Bank, 314 U.S. 63 (1941)).

27. *Indianapolis*, 314 U.S. at 69 (citations omitted).

28. *United States Fidelity & Guar.*, 839 F. Supp. at 351.

29. *Id.* at 349.

30. *Id.* at 351.

31. *Id.*

pose test to ascertain whether realignment was appropriate.[32] The Fourth Circuit began its analysis of the case by recognizing the split among the circuits as to the appropriate test to apply in realignment cases.[33] Presently, the Third, Sixth, and Ninth Circuits all utilize the primary purpose test endorsed by the district court.[34] The Second and Seventh Circuits employ the substantial controversy test, which USF&G urged the Fourth Circuit to adopt.[35]

The Fourth Circuit identified *City of Indianapolis v. Chase National Bank*[36] as the controlling Supreme Court authority on the test for realignment of parties.[37] As previously mentioned, the various circuits have devised two different tests for realignment from the holding in *Indianapolis*: the substantial controversy test and the primary purpose test.[38] Under the substantial controversy test, realignment is improper if any substantial conflict may be found between the parties.[39] The Fourth Circuit acknowledged that the Supreme Court in *Indianapolis* considered several issues raised by the parties adverse to realignment,[40] but it stated that the Supreme Court's inquiry was solely in pursuit of identifying the principal purpose of the action as opposed to applying a "substantial controversy" test.[41] The Fourth Circuit rejected the substantial controversy test because of its tendency to "allow[ ] parties to easily manipulate diversity jurisdiction" by identifying

32. United States Fidelity & Guar. Co. v. A&S Mfg. Co., 48 F.3d 131, 132 (4th Cir. 1995).

33. *Id.*

34. *Id.*; *see also* United States Fidelity & Guar. Co. v. Thomas Solvent Co., 955 F.2d 1085, 1088-91 (6th Cir. 1992) (endorsing the primary purpose test in realignment decisions); Employers Ins. of Wausau v. Crown Cork & Seal Co., 942 F.2d 862, 864-67 (3d Cir. 1991) (same); Continental Airlines, Inc. v. Goodyear Tire & Rubber Co., 819 F.2d 1519, 1523 n.2 (9th Cir. 1987) (same); *accord* Zurn Indus., Inc. v. Action Constr. Co., Inc., 847 F.2d 234, 237 (5th Cir. 1988) (also adopting the primary purpose test, although not cited in the Fourth Circuit's opinion).

35. *United States Fidelity & Guar.*, 48 F.3d at 132; *see also* Maryland Casualty Co. v. W.R. Grace & Co., 23 F.3d 617, 621-24 (2d Cir.) (applying the substantial controversy test), *cert. denied*, 115 S. Ct. 655 (1994); American Motorists Ins. Co. v. Trane Co., 657 F.2d 146, 149-51 (7th Cir. 1981) (same). Other circuits adopting the substantial controversy test include the Eighth and Tenth. *See* Farmers Alliance Mut. Ins. Co. v. Jones, 570 F.2d 1384, 1387-88 (10th Cir.), *cert. denied*, 439 U.S. 826 (1978); Universal Underwriters Ins. Co. v. Wagner, 367 F.2d 866, 870-71 (8th Cir. 1966).

36. 314 U.S. 63 (1941).

37. *United States Fidelity & Guar.*, 48 F.3d at 132-33.

38. *See supra* notes 34-35 (listing circuits according to test adopted).

39. *United States Fidelity & Guar.*, 48 F.3d at 133 (citing *Maryland Casualty Co.*, 23 F.3d at 622-23).

40. *Id.* (citing City of Indianapolis v. Chase Nat'l Bank, 314 U.S. 63, 73 n.3 (1941) (discussing and dispensing with several alternative disputes that might exist between Chase and Indianapolis Gas)).

41. *Id.*

any hypothetical dispute between the parties.[42] USF&G argued that the substantial controversy test was valid, pointing out that the Fourth Circuit had endorsed it on several occasions in the past.[43] However, the Fourth Circuit rejected USF&G's argument and distinguished each case.[44]

After clearly indicating its endorsement of the primary purpose test, the court proceeded to determine the principal issue underlying the suit.[45] Looking to the pleadings and the nature of the suit,[46] the court concluded that the primary conflict in the action stemmed from the indemnity and legal fees that A&S sought from its insurers.[47] Therefore, the proper alignment of the parties was insured (A&S) against insurers (USF&G, Federal, and Hartford).[48] Because this alignment of the parties destroyed complete diversity, the Fourth Circuit affirmed the lower court and dismissed the action for lack of subject matter jurisdiction.[49]

Realignment issues are necessarily intertwined with diversity jurisdiction because the realignment of parties often will destroy complete diversity requirements. The authority for diversity jurisdiction is rooted in Article III of the Constitution, which provides: "The Judicial Power shall extend . . . to Controversies between Citizens of different States . . . ."[50] The Framers' justifications for diversity jurisdiction included: protection of out-of-state citizens from local bias,[51] providing citizens of the various states access to a superior fed-

42. *Id.*

43. *Id.* USF&G identified J.B. Hunt Transp., Inc. v. Innis, No. 92-1273, 1993 U.S. App. LEXIS 1315 at *5 (4th Cir. Jan. 26, 1993) (unpublished); American Ins. Co. v. Lester, 214 F.2d 578, 581 (4th Cir. 1954); and C.Y. Thomason Co. v. Lumbermens Mut. Casualty Co., 183 F.2d 729, 733 (4th Cir. 1950), as Fourth Circuit decisions utilizing the substantial controversy test. *United States Fidelity & Guar.*, 48 F.3d at 133.

44. *United States Fidelity & Guar.*, 48 F.3d at 133. The Fourth Circuit claimed it was concerned with the district court's determination of the primary dispute in *Lester*, not its application of the primary purpose test. *Id.* The court also stated that *Thomason* and *J.B. Hunt* could be read to support either test and did not indicate that the Fourth Circuit had embraced the substantial controversy test. *Id.*

45. *Id.* at 133-34.

46. *See* Smith v. Sperling, 354 U.S. 91, 97 (1957) (stating that determining whether there is a "collision of issues . . . is a practical not a mechanical determination and is resolved by the pleadings and the nature of the dispute" (citations omitted)).

47. *United States Fidelity & Guar.*, 48 F.3d at 134.

48. *Id.*

49. *Id.*

50. U.S. CONST. art. III, § 2.

51. CARL MCGOWAN, THE ORGANIZATION OF JUDICIAL POWER IN THE UNITED STATES 27-28 (1967) (quoting James Madison's speech to the Virginia ratifying convention); *see also* ERWIN C. SURRENCY, HISTORY OF THE FEDERAL COURTS 96 (1987) (stating that the "accepted rationale for this diversity jurisdiction is that the federal courts were tribunals presumed to be free from local influence"); Adrienne J. Marsh, *Diversity Jurisdic-*

eral court system,[52] and encouraging interstate commerce.[53] In the years since the ratification of the Constitution, Congress and the judiciary have generally placed more restrictive limits on the grant of jurisdiction to citizens of different states.

Diversity jurisdiction was first limited by Congress in the Judiciary Act of 1789, which required one of the parties to be a citizen of the state in which suit was brought and implemented a minimum amount in controversy requirement.[54] *Strawbridge v. Curtiss*, decided in 1806, limited diversity jurisdiction further by requiring complete diversity among parties.[55] Later, Congress eliminated the need for one of the parties to be a citizen of the state in which suit was brought,[56] authorized removal to federal courts,[57] and revised the minimum amount-in-controversy requirement several times.[58] A final notable

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tion: Scapegoat of Overcrowded Federal Courts, 48 BROOK. L. REV. 197, 199-205 (1982) (stating that "protect[ion of] out-of-state litigants from local prejudice and, concomitantly promot[ion of] harmony among the states" were justifications enumerated by the Founding Fathers for diversity jurisdiction (footnote omitted)).

52. *See* MCGOWAN, *supra* note 51, at 27-28 (citing James Madison's speech to the Virginia ratifying convention); *see also* Marsh, *supra* note 51, at 200, 210-12 (naming access to superior federal courts as a justification for diversity jurisdiction).

53. John P. Frank, *Historical Bases of the Federal Judicial System*, 13 LAW & CONTEMP. PROBS. 3, 22-28 (1948); Marsh, *supra* note 51, at 200, 205-09. The justifications offered for diversity jurisdiction have been subject to much criticism. *See* MAX FARRAND, THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES 154 (1913) (stating that "[t]o one who is especially interested in the judiciary, there is surprisingly little on the subject to be found in the records of the convention"); Henry J. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483, 484, 510 (1928) (commenting on the small "amount of thought [given by the Framers] to the construction of a federal judiciary" and stating that the justification concerning "fears of local hostilities, which had only a speculative existence in 1789, . . . are still less real today"); Carl McGowan, *Federal Jurisdiction: Legislative and Judicial Change*, 28 CASE WEST. RES. L. REV. 517, 530-33 (1978) [hereinafter McGowan, *Federal Jurisdiction*] (stating that state court bias is no longer a reason to sustain diversity jurisdiction); Herbert Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 LAW & CONTEMP. PROBS. 216, 239-40 (1948) (advocating the limitation of diversity jurisdiction).

54. Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78. The Judiciary Act of 1789 set the amount-in-controversy requirement at $500. *Id.*

55. Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267, 267 (1806); *see supra* note 25 (discussing the *Strawbridge* holding requiring complete diversity).

56. Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470, 470 (current version at 28 U.S.C § 1441 (1994)).

57. *Id.* § 2, 18 Stat. 470, 470-71.

58. The minimum amount in controversy requirement was raised to $2,000 in 1887 and 1888, Act of Aug. 13, 1888, ch. 866, sec. 1, § 1332(a), 25 Stat. 433, 433-34; Act of Mar. 3, 1887, ch. 373, sec. 1, § 1332(a), 24 Stat. 552, 552-53 (amended in 1911); increased to $3,000 in 1911, Judiciary Act of Mar. 3, 1911, ch. 231, sec. 24, § 1332(a), 36 Stat. 1087, 1091; to $10,000 in 1958, Act of July 25, 1958, Pub. L. No. 85-554, sec. 2, § 1332(a), 72 Stat. 415, 415 (amended in 1958); and most recently to $50,000 in 1988, Judicial Improvements and Access to Justice Act of Nov. 19, 1988, Pub. L. No. 100-702, sec. 201(a), § 1332(a), 102 Stat. 4646, 4646 (current version at 28 U.S.C. § 1332(a) (1994)).

development occurred in 1958, when Congress amended the diversity statute to recognize corporations as citizens of states in which they are incorporated or have their principal place of business.[59]

As diversity jurisdiction evolved, federal judges were often asked to determine the proper alignment of parties in order to ensure that complete diversity requirements were satisfied. *City of Indianapolis v. Chase National Bank*,[60] handed down by the Supreme Court in 1941, is unequivocally the most significant decision in realignment jurisprudence.[61] A five to four decision,[62] *Indianapolis* afforded Justice Felix Frankfurter an opportunity to place limitations on diversity jurisdiction.[63] *Indianapolis* involved a complicated arrangement of four principal parties—Chase National Bank (Chase), the City of Indianapolis (City), Citizens Gas Company of Indianapolis (Citizens Gas), and Indianapolis Gas Company (Indianapolis Gas).

Chase was the trustee under a mortgage deed securing a bond issued to Indianapolis Gas.[64] Subsequently, Citizens Gas was formed to compete with Indianapolis Gas, and, at the end of twenty-five years, Citizens Gas was to be conveyed to the City subject to the com-

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59. Act of July 25, 1958, Pub. L. No. 85-554, sec. 2, § 1332(a), 72 Stat. 415, 415 (current version at 28 U.S.C. § 1332(c)(1) (1994)). One commentator has argued that the 1958 amendment encouraged corporations to rely more heavily on realignment of parties to achieve diversity because it limited their citizenship to their state of incorporation or principal place of business. William A. Braverman, Note, *Janus Was Not a God of Justice: Realignment of Parties in Diversity Jurisdiction*, 68 N.Y.U. L. REV. 1072, 1092 (1993).

60. 314 U.S. 63 (1941).

61. *See* 13B CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3607 (Supp. 1995) (identifying *Indianapolis* as "the leading case" on realignment jurisprudence); Braverman, *supra* note 59, at 1074 (citing *Indianapolis* as the exclusive guide for federal judges in realignment decisions).

62. Justice Frankfurter wrote the majority opinion, *Indianapolis*, 314 U.S. at 68, while the dissent was led by Justice Jackson and joined by Chief Justice Stone, Justice Roberts, and Justice Reed, *id.* at 77 (Jackson, J., dissenting).

63. Justice Frankfurter was long opposed to diversity jurisdiction and wrote several articles on the subject. *See* Felix Frankfurter, *A Note on Diversity Jurisdiction—In Reply to Professor Yntema*, 79 U. PA. L. REV. & AM. L. REG. 1097 (1931) [hereinafter Frankfurter, *Note on Diversity Jurisdiction*]; Felix Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 CORNELL L.Q. 499 (1928); Felix Frankfurter & James M. Landis, *The Business of the Supreme Court of the United States: A Study in the Federal Judicial System*, 40 HARV. L. REV. 834 (1927). Justice Frankfurter, while a professor at Harvard Law School, also encouraged several of his students to produce commentary on the subject. *See* BRUCE A. MURPHY, THE BRANDEIS/FRANKFURTER CONNECTION 88 & n.55 (1982) (citing Henry J. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483 (1928) and referencing unpublished research papers written by A.H. Feller and N. Jacobs entitled "Proposed Limitations on the Diversity of Jurisdiction of the Federal Courts" and unpublished studies on the *Swift v. Tyson* decisions by Harry Shulman and Lowell Turrentine).

64. *Indianapolis*, 314 U.S. at 70.

pany's " 'outstanding legal obligations.' "[65] After the two gas companies competed for seven years, Indianapolis Gas leased all of its property to Citizens Gas for a term of ninety-nine years.[66] As part of the rental agreement, Citizens Gas was required to pay the interest on the outstanding bond debt and annual sums equal to a six percent return on Indianapolis's stock.[67] At the end of twenty-five years, Citizens Gas conveyed all of its property and obligations to the City, and Citizens Gas and the City thereafter denied any accountability for the bond payments initially pledged by Indianapolis Gas to Chase.[68]

Chase instituted suit against Citizens Gas, the City, and Indianapolis Gas, asking the court to declare the lease agreement between Citizens Gas and Indianapolis Gas valid and to obligate the City to pay the interest on the bond payments pursuant to the terms of the lease.[69] Citizens Gas and the City denied the validity of the lease and claimed that the actual dispute was between the City and Indianapolis Gas, both citizens of the same state.[70] The Supreme Court agreed, found that the validity of the lease was the primary dispute, and realigned the parties around this issue.[71]

In reaching its decision to realign, the *Indianapolis* Court utilized language that has since been interpreted variably by the circuit courts.[72] Justice Frankfurter wrote:

> To sustain diversity jurisdiction there must exist an "actual," "substantial" controversy between citizens of different states, all of whom on one side of the controversy are citizens of different states from all parties on the other side. Diversity jurisdiction cannot be conferred upon the federal courts by the parties' own determination of who are plaintiffs and who defendants. It is our duty . . . to "look beyond the pleadings and arrange the parties according to their sides in the dispute." . . . Whether the necessary "collision of interests" exists, is therefore not to be determined by mechanical rules. It must be ascertained from the "principal purpose of the suit" and the "primary and controlling matter in dispute."[73]

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65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.* at 70-71.
69. *Id.* at 71.
70. *Id.* Indianapolis Gas and the City of Indianapolis were both citizens of Indiana for purposes of diversity jurisdiction.
71. *Id.* at 72-76. Realigning the parties in this manner resulted in parties from Indiana on both sides of the suit and led the Supreme Court to hold that the district court lacked jurisdiction to hear the case. *Id.* at 75-76.
72. *See infra* notes 82-116 and accompanying text.
73. *Indianapolis*, 314 U.S. at 69-70 (citations omitted).

Under this analysis, Justice Frankfurter determined that the controlling matter in the suit hinged on whether the lease between Indianapolis Gas and Citizens Gas bound the City, and that everything else was just "window-dressing designed to satisfy the requirements of diversity jurisdiction."[74] The Court also recognized that the suit could be brought in state court and emphasized the constitutional and congressional limits on diversity jurisdiction.[75]

The dissenters in *Indianapolis*, led by Justice Jackson, would have held that sufficient conflicts existed between the parties to avoid realignment, and stated that realignment in this case would cause unfairness and delay.[76] Justice Jackson agreed that realignment is appropriate in instances where the " 'arrangement of the parties is a mere contrivance,' "[77] but refused to limit the court's recognition of a cause of action to ones that were "more 'actual' or 'substantial' than the other."[78]

The circuits are almost evenly divided on whether Justice Frankfurter's words advocate realignment when no substantial controversy is present between the parties or when the parties are not aligned around the primary issue in dispute.[79] The courts that utilize the substantial controversy test in realignment cases[80] begin their analysis by identifying all disputes between the parties, and then if an actual or substantial conflict exists, even if it is not the primary issue, realignment will be denied.[81]

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74. *Id.* at 72.

75. *Id.* at 76-77. Justice Frankfurter noted that congressional limits on diversity jurisdiction have been influenced by a need to protect states' rights and to avoid burdening the federal courts with " 'business that intrinsically belongs to the state courts' in order to keep them free for their distinctive federal business." *Id.* at 76 (citation omitted).

76. *Id.* at 81-84 (Jackson, J., dissenting).

77. *Id.* at 82 (Jackson, J., dissenting).

78. *Id.* at 80 (Jackson, J., dissenting).

79. *See supra* notes 34-35 (listing the division of the circuit courts).

80. *See supra* note 35 (identifying the Second, Seventh, Eighth, and Tenth Circuits as adopting the substantial controversy test).

81. *See* Maryland Casualty Co. v. W.R. Grace & Co., 23 F.3d 617, 623 (2d Cir.) (requiring an actual, substantial controversy in order to avoid realignment), *cert. denied*, 115 S. Ct. 655 (1994); American Motorists Ins. Co. v. Trane Co., 657 F.2d 146, 151 (7th Cir. 1981) (stating that realignment is proper where "no actual, substantial conflict" exists); Farmers Alliance Mut. Ins. Co. v. Jones, 570 F.2d 1384, 1388 (10th Cir.) (holding that an actual controversy existed between the parties and refusing to realign), *cert. denied*, 439 U.S. 826 (1978); Universal Underwriters Ins. Co. v. Wagner, 367 F.2d 866, 870 (8th Cir. 1966) (requiring the controversy to be actual and substantial); *see also* Syms, Inc. v. IBI Sec. Serv., Inc., 586 F. Supp. 53, 56 (S.D.N.Y. 1984) (stating that realignment is inappropriate where there is a "clear 'collision of interest' " between the parties); American Mut. Liab. Ins. Co. v. Flintkote Co., 565 F. Supp. 843, 846-47 (S.D.N.Y. 1983) (finding that " 'a mere mutuality of interest in escaping liability is not of itself sufficient to justify realignment.' " (quoting *Trane*, 657 F.2d at 151)); Irving Trust Co. v. Century Export & Import,

The Seventh Circuit formally embraced the substantial controversy test in *American Motorists Insurance Co. v. Trane Co.*[82] American Motorists and several other insurance companies refused to defend their insured, Trane, against a claim by a third party.[83] American Motorists filed a declaratory judgment action in federal court invoking diversity jurisdiction and seeking a declaration of its rights and liabilities to Trane and Trane's other insurers.[84] One of Trane's other insurers filed a motion to realign the parties to reflect all the insurance companies interested in escaping liability to Trane on one side.[85] The court noted the relevant language in *Indianapolis* and stated that "[r]ealignment is proper where there is no actual, substantial conflict between the parties that would justify placing them on opposite sides of the lawsuit."[86] Because American Motorists would benefit from a holding that another one of Trane's insurers had a duty to defend Trane,[87] the Seventh Circuit found that a substantial conflict existed and reversed the lower court's order to realign.[88]

The recent decision in *Maryland Casualty Co. v. W.R. Grace & Co.* reflects the Second Circuit's preference for the substantial controversy test.[89] *Maryland Casualty* arose out of underlying lawsuits against an asbestos manufacturer, Grace.[90] Maryland Casualty filed a declaratory judgment action in federal court to determine its rights and liabilities in the asbestos litigation and named Grace and its primary insurer as defendants.[91] Jurisdiction was based solely on diversity of citizenship.[92] Grace moved to realign the parties as insurers opposing insured, which would have destroyed the basis for diversity jurisdiction.[93] The Second Circuit reviewed the two approaches to realignment and adopted the substantial controversy test "because it

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S.A., 464 F. Supp. 1232, 1241 (S.D.N.Y. 1979) (stating that the fact that "one defendant may benefit should [the] plaintiff prevail against another defendant [is] not . . . a sufficient basis for realignment").

82. 657 F.2d 146 (7th Cir. 1981).

83. *Id.* at 148. Several contractors sued Trane in connection with the sale of heat exchanger units. *Id.*

84. *Id.* at 148-49.

85. *Id.* at 149.

86. *Id.* at 151.

87. *Id.* at 150.

88. *Id.* at 151.

89. Maryland Casualty Co. v. W.R. Grace & Co., 23 F.3d 617, 622 (2d Cir.), *cert. denied*, 115 S. Ct. 655 (1994).

90. *Id.* at 619-20.

91. *Id.* at 620. Subsequently, Maryland Casualty added several other Grace insurers as defendants. *Id.*

92. *Id.*

93. *Id.* at 621.

permits courts deciding whether diversity exists to consider the multiple interests and issues involved in the litigation."[94] The court stated that its "approach is consistent with the Supreme Court's chief concern in *Indianapolis* that parties not manipulate alignment to manufacture diversity jurisdiction."[95] Then, the court found that the insurance companies had interests in avoiding liability to Grace and in avoiding liability to one another.[96] These interests constituted a substantial conflict, and the court declined to realign the parties.[97]

A number of other circuits employ a primary purpose test in realignment cases.[98] The primary purpose test requires the court to identify the principal dispute in the suit and then realign the parties around that dispute.[99] The circuits adopting the primary purpose test have modeled their test on the language and result reached by the court in *Indianapolis*.[100]

The Third Circuit applied the primary purpose test in *Employers Insurance of Wausau v. Crown Cork & Seal Company*,[101] a 1991 decision closely resembling the facts presented in *United States Fidelity and Guaranty*. Crown Cork & Seal Co. brought a state court action seeking indemnification from several of its insurers, including Wausau, for alleged environmental contamination claims.[102] Wausau filed a declaratory judgment action in federal court against Crown Cork & Seal and six other insurers to determine its rights and obligations regarding the environmental contamination claims.[103] Crown

94. *Id.* at 622.

95. *Id.* at 623.

96. *Id.* The Second Circuit noted that "[r]ealignment hinges on those issues that divide the parties, not on those on which they agree." *Id.*

97. *Id.* at 624.

98. *See supra* note 34 and accompanying text (explaining that the Third, Fourth, Fifth, Sixth, and Ninth Circuits have adopted the primary purpose test).

99. *See United States Fidelity & Guar. Co.*, 48 F.3d at 133 (4th Cir. 1995) (stating that "the principal purpose test entails two steps," identifying the primary issue, and aligning the parties around the issue); United States Fidelity & Guar. Co. v. Thomas Solvent Co., 955 F.2d 1085, 1091 (6th Cir. 1992) (discussing the primary issue in dispute and stating that the parties must be realigned around it); Employers Ins. of Wausau v. Crown Cork & Seal Co., 942 F.2d 862, 866-67 (3d Cir. 1991) (identifying the primary issue in dispute and affirming the district court's order for realignment); Zurn Indus., Inc. v. Action Constr. Co., 847 F.2d 234, 237 (5th Cir. 1988) (identifying the principal claim and holding that the parties were properly aligned around it); Continental Airlines, Inc. v. Goodyear Tire & Rubber Co., 819 F.2d 1519, 1523-24 & n.2 (9th Cir. 1987) (inquiring as to the " 'primary and controlling matter in dispute' " and arranging the parties around it).

100. City of Indianapolis v. Chase Nat'l Bank, 314 U.S. 63, 69 (1941). See *supra* note 73 and accompanying text for full text of the relevant *Indianapolis* language.

101. 942 F.2d 862 (3d Cir. 1991).

102. *Id.* at 863.

103. *Id.* Wausau's suit was based on diversity jurisdiction under 28 U.S.C. § 1332. *Id.*

Cork & Seal filed a motion for realignment of the parties as insured against insurers and a motion for lack of subject matter jurisdiction because such realignment would destroy complete diversity.[104] The Third Circuit cited the relevant language in *Indianapolis*[105] and noted the two approaches that had been utilized in realignment cases.[106] The court read the language in *Indianapolis* narrowly and held that it did not support the substantial controversy test.[107] Applying instead the primary purpose approach, the Third Circuit identified the primary issue as the liability of its insurers to Crown and realigned the parties as insured against insurers.[108]

Another decision administering the primary purpose test, *United States Fidelity & Guaranty Co. v. Thomas Solvent Co.*, also involved an insurer instituting a declaratory judgment action to determine its rights and liabilities to the insured and other insurers in an underlying environmental contamination claim.[109] Thomas Solvent, the insured, and one of its insurers filed motions for realignment of the parties as insurers against insured.[110] The court began by recognizing that realignment would destroy complete diversity and necessitate a dismissal for lack of subject matter jurisdiction.[111] The Sixth Circuit adopted the primary purpose test previously endorsed by the Third, Fifth, and Ninth Circuits and held "that *Indianapolis Gas* requires that parties be aligned in accordance with the primary dispute in the controversy, even where a different, legitimate dispute between the parties supports the original alignment."[112] Applying the primary purpose test to the facts in *Thomas Solvent* and finding that the primary dispute involved the insurers' duties to indemnify Thomas, the court realigned

104. *Id.* Crown and one of its insurers were citizens of Pennsylvania and realignment would place them on opposite sides of the suit in violation of complete diversity requirements. *Id.*

105. *See supra* note 73 and accompanying text.

106. *Crown Cork & Seal*, 942 F.2d at 864-65.

107. *Id.* at 866-67. The Third Circuit noted that "[t]he Supreme Court has long interpreted statutes conferring diversity jurisdiction with 'jealous restriction' and 'strict construction,' so as not to infringe on 'state sensitivities.' " *Id.* at 866. Furthermore, it stated that their application of the primary purpose test more closely comports with the need for "federal courts in diversity litigation to 'scrupulously confine their own jurisdiction to the precise limits which the statute has defined.' " *Id.* at 866-67 (quoting City of Indianapolis v. Chase Nat'l Bank, 314 U.S. 63, 76-77 (1941)).

108. *Id.*

109. United States Fidelity & Guar. Co. v. Thomas Solvent Co., 955 F.2d 1085, 1086-87 (6th Cir. 1992).

110. *Id.* at 1087.

111. *Id.* at 1088.

112. *Id.* at 1089.

the parties as insured against insurers and dismissed the action for lack of subject matter jurisdiction.[113]

The Fourth Circuit's decision in *United States Fidelity and Guaranty* re-emphasized the need for the Supreme Court to resolve the conflict between the circuits' two interpretations of the *Indianapolis* language. In analyzing the merits of the primary purpose and substantial controversy test, the Fourth Circuit chose to strictly construe the language in *Indianapolis* and adopt the primary purpose test.[114] The court also highlighted several disadvantages of the substantial controversy test, including the manipulation of diversity jurisdiction and the potential for forum shopping.[115] Although not explicitly stated by the Fourth Circuit, it may be inferred that the court wished to curtail the burgeoning impact of insurance litigation on the federal courts by requiring a stricter test.[116]

Despite the solid arguments made by the *United States Fidelity and Guaranty* Court in favor of the primary purpose test, proponents of the substantial controversy test enumerate equally solid arguments in favor of that approach. Although the language of the majority opinion in *Indianapolis* is mainly utilized by advocates of the primary purpose test,[117] that same language may also be read to accommodate the substantial controversy test. The *Indianapolis* majority stated that "[t]o sustain diversity jurisdiction there must exist an 'actual,' 'substantial' controversy"[118] and this language can reasonably be cited in support of the substantial controversy approach. The dissent in *Indianapolis* also offers encouragement to champions of the substantial controversy test.[119] Justice Jackson would realign parties only "where

113. *Id.* at 1091.

114. *United States Fidelity & Guar.*, 48 F.3d at 133. In finding support for the primary purpose test, the court cited *Indianapolis* as requiring a court to "ascertain the 'collision of interests' from the 'principal purpose of the suit, and the primary and controlling matter in dispute' " and stated that this language "cannot be disregarded as mere surplusage." *Id.*

115. *Id.*

116. *See supra* note 3 and accompanying text (detailing the increase in the federal court caseload).

117. *See supra* note 34 (naming courts which strictly construe the language in *Indianapolis* to support adopting the primary purpose test).

118. City of Indianapolis v. Chase Nat'l Bank, 314 U.S. 63, 69 (1941) (citations omitted). In constructing this language, Justice Frankfurter relied on Helm v. Zarecor, 222 U.S. 32, 36 (1911), which indicated that arrangement of parties in diversity suits should reflect the "actual controversy, . . . looking beyond the formal arrangement made by the bill," and on Niles-Bement-Pond Co. v. Iron Moulders Union Local No. 68, 254 U.S. 77, 81 (1920), which required the presence of a "substantial controversy" to sustain diversity jurisdiction. *Indianapolis*, 314 U.S. at 69.

119. *Indianapolis*, 314 U.S. at 79 (Jackson, J., dissenting) (utilizing the language " 'actual' and 'substantial' enough to support the jurisdiction").

no real cause of action is asserted."[120] The dissent would undoubtedly uphold the substantial controversy test applied by several of the circuits and presumably recognize an even weaker test for identifying a controversy between parties.[121]

One advantage of the substantial controversy test is that it allows diversity actions an easier procession through the federal courts.[122] It also extends more flexibility to courts in deciding whether diversity is present than the primary purpose test.[123] Finally, because the substantial controversy test results in realignment and subsequent dismissals for lack of jurisdiction less frequently than the primary purpose test, a strong argument may be made that the substantial controversy test more accurately reflects the Constitution's broad grant of jurisdiction to citizens of different states by allowing more citizens access to the federal courts.[124]

Opponents of the substantial controversy test, however, believe it permits manipulation of diversity requirements because some adversity can be found between almost any parties to a suit.[125] Additionally, the substantial controversy approach requires a liberal reading of Justice Frankfurter's opinion in *Indianapolis* and would appear to render the dissent unnecessary.[126]

Strictly construed, the language and holding in *Indianapolis* lend substantial weight to the primary purpose approach implemented by the Third, Fourth, Fifth, Sixth, and Ninth Circuits.[127] *Indianapolis* specifically inquired into "the 'primary and controlling matter in dispute' " and found that "[e]verthing else in the case [wa]s incidental to

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120. *Id.* at 80 (Jackson, J., dissenting).

121. The dissent indicated realignment is proper when " 'the arrangement of the parties is merely a contrivance between friends for the purpose of founding a jurisdiction which otherwise would not exist,' " but did not suggest that a controversy must be substantial to avoid realignment. *Id.* at 82 (Jackson, J., dissenting) (quoting Justice Holmes in Dawson v. Columbia Ave. Sav. Fund, Safe Deposit, Title & Trust Co., 197 U.S. 178, 181 (1905)).

122. *See* Braverman, *supra* note 59, at 1114.

123. Maryland Casualty Co. v. W.R. Grace & Co., 23 F.3d 617, 622 (2d Cir.), *cert. denied*, 115 S. Ct. 655 (1994).

124. *See* John P. Frank, *For Maintaining Diversity Jurisdiction*, 73 YALE L. REV. 7, 9-13 (1963) (discussing the Constitution's grant of diversity jurisdiction to the judiciary); J. Skelly Wright, *The Federal Courts and The Nature and Quality of State Law*, 13 WAYNE L. REV. 317, 327 (1967) [hereinafter Wright, *The Federal Courts*] (stating that "if the Constitution confers the authority, we may exercise it in furtherance of any decent social purpose").

125. Braverman, *supra* note 59, at 1117.

126. *See United States Fidelity & Guar.*, 48 F.3d at 133 (finding that the substantial controversy allows a party to claim "some hypothetical adversity between diverse parties" in order to find a substantial conflict); Braverman, *supra* note 59, at 1117.

127. *See supra* notes 34, 98-113 and accompanying text.

[the validity of the lease, the] dominating controversy."[128] In a footnote to the opinion, the majority recognized that other disputes might exist between the parties, but stated that "diversity jurisdiction [cannot] be rested upon so flimsy a basis."[129] This narrower approach is also supported by the fact that Justice Frankfurter, the author of the majority opinion in *Indianapolis*, opposed diversity jurisdiction throughout his tenure and attempted to place limits upon it.[130]

One of the principal benefits of the primary purpose test is its ability to limit the scope of diversity jurisdiction, especially in cases involving multiple parties and issues.[131] This test also allows the federal courts to avoid attempts by parties to circumvent the requirements of 28 U.S.C. § 1332.[132] Federal judges utilizing a primary purpose approach may exercise more discretion in determining the primary issue in dispute, and litigants, in order to avoid realignment, must identify the issue with which they are aligned as the primary one in dispute instead of merely one issue in the suit.[133] Finally, the primary purpose approach bolsters state's rights by limiting access to the federal court system for claims that are not based on federal questions.[134]

One criticism of the primary purpose approach is that it puts courts in the position of investigating the merits of a case before jurisdiction is established in order to determine which issues are actual disputes and which issue is the primary purpose of the litigation.[135] Another weakness of this approach may be found by exploring the precedent cited by Justice Frankfurter in *Indianapolis*. Justice Frankfurter utilized language from *East Tennessee, Virginia & Georgia R.R. v. Grayson,* referring to the "principal purpose of the suit"[136] and *Merchants' Cotton Press & Storage Co. v. Insurance Co. of North America,* referring to the "primary and controlling matter in dis-

128. City of Indianapolis v. Chase Nat'l Bank, 314 U.S. 63, 72 (1941).

129. *Id.* at 73 n.3. Justice Frankfurter declared that "[t]he tail flies with the kite." *Id.*

130. *See supra* note 63 (citing articles authored by Justice Frankfurter which opposed diversity jurisdiction).

131. *See* Employers Ins. of Wausau v. Crown Cork & Seal Co., 942 F.2d 862, 866 (3d Cir. 1991) (discussing the Supreme Court's "strict construction" and "jealous restriction" of diversity jurisdiction in deciding to adopt the primary purpose test).

132. Braverman, *supra* note 59, at 1113.

133. *Id.* at 1113-15.

134. *See Crown Cork & Seal*, 942 F.2d at 866-67 (citing the protection of "state sensitivities" as a reason for adopting the primary purpose test).

135. Braverman, *supra* note 59, at 1122-23.

136. City of Indianapolis v. Chase Nat'l Bank, 314 U.S. 63, 69 (1941) (citing East Tennessee, Virginia & Georgia R.R. v. Grayson, 119 U.S. 240, 244 (1886)).

pute."[137] While *East Tennessee* can be read as supporting the primary purpose test, the facts of *Merchant's Cotton Press* indicate the Supreme Court did not limit itself to an investigation of the primary dispute.[138] Instead, the Court analyzed all potential issues in dispute and concluded that no conflict existed.[139]

Two other cases cited by Frankfurter, *Dawson v. Columbia Avenue Savings Fund, Safe Deposit, Title & Trust Co.*[140] and *Sutton v. English*,[141] may be interpreted as providing more support for the substantial controversy test than for the primary purpose test. The *Dawson* court, led by Justice Holmes, realigned the parties when no controversy existed, but did not define the standard for determining when an existing controversy will sustain jurisdiction.[142] It may be inferred from the *Dawson* opinion that if some "collision of interest" had existed between the parties, realignment would have been improper.[143] In *Sutton*, although the Court realigned the parties around a primary dispute, its reason for doing so rested on its interpretation of the facts of the case and not in the application of any realignment test.[144]

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137. *Id.* at 69-70 (citing Merchant's Cotton Press & Storage Co. v. Ins. Co. of N. Am., 151 U.S. 368, 385 (1894)).

138. The Supreme Court detailed the possible disputes in the case and determined that no dispute existed between Merchant's Cotton Press and the plaintiffs in the action. *Merchant's Cotton Press*, 151 U.S. at 385-87.

139. *Id.*

140. *Indianapolis*, 314 U.S. at 69 (citing Dawson v. Columbia Ave. Sav. Fund, Safe Deposit, Title & Trust Co., 197 U.S. 178, 180 (1905)). The Supreme Court in *Dawson* instructed the federal courts to "look beyond the pleadings and arrange the parties according to their sides in the dispute" and determine whether the necessary "collision of interest" exists. *Dawson*, 197 U.S. at 180-81.

141. *Indianapolis*, 314 U.S. at 75 n.4 (citing Sutton v. English, 246 U.S. 199, 204 (1918)). Frankfurter referred to *Sutton* and *Indianapolis* as "applications of the same principle." *Id.* However, *Sutton* held that parties must be aligned around their "attitude towards the actual and substantial controversy." *Sutton*, 246 U.S. at 204.

142. *Dawson*, 197 U.S. at 181.

143. *See id.* (stating that "[n]o difference or collision of interest or action is alleged or even suggested").

144. In *Sutton*, the heirs of Mary and Moses Hubbard protested Moses's establishment of a charitable trust and Mary's gift of land to her niece. *Sutton*, 246 U.S. at 201-03. The complaint named the three trustees and the niece as defendants and the lower court realigned the niece as a plaintiff, destroying diversity jurisdiction. *Id.* at 203-04. The Supreme Court reversed the lower court and held that the niece was properly a defendant because that was "her attitude towards the actual and substantial controversy." *Id.* at 204. Although the *Sutton* decision may be read as identifying the disputes and selecting the primary dispute around which to align the parties, it is more probable, as Justice Jackson suggested in his *Indianapolis* dissent, that the court was "disagree[ing] with the lower court's view of the facts rather than with its view of the law." *Indianapolis*, 314 U.S. at 83 (Jackson, J., dissenting); *see also* Braverman, *supra* note 59, at 1110 (analyzing Frankfurter's interpretation of *Sutton* in *Indianapolis*).

Taking into account the merits and disadvantages of the substantial controversy and primary purpose tests, an attractive alternative might be a combination of the two. This third approach to realignment, which has been applied by the First Circuit in *U.S.I. Properties Corp. v. M.D. Construction Co.*[145] involves identifying the primary dispute and then considering whether any other controversies warrant aligning the parties differently.[146] This test provides the benefits of the substantial controversy and primary purpose approaches—preventing judicial limitation of diversity jurisdiction and preventing manipulation of diversity jurisdiction requirements by the parties.[147] However, this test places extensive discretion in the hands of judges and could produce arbitrary results.[148]

Another solution to the problems created by realignment may be to abolish or limit diversity jurisdiction.[149] It appears that the underly-

145. 860 F.2d 1, 4 (1st Cir. 1988) (stating that the court's "task [wa]s to determine 'the primary and controlling matter in dispute,' and then determine whether any actual collision in interests remains" (citations omitted)), *cert. denied*, 490 U.S. 1065 (1989).

146. *Id.; see also* Travelers Indemnity Co. v. Metropolitan Life Ins. Co., 798 F. Supp. 156, 158 (S.D.N.Y. 1992) (adopting a realignment approach based on footnote three in *Indianapolis* that combines elements of the substantial controversy and primary purpose tests); Braverman, *supra* note 59, at 1118-23 (advocating the ideal realignment test, based on footnote three in *Indianapolis*).

147. *See Travelers Indemnity*, 798 F. Supp. at 159; Braverman, *supra* note 59, at 1119. In *Travelers Indemnity*, the district court opted for a realignment test that would recognize an actual, substantial controversy as long as it was not hypothetical and not based on a face-value reading of the pleadings. *Travelers Indemnity*, 798 F. Supp. at 159. The court's test, like the substantial controversy test, allows more diversity cases access to federal court, but also provides limits to manipulation of diversity requirements by requiring an investigation into the conflict beyond a mere look at the pleadings and assertions of the parties.

148. Braverman, *supra* note 59, at 1122.

149. *See, e.g.*, Richard Allan, *Demarche or Destruction of the Federal Courts—A Response to Judge Friendly's Analysis of Federal Jurisdiction*, 40 BROOK. L. REV. 637, 655-56 (1974) (supporting the abolition of diversity jurisdiction); Howard C. Bratton, *Diversity Jurisdiction—An Idea Whose Time Has Passed*, 51 IND. L.J. 347, 350-51 (1976) (citing the overload of the courts and the problems with applying state law after *Erie* as reasons to abolish diversity jurisdiction); Frankfurter, *Note on Diversity Jurisdiction*, *supra* note 63, at 1100 (1931) (arguing for the abolition of diversity jurisdiction); McGowan, *Federal Jurisdiction*, *supra* note 53, at 533-34 (supporting limits on diversity jurisdiction); Thomas D. Rowe, Jr., *Abolishing Diversity Jurisdiction: The Silver Lining*, 66 A.B.A. J. 177, 178 (1980) (supporting abolition of diversity jurisdiction because its benefits are random and it would reduce procedural difficulties); Thomas D. Rowe, Jr., *Abolishing Diversity Jurisdiction: Positive Side Effects and Potential for Further Reforms*, 92 HARV. L. REV. 963, 971-72 (1979) (advocating abolition of diversity jurisdiction and stating that it will solve the problems created by realignment); David L. Shapiro, *Federal Diversity Jurisdiction: A Survey and A Proposal*, 91 HARV. L. REV. 317, 319 (1977) (advocating a "local option" plan where each federal district opts to limit or eliminate diversity jurisdiction); Wechsler, *supra* note 53, at 239-40 (supporting the limitation of diversity jurisdiction); Charles A. Wright, *Restructuring Federal Jurisdiction: The American Law Institute Proposals*, 26 WASH. & LEE L. REV. 185, 192-208 (1969) [hereinafter Wright, *Restructuring Federal Jurisdiction*]

ing controversy regarding diversity jurisdiction has affected the circuit courts' treatment of realignment decisions leading courts to adopt a realignment test that corresponds to their ideal view of diversity jurisdiction. The substantial controversy test provides a broader application of diversity jurisdiction, while the primary purpose test seeks to limit diversity jurisdiction.[150] The American Law Institute's extensive study of the federal court system in 1969 concluded that:

> diversity jurisdiction continues to serve an important function in our federal system, but . . . it presently extends to substantial classes of cases with no valid justification for being in the national courts and omits some that should have access to a federal forum. . . . These considerations are relevant both to the specific proposals for change in the scope of diversity jurisdiction and to the broader question, answered by the Institute in the negative, as to whether this head of jurisdiction should be abolished.[151]

More recently, the Federal Courts Study Committee suggested that: "Congress should limit federal jurisdiction based on diversity of citizenship . . . . At the least, it should effect changes to curtail the most obvious problems of the current jurisdiction."[152]

Some of the more compelling reasons for the dilution of diversity jurisdiction include the overcrowded federal docket,[153] the obsolescence of the classic justification that diversity jurisdiction avoids local

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(investigating the ALI proposals and generally agreeing that diversity jurisdiction should be limited).

150. *See, e.g.*, Braverman, *supra* note 59, at 1115.

151. AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 1-2 (1969); *see also id.* at §§ 1301-07 (detailing the proposed limitations and alterations to diversity jurisdiction). The ALI's study sparked heated debates in the legal community regarding the abolition and limitation of diversity jurisdiction. *See* Bratton, *supra* note 149, at 349-54 (supporting the abolition of diversity jurisdiction and citing the ALI proposals); McGowan, *Federal Jurisdiction*, *supra* note 53, at 532 (discussing the ALI proposals and advocating the limitation of diversity jurisdiction); Wright, *Restructuring Federal Jurisdiction*, *supra* note 149, at 204 (generally supporting the ALI proposals with some reservations). *But see* John P. Frank, *The Case for Diversity Jurisdiction*, 16 HARV. J. ON LEGIS. 403, 405 (1979) [hereinafter Frank, *Case for Diversity Jurisdiction*] (refuting arguments made by the ALI to limit diversity jurisdiction); Marsh, *supra* note 51, at 197 n.1 (recognizing the ALI study as causing controversy); Wright, *The Federal Courts*, *supra* note 124, at 319-21 (disputing the reasons enumerated by the ALI to abolish diversity jurisdiction).

152. FEDERAL COURTS STUDY, *supra* note 3, at 38. The Federal Courts Study Committee cited the caseload pressures and strain on the federal judicial budget as reasons for the limitation of diversity jurisdiction to "narrowly defined exceptions." *Id.* at 39.

153. *See* Bratton, *supra* note 149, at 350-51; McGowan, *Federal Jurisdiction*, *supra* note 53, at 524.

prejudice,[154] the interests the states have in hearing state cases,[155] and the difficulties the federal courts have had in applying state law after *Erie Railroad Co. v. Tompkins*[156] was decided.[157] Commentators have offered many alternatives to abolition, which include denying in-state litigants the power to invoke diversity jurisdiction,[158] increasing the amount in controversy requirement,[159] and defining corporate citizenship to include every state in which the corporation does business.[160] Abolition seems unlikely in view of Congress's rejection of past proposals, but it remains to be determined whether Congress will implement any of the proposed limitations.[161]

If the Supreme Court elects to resolve the tension among the circuits on realignment issues, proponents of the primary purpose test, including the Fourth Circuit, have several strong arguments.[162] Considering these arguments, the text of *Indianapolis*, and the underlying ideology espoused by Justice Frankfurter, the Fourth Circuit's interpretation of the *Indianapolis* decision rests on solid ground.[163] However, even though the decision in *United States Fidelity and Guaranty* is clearly justifiable, the results it effectuates are less creditable. The right of the judiciary to hear controversies between citizens of different states was broadly granted by the Constitution, and many of the

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154. *See* FEDERAL COURTS STUDY, *supra* note 3, at 40-41 (finding that diversity jurisdiction causes friction between state and federal courts and the main justification for retaining diversity jurisdiction, local bias, was no longer prevalent); McGowan, *Federal Jurisdiction*, *supra* note 53, at 534.

155. *See* Allan, *supra* note 149, at 654-55; Bratton, *supra* note 149, at 349-50; Frank, *Case for Diversity Jurisdiction*, *supra* note 151, at 411.

156. 304 U.S. 64 (1938) (holding that federal courts in diversity cases must apply state law).

157. *See* Bratton, *supra* note 149, at 350; Frank, *Case for Diversity Jurisdiction*, *supra* note 151, at 411; McGowan, *Federal Jurisdiction*, *supra* note 53, at 529.

158. *See* FEDERAL COURTS STUDY, *supra* note 3, at 42; Marsh, *supra* note 51, at 221-22.

159. *See* FEDERAL COURTS STUDY, *supra* note 3, at 42; Marsh, *supra* note 51, at 224-25.

160. *See* FEDERAL COURTS STUDY, *supra* note 3, at 42; Marsh, *supra* note 51, at 225-26.

161. Previous proposals for either limitation or abolition of diversity jurisdiction have failed. *See* S. 679, 96th Cong., 1st. Sess. (1979) (proposing limits to diversity jurisdiction); H.R. 130, 96th Cong., 1st Sess. (1979) (proposing abolition); H.R. 2202, 96th Cong., 1st Sess. (1979) (same); H.R. 9622, 95th Cong., 1st Sess. (1977) (same); S. 939, 72d Cong., 1st Sess. (1932) (proposing limits to diversity jurisdiction); H.R. 11508, 72d Cong., 1st Sess. (1932) (same); S. 4357, 71st Cong., 2d Sess. (1930) (same); S. 3151, 70th Cong., 1st Sess. (1928) (same).

162. *See supra* notes 131-34 and accompanying text (outlining arguments in favor of the primary purpose test including: protection of states rights, discouraging multiple party and controversy litigation in federal courts, limiting diversity jurisdiction, and decreasing the caseload of the overburdened federal courts).

163. *See supra* notes 63, 73 and accompanying text.

original justifications for this grant of power still exist.[164] Relying on a decision that has been ambiguously interpreted by the circuits, the Fourth Circuit's adoption of the primary purpose test purports to limit this grant of power to the judiciary by allowing the dismissal of more diversity cases.[165] Further, the primary purpose test bestows considerable discretion on federal judges to determine the primary issue in a suit.[166] Undoubtedly, this broad grant of discretion will lead to inconsistency among the federal courts.[167]

Although the arguments elicited by the Fourth Circuit in *United States Fidelity and Guaranty* in favor of the primary purpose test are compelling, the results of the test render it incompatible with the broad constitutional grant of diversity jurisdiction and the need for consistency and efficiency in the federal court system. The substantial controversy test or a combination of both tests might produce better results, especially if combined with some of the suggested modifications to the diversity statute.[168] After *United States Fidelity and Guaranty*, the circuit courts' holdings regarding the test for realignment of parties remain divided, but they emphasize the need for Congress or the Supreme Court to clarify the ambiguity either through legislation modifying 28 U.S.C. § 1332 or an opinion clearly outlining the apposite test for realignment.

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164. *See* Frank, *supra* note 124, at 9 (discussing the Constitution's broad grant of diversity jurisdiction to the judiciary); Marsh, *supra* note 51, at 203 (defending an original justification of diversity jurisdiction, the protection from local bias, by finding that "no one has yet established, by survey or other empirical proof, that parochial bias has so dissipated that diversity jurisdiction has become obsolete"); Wright, *The Federal Courts*, *supra* note 124, at 327 (stating that "if the Constitution confers authority, [the court] may exercise it in furtherance of any decent social purpose").

165. The facts of *United States Fidelity & Guar. Co.* closely parallel those in realignment cases in other circuits. *See supra* notes 82-97 and 101-13 and accompanying text (detailing the facts in *American Motorists*, *Maryland Casualty*, *Crown Cork & Seal* and *Thomas Solvent*). It can be inferred that there is no clear test mandated by the Supreme Court because the circuits are routinely applying different tests to similar facts.

166. *See* Braverman, *supra* note 59, at 1076 (arguing that the discretion granted to federal judges by the primary purpose test allows them to use "[r]ealignment . . . [as] a tool . . . to destroy diversity of the parties and dismiss suits—even those that may have been legitimately aligned").

167. *Id.* at 1075.

168. *See supra* notes 158-160 and accompanying text.

Crossman v. Moore: The End of Relation Back with Regard to Corrected Party Names in North Carolina

North Carolina and Federal Rule of Civil Procedure 15(c)'s provisions for relation back are critical for plaintiffs who make a mistake by improperly naming a defendant or who fail to assert all possible related claims in their original pleading.[1] When a plaintiff tries to use relation back to add a party or claim, the court's resolution of the issue either allows the plaintiff's claim to go forward for a decision on the merits or it disallows the claim. Thus, the stakes are high: plaintiffs who lose on this issue will be completely barred from asserting their new or additional claims.[2]

Traditionally, the federal rules have recognized two types of relation back.[3] One form arises when plaintiffs attempt to add additional claims related to those already properly alleged in their timely complaint.[4] In general, this form of relation back is permitted if the new claim arises out of the same conduct, transaction, or occurrence that gave rise to the original, properly asserted claims.[5] The second form of relation back involves plaintiffs who file timely complaints, but fail to name the correct defendants.[6] This was the issue most recently

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1. *See* FED. R. CIV. P. 15(c); N.C. R. CIV. P. 15(c).

2. *See* Crossman v. Moore, 341 N.C. 185, 186, 459 S.E.2d 715, 717 (1995) (recognizing that the resolution of the relation back issue determines the case).

3. *See* FED. R. CIV. P. 15(c); *see also* LARRY L. TEPLY & RALPH U. WHITTEN, CIVIL PROCEDURE 523-35 (1994) (discussing history and requirements of amending pleadings under the federal rules).

4. This type of relation back is codified in the first prong of Rule 15(c) of the Federal Rules of Civil Procedure, which states:

> An amendment of a pleading relates back to the date of the original pleading when (1) relation back is permitted by the law that provides the statute of limitations applicable to the action, or (2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading . . . ."

FED. R. CIV. P. 15(c)(1)(2).

5. *See, e.g.*, Tiller v. Atlantic Coast Line R.R. Co., 323 U.S. 574 (1945); Rogerson v. Fitzpatrick, 121 N.C. App. 728, 468 S.E.2d 447 (1996); Bowlin v. Duke Univ., 119 N.C. App. 178, 457 S.E.2d 757, *disc. review denied*, 342 N.C. 190, 463 S.E.2d 233 (1995); Wooten v. Warren, 117 N.C. App. 350, 451 S.E.2d 342 (1994).

6. This form of relation back is codified in the second part of Rule 15(c) of the Federal Rules of Civil Procedure, which states:

> An amendment of a pleading relates back to the date of the original pleading when . . . (3) the amendment changes the party or the naming of the party against whom a claim is asserted if the foregoing provision (2) is satisfied and, within the period provided by Rule 4(m) for service of the summons and complaint, the party to be brought in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a mistake concerning

addressed by the North Carolina Supreme Court in *Crossman v. Moore*.[7]

North Carolina's rule for relation back of amendments to pleadings is substantially different from its federal counterpart.[8] North Carolina's Rule 15(c) states:

> A claim asserted in an amended pleading is deemed to have been interposed at the time the claim in the original pleading was interposed, unless the original pleading does not give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading.[9]

In *Crossman v. Moore*, the North Carolina Supreme Court interpreted this rule to encompass only the first form of relation back—addition of related claims.[10] The court held that North Carolina's rule for relation back does not apply to a situation in which plaintiffs need to correct the names of defendants in order to carry the case forward on the merits.[11] Without considering the practical consequences of the rule it adopted,[12] the court reasoned that the plain language of Rule 15(c) of the North Carolina Rules of Civil Procedure does not permit relation back with regard to corrected party names.[13]

The claims asserted in *Crossman* arose out of an automobile accident that occurred in Mecklenburg County on January 25, 1989.[14] The plaintiff filed a complaint on January 24, 1992, to recover for personal injuries sustained in the accident.[15] The original complaint named Van Dolan Moore and the Dolan Moore Company as defendants.[16] The police officer's accident report listed Van Dolan Moore as the

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> the identity of the proper party, the action would have been brought against the party.

FED. R. CIV. P. 15(c).

7. 341 N.C. 185, 459 S.E.2d 715 (1995).

8. *Compare* N.C. R. CIV. P. 15(c) (allowing relation back of claims if original pleading gives defendant notice of the "transactions" or "occurrences" alleged) *with* FED. R. CIV. P. 15(c) (specifically referring to changing of the party or naming of the party).

9. N.C. R. CIV. P. 15(c).

10. *Crossman*, 341 N.C. at 187, 459 S.E.2d at 717. The court stated, "We hold that this rule does not apply to the naming of a new party-defendant to the action." *Id.*

11. *Id.*

12. *See id.* at 187-88, 459 S.E.2d at 717.

13. *Id.* at 187, 459 S.E.2d at 717.

14. *Id.* at 186, 459 S.E.2d at 716.

15. *Id.* North Carolina has a three-year statute of limitations for personal injury actions resulting from negligence. N.C. GEN. STAT. § 1-52(16) (Supp. 1995).

16. *Crossman*, 341 N.C. at 186, 459 S.E.2d at 716.

driver of the automobile.[17] However, Van Dolan Moore's son, Van Dolan Moore II, was the actual driver of the car.[18]

Van Dolan Moore filed a motion for summary judgment because he was not the driver of the automobile involved in the accident.[19] In response, the plaintiff filed a motion to amend her complaint to add Van Dolan Moore II as a defendant.[20] She also filed a motion requesting that the court allow the amendment to relate back to the original complaint.[21]

The superior court judge granted the plaintiff's motion to amend her complaint to add Van Dolan Moore II as a defendant, but denied her motion for relation back.[22] Since the complaint against Van Dolan Moore II did not relate back, the statute of limitations barred the suit against him. Furthermore, since there was no basis for a suit against Van Dolan Moore, the plaintiff was effectively barred from any recovery for injuries sustained in the accident.[23]

The plaintiff appealed the denial of her motion for relation back to the North Carolina Court of Appeals.[24] A unanimous panel recognized that in *Ring Drug Co. v. Carolina Medicorp Enterprises, Inc.*,[25] the court had adopted the rationale of *Schiavone v. Fortune*,[26] in which the United States Supreme Court applied a strict four-part test[27] in deciding whether to allow an amendment to correct a party's name to relate back.[28] The court of appeals reiterated the *Schiavone* test, and recognized that the Supreme Court had rejected the contention that a plaintiff should be able to correct a defendant's name after the statute of limitations expires so long as the plaintiff makes the

17. Crossman v. Moore, 115 N.C. App. 372, 373, 444 S.E.2d 630, 630 (1994), *aff'd*, 341 N.C. 185, 459 S.E.2d 715 (1995).

18. *Crossman*, 341 N.C. at 186, 459 S.E.2d at 716.

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *See id.*

24. Crossman v. Moore, 115 N.C. App. 372, 373, 444 S.E.2d 630, 631 (1994), *aff'd*, 341 N.C. 185, 459 S.E.2d 715 (1995).

25. 96 N.C. App. 277, 283, 385 S.E.2d 801, 806 (1989), *overruled by* Crossman v. Moore, 341 N.C. 185, 459 S.E.2d 715 (1995).

26. 477 U.S. 21 (1986); *see infra* notes 58-71 and accompanying text.

27. *Id.* at 29. The United States Supreme Court resolved the issue in *Schiavone* by adopting a test that required a court to determine whether: (1) the basic claim arose out of the conduct set forth in the original pleading; (2) the party to be brought in received notice so that it would not be prejudiced in its defense; (3) the party knew or should have known that it would have been named in the original pleading but for a mistake as to identity; and (4) the second and third requirements were fulfilled within the prescribed limitations period. *Id.*

28. *Crossman*, 115 N.C. App. at 375, 444 S.E.2d at 631-32.

correction during the time allowed for service of process under Rule 4(j) of the Federal Rules of Civil Procedure.[29]

The court of appeals then pointed out that commentators had criticized the *Schiavone* rule as being too harsh,[30] and that, as a result, the United States Congress amended Rule 15(c) to allow more claims to relate back.[31] However, while stating that "*Schiavone*, and thus *Ring Drug*, represent a strict construction of Rule 15(c) that should be reexamined,"[32] the court refused to adopt a more lenient rule because it was bound by its precedent unless overruled by the North Carolina Supreme Court.[33] Therefore, the court of appeals applied the *Schiavone/Ring Drug* test and held that the amended complaint did not relate back to the original complaint.[34] The court of appeals seemed reluctant in refusing to allow the amendment to relate back, apparently feeling that justice would have been better served by allowing relation back in this instance.[35] The court of appeals cited precedent as its only reason for affirming the trial court's decision and stated that "it is not a function of this Court to legislate."[36]

Recognizing the importance of the issue, the North Carolina Supreme Court allowed discretionary review of the case.[37] The court examined the language of Rule 15(c) of the North Carolina Rules of Civil Procedure and stated, "[w]e believe the resolution of this case may be had by discerning the plain meaning of the language of the rule."[38] Next, the court noted that the language of the rule speaks of

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29. *Id.* Rule 4(m) of the federal rules (formerly FED. R. CIV. P. 4(j)) provides:

> Time Limit for Service. If the service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint, the court, upon motion or on its own initiative after notice to the plaintiff, shall dismiss the action
>
> . . . .

FED. R. CIV. P. 4(m).

30. *Crossman*, 115 N.C. App. at 375-76, 444 S.E.2d at 632 (citing Diane S. Kaplan & Kimberly L. Craft, *Time Warps and Identity Crises: Muddling Through the Misnomer/Misidentification Mess*, 26 J. MARSHALL L. REV. 257, 289-90 n.164 (1993)).

31. *Id.* at 376, 444 S.E.2d at 632.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Crossman*, 341 N.C. at 186, 459 S.E.2d at 717.

38. *Id.* at 187, 459 S.E.2d at 717. The court noted that North Carolina's rule for relation back is not derived from its federal counterpart, as are most of the states' rules of civil procedure. *Id. Compare* FED. R. CIV. P. 15(c), *supra* notes 4, 6 (allowing amendments correcting party names to relate back if the defendant is notified of the action within the period allowed for service of summons and complaint if other notice requirements are met) *with* N.C. R. CIV. P. 15(c), *supra* text accompanying note 9 (construed by the North Carolina Supreme Court in *Crossman* as allowing relation back of related claims, but not the addition of parties). Instead, the language of the North Carolina rule mirrors that of a

claims, as opposed to parties, and that it allows relation back only when there is notice of the transactions or occurrences to be proved.[39] The court interpreted the statute to mean that there can be no notice to a new party when the amendment of the complaint seeks to add a new party.[40] There can only be notice when the plaintiff uses the amendment to correct the name of a party already involved in the action as a defendant.[41] Thus, the court concluded "that this rule does not apply to the naming of a new party-defendant to the action. It is not authority for the relation back of a claim against a new party."[42] With this holding, the court eliminated any possibility of relation back of corrected party names to add a new party in North Carolina.[43]

In its final task the court addressed how this holding compared to precedent.[44] First, the court stated that three previous decisions of the court of appeals had examined the same issue, and each had refused to allow the addition or correction of a party name to relate back to the original complaint.[45] However, the court recognized that in *Ring Drug Co. v. Carolina Medicorp Enterprises*,[46] the court of appeals upheld a trial court's decision to allow an amendment naming a new party to relate back.[47] The court expressly overruled *Ring* and stated: "We overrule the holding in *Ring*, and do not approve of the rationale of the other three cases so far as they are inconsistent with the reasoning of this opinion."[48]

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rule from New York's rules of civil procedure. *Crossman*, 341 N.C. at 187, 459 S.E.2d at 717; *see* N.Y. Civ. Prac. L. & R. 203(f) (McKinney 1992).

39. *Crossman*, 341 N.C. at 187, 459 S.E.2d at 717.

40. *Id.*

41. *Id.*

42. *Id.* Thus, while the North Carolina Court of Appeals had arguably advocated a more lenient standard for the relation back of party names, the North Carolina Supreme Court handed down a much more restrictive holding. *See supra* text accompanying notes 29-34, 40. The Court stated that its interpretation was consistent with the interpretation given by the New York courts in applying its rule. *Crossman*, 341 N.C. at 187, 459 S.E.2d at 717 (citing Brock v. Bua, 83 A.D.2d 61 (N.Y. 1981)).

43. *Crossman*, 341 N.C. at 187, 459 S.E.2d at 717. The court went on to recognize that other jurisdictions follow a different rule, but it noted that the language of those states' rules differs from that in North Carolina's rule. *Id.*

44. *Id.* at 187-88, 459 S.E.2d at 717.

45. *Id.* at 187, 459 S.E.2d at 717. *See* Stevens v. Nimocks, 82 N.C. App. 350, 357, 346 S.E.2d 180, 184, *cert. denied*, 318 N.C. 511, 349 S.E.2d 873 (1986), *reconsideration denied*, 318 N.C. 702, 351 S.E.2d 760 (1987); Callicutt v. American Honda Motor Co., 37 N.C. App. 210, 212-13, 245 S.E.2d 558, 560 (1978); Teague v. Motor Co., 14 N.C. App. 736, 740, 189 S.E.2d 671, 673 (1972). For discussion of these cases, see *infra* note 83 (*Stevens*); *infra* notes 57-59 and accompanying text (*Callicutt*); *infra* notes 53-56 and accompanying text (*Teague*).

46. 96 N.C. App. 277, 385 S.E.2d 801 (1989).

47. *Crossman*, 341 N.C. at 187-88, 459 S.E.2d at 717.

48. *Id.* at 188, 459 S.E.2d at 717.

Before the United States Supreme Court addressed the issue of relation back, the North Carolina Court of Appeals dealt with the issue under North Carolina's Rule 15(c) in two significant cases.[49] Each time, the court of appeals refused to allow any correction of a party name to relate back to the filing of the original complaint.[50] In *Teague v. Asheboro Motor Co.*,[51] the plaintiff's original complaint named the wrong business as defendant because the proper defendant had sold the business to a new corporation.[52] Even though the new corporation conducted business under the name of the proper defendant, the court of appeals did not allow the claim against the proper defendant to relate back to the filing of the original complaint. Under the plain language of Rule 15(c) of the North Carolina Rules of Civil Procedure, "a claim asserted in an amended pleading relates back to the original pleading, 'unless the original pleading does not give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading.' "[53] Ultimately the *Teague* court did not find that the proper defendant received the requisite notice.[54]

In *Callicutt v. American Honda Motor Co.*,[55] the court of appeals reached a similar conclusion.[56] Finding that the determination of whether relation back can be allowed rests on notice to the party sought to be added, the Court concluded:

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49. *See* Callicutt v. American Honda Motor Co., 37 N.C. App. 210, 245 S.E.2d 558 (1978); Teague v. Asheboro Motor Co., 14 N.C. App. 736, 189 S.E.2d 671 (1972).

50. *Teague*, 14 N.C. App. at 740, 189 S.E.2d at 673; *Callicutt*, 37 N.C. App. at 212-213, 245 S.E.2d at 673.

51. 14 N.C. App. 736, 189 S.E.2d 671 (1972).

52. *Id.* at 737, 180 S.E.2d at 671-72. The plaintiff was suing for personal injuries he received from the alleged negligence of an automobile dealership. *Id.* at 737, 189 S.E.2d at 671. After the accident, but before the complaint was filed, the dealership changed its name and moved to a new location. *Id.* at 737, 189 S.E.2d at 672. A new corporation purchased the old dealership and continued doing business in the same location and under the same name as the old dealership, Asheboro Motor Co. *Id.* The complaint was filed against this corporation, which technically had not been in existence at the time of the injury. *Id.* When the plaintiff discovered this fact, he attempted to correct the name and have it relate back to the original complaint. *Id.*

53. *Id.* at 739, 189 S.E.2d at 673 (quoting N.C. R. Civ. P. 15(c)).

54. *Id.* at 740, 189 S.E.2d at 673.

55. 37 N.C. App. 210, 245 S.E.2d 558 (1978). This case was not technically a Rule 15(c) relation back case, but instead was a Rule 15(a) motion to amend the complaint. *Id.* at 211, 245 S.E.2d at 559.

56. *Id.* at 213, 245 S.E.2d at 560. In this case, the plaintiff sued American Honda Motor Co. for injuries he received while riding one of their motorcycles. *Id.* at 210, 245 S.E.2d at 559. After the statute of limitations had expired, he discovered that this company was not the manufacturer of the motorcycle, but was only the retailer. *Id.* When he sought to amend the complaint to include the manufacturer, the court refused to allow relation back. *Id.* at 213, 245 S.E.2d at 560.

> If the effect of the proposed amendment is merely to correct the name of the party already in court, clearly there is no prejudice in allowing the amendment, even though it relates back to the date of the original complaint.
>
> On the other hand, if the effect of the amendment is to substitute for the defendant a new party, or add another party, such amendment amounts to a new and independent [cause] of action and cannot be permitted when the statute of limitations has run.[57]

In deciding these cases, the North Carolina courts had little guidance from federal precedent. However, in 1986, the United States Supreme Court tackled the issue of relation back with regard to party names in *Schiavone v. Fortune*.[58] In *Schiavone* the plaintiffs sought to recover for an allegedly defamatory story in *Fortune* magazine.[59] The plaintiffs listed *Fortune* as the defendant in the original complaint, even though *Fortune* is only the trademarked name of the magazine published by Time, Incorporated.[60] Nonetheless, the complaint was served on the registered agent for Time.[61] After the expiration of New Jersey's one-year statute of limitations for libel actions, Time moved to dismiss for failure to name it as a defendant within the statutory period.[62] The trial court granted Time's motion to dismiss, and the United States Court of Appeals for the Third Circuit affirmed.[63]

The United States Supreme Court utilized a four-prong test in deciding whether an amendment could relate back.[64] First, the basic claim must have risen out of the conduct set forth in the original pleading;[65] second, the party to be brought in must have received notice such that it would not be prejudiced in maintaining its defense;[66] third, the party must have known or should have known that, but for a

57. *Id.* at 212, 245 S.E.2d at 560 (quoting Kerner v. Rackmill, 111 F. Supp. 150, 151 (M.D. Pa. 1953) (citations omitted)). Interestingly, the North Carolina Court of Appeals applied the reasoning of a federal district court in reaching its conclusions. *Id.* When subsequent developments in federal law moved toward a more lenient rule, North Carolina courts at first began to follow. *See* Ring Drug Co. v. Carolina Medicorp Enters., 96 N.C. App. 277, 283, 385 S.E.2d 801, 806 (1989).

58. 477 U.S. 21 (1986). For a detailed discussion of the *Schiavone* decision, see Joseph Dornfried, Note, Schiavone v. Fortune*: Notice Becomes a Threshold Requirement for Relation Back Under Rule 15(c)*, 65 N.C. L. REV. 598 (1987).

59. *Schiavone*, 477 U.S. at 22-23.

60. *Id.* at 23.

61. *Id.* Thus, the proper defendant had notice, and the suit was properly filed before the statute of limitations had run.

62. *Id.* at 24.

63. *Id.* at 24-25.

64. *Id.* at 29.

65. *Id.*

66. *Id.*

mistake of identity, the action would have been brought against it;[67] and fourth, the second and third requirements must have been satisfied within the prescribed limitations period.[68]

The Supreme Court defined the "period provided by law for commencing the action" as the statute of limitations, and held that the amendment of the party name could not relate back to the original complaint.[69] Thus, the claim was barred by the statute of limitations.[70] The Court then sought to dispel the notion that the "period provided by law" could mean the period provided for service of process under Rule 4, in addition to the limitations period, by pointing out the advisory committee's note regarding the adoption of the then-existing Rule 15(c) in 1966.[71]

The *Schiavone* case has received extensive criticism for its perceived creation of an extremely severe standard.[72] Commentators have felt that the *Schiavone* rule leads to unjust results by dismissing too many claims before they are heard on the merits.[73] In 1991, this

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67. *Id.*

68. *Id.* Federal Rule of Civil Procedure 15(c) has been amended since the time of the *Schiavone* case. At that time, the rule stated:

> Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

Id. at 24 n.5 (quoting former FED. R. CIV. P. 15(c)). For the text of the current federal rule; see *supra* notes 4 & 6.

69. *Id.* at 30 (quoting former FED. R. CIV. P. 15(c)).

70. *Id.*

71. *Id.* at 30-31. Justice Stevens entered a dissenting opinion in this case, in which he was joined by Chief Justice Burger and Justice White. *Id.* at 32 (Stevens, J., dissenting). Justice Stevens argued that the four-part test had been satisfied, because " 'the period provided by law for commencing the action' " includes both the time for filing the complaint to avoid the expiration of the statute of limitations and the time for service of process of the complaint. *See id.* at 32-40 (Stevens, J., dissenting) (quoting former FED. R. CIV. P. 15(c)).

72. *See* Joseph P. Bauer, *An Un-*Fortune*-Ate Illustration of the Supreme Court's Role as Interpreter of the Federal Rules of Civil Procedure*, 63 NOTRE DAME L. REV. 720, 728 (1988); Robert D. Brussack, *Outrageous* Fortune*: The Case for Amending Rule 15(c) Again*, 61 S. CAL. L. REV. 671, 683 (1988); Harold S. Lewis, Jr., *The Excessive History of Federal Rule 15(c) and Its Lessons for Civil Rules Revision*, 85 MICH. L. REV. 1507, 1572-73 (1987).

73. Much of the commentary has focused on unfair results relating to the service of process. *See* Bauer, *supra* note 72, at 731; Brussack, *supra* note 72, at 697; Lewis, *supra* note 72, at 1560. For example, if two plaintiffs are injured in the same automobile accident

criticism influenced Congress to change the text of Rule 15(c) to allow for relation back of corrected party names so long as the plaintiff makes the amendment to the complaint within the time allowed for service of process under Rule 4(j).[74] The advisory committee's note to the 1991 amendments specifically states that the amendment of the text of the rule was made in order to change the result of the *Schiavone* decision.[75] In addition, many states followed the congressional lead and applied a less restrictive rule.[76] Interestingly enough, while the North Carolina courts were reluctant to adopt a standard as "liberal" as the *Schiavone* rule—and were applying a very strict interpretation of that rule when they did use it[77]—Congress amended the *Schiavone* rule because they felt it was too harsh.[78]

After the United States Supreme Court addressed the problem of relation back of corrected party names, the stage was set for the North Carolina courts to re-examine their treatment of the issue. In *Ring Drug Co. v. Carolina Medicorp Enterprises*,[79] the North Carolina Court of Appeals expressly adopted the federal test espoused in *Schiavone*[80] and, for the first time, allowed relation back of a corrected party name.[81]

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and both of their complaints are filed before the statute of limitations expires, the outcomes of their filings may be inconsistent. If Plaintiff A properly names the defendant, and Plaintiff B does not, the claim with the properly named defendant can go forward, and Plaintiff A need not serve the defendant until some time after the statute of limitations has run. *See* FED. R. CIV. P. 4(m) (allowing 120 days for service of process after the filing of the complaint). If Plaintiff B amends her complaint, she may properly serve the defendant and give notice to the defendant that a suit has been filed before the defendant ever knows that Plaintiff A has filed suit as well. Under *Schiavone*'s notice requirement, only Plaintiff A's claim can go forward, despite the fact that the defendant is not prejudiced in any manner whatsoever by having to answer Plaintiff B's complaint. *See* Brussack, *supra* note 72, at 697; *see also* Peter A. Zorn, Note, *Rule 15(c) and the Relation Back of Corrected Party Names*, 73 N.C. L. REV. 2189, 2203-07 (1995) (noting that the rules require a defendant brought into court by amendment to receive notice earlier than a defendant properly named originally.)

74. *See* FED. R. CIV. P. 15(c) advisory committee's note (1991). Former FED. R. CIV. P. 4(j) is now FED. R. CIV. P. 4(m).

75. FED. R. CIV. P. 15(c) advisory committee's note (1991).

76. *See, e.g.*, Frances T. Barnes, *Court Liberally Applies Rules of Civil Procedure to Case of Misnamed Defendant*, 47 S.C. L. Rev. 102 *passim* (1995) (discussing South Carolina's liberal application of the relation back rule).

77. *See* Franklin v. Winn-Dixie Raleigh, Inc., 117 N.C. App. 28, 39-40, 450 S.E.2d 24, 31 (1994), *aff'd*, 342 N.C. 404, 464 S.E.2d 46 (1995) (discussed *infra* notes 86-90 and accompanying text).

78. *See* FED. R. CIV. P. 15(c) advisory committee's note (1991).

79. 96 N.C. App. 277, 385 S.E.2d 801 (1989).

80. *Id.* at 283, 385 S.E.2d at 806.

81. *Id.* Before *Ring Drug* but after *Schiavone*, the North Carolina Court of Appeals heard one other case on this issue. In Stevens v. Nimocks, 82 N.C. App. 350, 346 S.E.2d 180 (1986), the plaintiff filed a legal malpractice claim against the defendant Nimocks. *Id.*

Ring Drug involved an unfair trade practices claim in which the plaintiff, a drug retailer, alleged that Carolina Medicorp Enterprises and Forsyth Memorial Hospital unfairly interfered with its contract with the Blumenthal Jewish Home for the Aged.[82] The original complaint failed to name Carolina Medicorp, Inc., the parent company of Carolina Medicorp Enterprises.[83] After the statute of limitations had run, the plaintiff sought to add Carolina Medicorp, Inc. and Salem Health Services, another subsidiary, to the complaint and have those claims relate back to the filing of the original complaint.[84] Applying the *Schiabone* test, the court of appeals held that the addition of Carolina Medicorp, Inc. related back to the filing of the original complaint, but that the addition of Salem could not.[85]

Just five years after *Ring Drug*, the court of appeals backed away from the more liberal federal test that it had adopted. In *Franklin v. Winn Dixie Raleigh, Inc.*,[86] the plaintiff, who was injured when she fell at a grocery store, filed a timely complaint which was then served on the proper registered agent for the store.[87] However, the complaint contained a minor error, naming as the defendant "Winn-Dixie Stores, Inc." instead of "Winn-Dixie Raleigh, Inc."[88] The court determined that under the federal test[89] the use of relation back would have prejudiced the defendant unfairly, and thus refused the plaintiff's motion to relate back to the original complaint.[90]

Until *Crossman*, the use of relation back of corrected party names had never reached the North Carolina Supreme Court. The supreme court could have utilized one of several approaches in *Crossman*. First, the court could have rejected the *Ring Drug* court's adop-

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at 351, 346 S.E.2d at 180. After the statute of limitations had run, the plaintiff sought to add Nimocks' partner as a defendant. *Id.* The court refused to allow this claim to relate back to the filing of the original complaint. *Id.* at 357, 346 S.E.2d at 184. Although decided after the United States Supreme Court had heard the *Schiavone* case, the *Stevens* court made no mention of it. *Id.* at 351-57, 346 S.E.2d at 182. However, the court did look to federal precedent for guidance. *Id.* at 354, 346 S.E.2d at 182.

82. Ring Drug Co. v. Carolina Medicorp Enters., Inc., 96 N.C. App. 277, 279, 385 S.E.2d 801, 803-04 (1989). The plaintiffs alleged an unfair trade practices violation under N.C. GEN. STAT. § 75-16 (1988).

83. *Ring Drug*, 96 N.C. App. at 279, 385 S.E.2d at 803-04. However, all of the defendants were subsidiaries of Carolina Medicorp Enterprises and the parent company, Carolina Medicorp, Inc. *Id.* at 279, 385 S.E.2d at 803.

84. *Id.* at 279-80, 385 S.E.2d at 804.

85. *Id.* at 283, 385 S.E.2d at 806.

86. 117 N.C. App. 28, 450 S.E.2d 24 (1994), *aff'd*, 342 N.C. 404, 464 S.E.2d 46 (1995). For a thorough discussion of *Franklin*, see Zorn, *supra* note 73, at 2190-95.

87. *Franklin*, 117 N.C. App. at 30-31, 450 S.E.2d at 26.

88. *Id.* at 30-31, 450 S.E.2d at 26-27.

89. *See supra* notes 64-68 and accompanying text.

90. *Franklin*, 117 N.C. App. at 39-40, 450 S.E.2d at 31.

tion of the *Schiavone* rule; second, it could have reaffirmed the adoption of the *Schiavone* rule;[91] or third, it could have adopted a test similar to the current federal test, as embodied in Rule 15(c) of the Federal Rules.[92]

The obvious trend nationwide was to follow the modern federal relation back rule,[93] or at least allow relation back of corrected party names in some circumstances.[94] However, the North Carolina Supreme Court did not follow this trend in *Crossman*.[95] *Instead, the court chose the first option mentioned above,*[96] *effectively ending the doctrine of relation back of corrected party names in North Carolina.*[97] *Before Crossman*, the state recognized an outdated federal test that commentators criticized as applying an extremely severe standard.[98] With *Crossman*, the North Carolina Supreme Court has reverted to a standard even more severe than the much-criticized test of *Schiavone*.

In coming to its decision, the court ignored the practical consequences of its holding.[99] In this respect, *Crossman* represents a complete departure from state precedent, which at least examined the consequences of a refusal to allow relation back.[100] The *Crossman* court, by contrast, gave only cursory treatment to the ramifications of its holding. The court made no mention of the potential for prejudice to the plaintiff who otherwise may have possessed a valid claim.

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91. *See infra* notes 64-68 and accompanying text.

92. *See infra* notes 4-6 and accompanying text.

93. *See, e.g.*, Brown v. Winn-Dixie Montgomery, Inc., 669 So.2d 92, 95-96 (Miss. 1996) ("Since the United States Supreme Court and Congress have abandoned *Schiavone* it seems illogical for Mississippi courts to adopt this harsh and unnecessary interpretation of Rule 15."); Hughes v. Water World Slide, Inc., 442 S.E.2d 584, 586 (S.C. 1994) (concluding that South Carolina's Rules of Civil Procedure are consistent with post-*Schiavone* amendments to Rule 15(c)).

94. *See* Southwestern Bell Telephone Co. v. Blastech, Inc., 852 S.W.2d 813, 813 (Ark. 1993) (requiring notice to the defendant, but allowing relation back of corrected party names); Porter v. Good Eavespouting, 505 N.W.2d 178, 181 (Iowa 1993) (same); Fennesy v. L.B.I. Management, Inc., 847 P.2d 1350, 1355 (Kan. App. 1993) (same); Richlick v. Relco Equip., Inc., 852 P.2d 240, 241 (Or. App.), *review denied*, 860 P.2d 819 (1993) (same); Wilcox v. Geneva Rock Corp., 911 P.2d 367, 370 (Utah 1996) (same); Bashara v. Corliss, 632 A.2d 30, 31 (Vt. 1993) (same); Barney v. Auvil, 466 S.E.2d 801, 808-09 (W.Va. 1995) (same).

95. *Crossman*, 341 N.C. at 187, 459 S.E.2d at 717.

96. The court expressly rejected the *Ring Drug* rule. *Crossman*, 341 N.C. at 188, 459 S.E.2d at 717.

97. *Id.* at 187, 459 S.E.2d at 717.

98. *See* Ring Drug Co. v. Carolina Medicorp Enters., 96 N.C. App. at 283, 385 S.E.2d at 806 (adopting the *Schiavone* test).

99. *Crossman*, 341 N.C. at 187, 459 S.E.2d at 717.

100. *See Ring Drug*, 96 N.C. App. 277, 284, 385 S.E.2d 801, 806-07 (1989); Stevens v. Nimocks, 82 N.C. App. 350, 357, 346 S.E.2d 180, 184 (1986).

The North Carolina Supreme Court may have reached a harsher resolution of the issue than the plain language of the rule mandates. North Carolina's Rule 15(c) states generally that if the original pleading gives notice of the transactions or occurrences to be proved pursuant to the amended pleading, then the amended pleading may relate back.[101] Under the language of the rule, there are many circumstances in which a corrected party name could comply with the requirements set forth therein.

For example, suppose a plaintiff files a suit against a business, but erroneously fails to include a small part of the defendant's business name. The plaintiff serves the proper registered agent before the statute of limitations expires, only to be faced with a motion for summary judgment after the statute of limitations has run for failing to name the proper defendant. The plaintiff amends the complaint and seeks relation back for the amended complaint.

In this situation, the plaintiff has served the defendant with a timely complaint detailing the transactions and occurrences giving rise to the suit. Under the plain language of North Carolina's Rule 15(c), when the original pleading gives notice of the transactions and occurrences to be proved pursuant to the amended complaint, the amended complaint should relate back. One can make the argument that the language of the rule allows for some instances in which relation back of corrected party names should be allowed. The North Carolina Supreme Court, however, did not approve of this interpretation of the rule.

Under a narrow reading, one could interpret *Crossman* to deal only with the situation in which a new defendant is brought into the action, as opposed to the situation in which the plaintiff has already served the proper defendant, but the complaint contains a misnomer. The court's approach, however, does not suggest such a limited reading. Because *Crossman* overruled *Stevens*, *Teague*, *Callicutt*, and *Ring Drug*,[102] but not *Franklin*, *Crossman* leaves in place the bar to relation back of corrected party names—even in cases in which the defendant has notice of the plaintiff's claim.[103] When a plaintiff seeks to add a new defendant, *Crossman* controls, and there can be no relation back. To the extent that an amendment simply seeks to correct the defendant's name, *Franklin* controls, and again there can be no relation back.

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101. *See* N.C. R. Civ. P. 15(c).

102. *Crossman*, 341 N.C. at 188, 459 S.E.2d at 717 (overruling *Ring Drug* and stating that *Stevens*, *Teague*, and *Callicutt* are overruled to the extent they are inconsistent with *Crossman*.)

103. The above hypothetical illustrates such a situation.

Given this potential for injustice to plaintiffs, the North Carolina Supreme Court should, at the least, adopt a narrow interpretation of *Crossman*. The court should recognize that when the proper defendant has been served, although the defendant was misnamed in the complaint, the defendant has received notice of the transactions and occurrences giving rise to the claim. The court should refrain from allowing *Crossman* to control that issue, and should overrule *Franklin* as leading to results inconsistent with the plain language of Rule 15(c).[104] This way, the court could rejuvenate the doctrine of relation back for plaintiffs who have merely made a technical error in preparing their pleadings.

The doctrine of relation back requires a more extensive overhaul if just relief is to be afforded in North Carolina courts. As the North Carolina Supreme Court properly noted in *Crossman*,[105] the text of North Carolina's Rule 15(c) is significantly different from the text of the current federal rule.[106] The North Carolina General Assembly should examine this issue and consider an amendment to the text of the North Carolina rule to correspond with the current federal rule. The amendment to Federal Rule 15(c) marked a determination by Congress that courts were dismissing many meritorious claims based on meaningless technicalities.[107] Unfortunately, until the North Carolina legislators amend Rule 15(c) of the North Carolina Rules of Civil Procedure, North Carolina courts will continue to administer this same brand of injustice.

L. THOMAS MCLEAN, JR.

104. The fact that *Franklin* led to results that were inconsistent with the plain language of the rule stems from the fact that the court in *Franklin* decided the case under the old *Schiavone* rule and not under the plain language of the North Carolina rule. Franklin v. Winn-Dixie Raleigh, Inc., 117 N.C. App. 28, 39, 450 S.E.2d 24, 31 (1994), *aff'd*, 342 N.C. 404, 464 S.E.2d 46 (1995). Since the court abandoned the *Schiavone* rule in *Crossman*, *Franklin* is already on unsteady ground. *See Crossman*, 341 N.C. at 188, 459 S.E.2d at 717.

105. *Crossman*, 341 N.C. at 187, 459 S.E.2d at 717.

106. *Compare supra* notes 4 & 7 (relevant text of Federal Rule 15(c) *with* text accompanying note 9 (text of the North Carolina rule).

107. *See* FED. R. CIV. P. 15(c) advisory committee's note (1991).

Doe v. University of Maryland Medical System Corporation: Should Doctors With AIDS Continue To Practice?

> *The vast majority [of doctors] have honorably abided by the opening sentence of the Hippocratic Oath: "I shall first do no harm." However, there are a few people in the medical establishment who have thrown away their oath and duty to others. [Doctors who transmit AIDS to their patients] should be treated no better than the criminal who guns down a helpless victim on the street; the effect is the same.*[1]
>
> Sen. Jesse Helms

In August of 1990, when twenty-three-year-old Kimberly Bergalis announced that she had contracted AIDS from her dentist, she became "the emotional symbol of public fears that health workers pose an HIV transmission threat."[2] Before the Bergalis announcement, fifty-three percent of Americans believed HIV-positive health care workers should be banned from practice;[3] after the announcement, the percentage approached ninety percent.[4] In the wake of publicity following Bergalis's infection, the Centers for Disease Control (CDC) published recommendations for preventing the spread of HIV from health care workers to patients.[5] Subsequently, Congress passed legis-

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1. 137 CONG. REC. S10,334 (daily ed. July 18, 1991) (statement of Sen. Helms, arguing it should be a crime, punishable by a 10-year jail sentence, for an HIV-positive health care worker to perform invasive procedures without notifying the patient of his or her HIV status). Not all Senators agreed. Arguing against Helms's position, Sen. Durenberger, quoting a New York columnist, stated: "As always, we yearn for bright lines, for guarantees, for absolutes. People look at photographs of Kimberly Bergalis, baked down to the bones by illness, and see themselves. But bright lines are neither available, nor, in the last analysis, right." *Id.* at S10,341 (daily ed. July 18, 1991) (remarks of Sen. Durenberger). Sen. Kennedy added: "We cannot absolutely ensure . . . that this situation might not occur again sometime in the future. What we must try to do is shape and fashion the soundest public health policy that we can to avoid such circumstances in the future." *Id.* (remarks of Sen. Kennedy).

2. Laurie Jones, *Continuing Debate Airs Facts, Fears*, AM. MED. NEWS, Oct. 14, 1991, at 1.

3. Rebecca Voelker, *Public Perceptions of AIDS; Polls: U.S. Understands Risks, but Backs Testing*, AM. MED. NEWS, Aug. 19, 1991, at 2 (reporting results of Centers for Disease Control surveys).

4. *AIDS Victim Blames Policy: Related Developments*, 51 FACTS ON FILE: WORLD NEWS DIGEST WITH INDEX 489, 516 (July 11, 1991). Results of a Gallup poll conducted in May of 1991 revealed that 87% of Americans supported mandatory HIV testing of doctors and dentists. *Id.* In North Carolina 78% of those polled said doctors with HIV should stop practicing. Karen Garloch, *Poll: Doctors With AIDS Should Stop Practicing*, CHARLOTTE OBSERVER, July 17, 1991, at A1, A4.

5. Centers for Disease Control, *Recommendations for Preventing Transmission of Human Immunodeficiency Virus and Hepatitis B Virus to Patients During Exposure-Prone*

lation requiring states to adopt the CDC Guidelines or their equivalent.[6] The CDC Guidelines stressed rigorous adherence to infection control procedures, but recommended neither mandatory HIV testing for health care workers (HCW) nor an outright ban on their continued medical practice.[7] Despite the position of the CDC and Congress, in *Doe v. University of Maryland Medical System Corporation* (*UMMSC*),[8] the Fourth Circuit held that a hospital could terminate an HIV-positive surgeon based on the risk of transmission of AIDS to his patients,[9] even though that risk was admittedly low.[10]

This Note first describes the background, reasoning and holding of the *UMMSC* decision.[11] Next, it examines the history of AIDS-related employment decisions[12] under section 504 of the Rehabilitation Act of 1973[13] and Title II of the Americans with Disabilities Act of 1990 (ADA).[14] The Note then analyzes the *UMMSC* decision in detail, calling attention to areas in which legal and medical opinions appear to conflict, and exploring the underlying collateral issues which may have influenced the Fourth Circuit's decision.[15] Finally, the Note concludes that the *UMMSC* decision is likely to be followed in other courts, and observes that while fear of casual contact with HIV-positive individuals has decreased over the years, any discernible risk, no matter how minimal, that a surgeon will transmit HIV to his patient may be a legally sufficient justification for termination of his employment.[16]

Dr. John Doe[17] was in his third year of neurosurgical residency at UMMSC when he was stuck with a needle while treating an HIV-positive patient.[18] Dr. Doe subsequently tested positive for the AIDS virus himself.[19] The hospital temporarily suspended Dr. Doe while its

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Invasive Procedures, MORBIDITY & MORTALITY WKLY. REP.: RECOMMENDATIONS AND REP., July 12, 1991, at 1 [hereinafter *CDC Guidelines*].

6. Pub. L. No. 102-141, 105 Stat. 876 (codified at 42 U.S.C. §300-ee-2 note (1994)).
7. *CDC Guidelines*, *supra* note 5, at 1-6.
8. 50 F.3d 1261 (4th Cir. 1995).
9. *Id.* at 1267.
10. *Id.* at 1266.
11. *See infra* notes 17-50 and accompanying text.
12. *See infra* notes 51-99 and accompanying text.
13. 29 U.S.C. § 794 (1994).
14. 42 U.S.C. § 12132 (1994).
15. *See infra* notes 100-53 and accompanying text.
16. *See infra* notes 154-67 and accompanying text.
17. A pseudonym.
18. *UMMSC*, 50 F.3d at 1262.
19. *Id.* Whether Dr. Doe acquired the virus from the accidental needle stick or in another manner is unknown. *Id.* at 1262 n.4. The CDC has estimated that the risk of HIV transmission after a needle-stick exposure to HIV-infected blood is about 0.3%. Mary E.

panel of experts on blood-borne pathogens considered possible responses to the situation.[20] The panel recommended that, with certain restrictions, Dr. Doe be allowed to continue his neurosurgical residency.[21] Despite the panel's recommendations, UMMSC's head administrators permanently terminated Dr. Doe's surgical privileges.[22] Doe then sued the hospital, claiming his termination violated section 504 of the Rehabilitation Act, Title II of the ADA, and the Equal Protection Clause of the Fourteenth Amendment.[23] At trial, UMMSC won summary judgment on all claims.[24]

The issue presented to the Fourth Circuit was whether Dr. Doe's HIV-positive status provided a sufficient justification for UMMSC to terminate his surgical practice.[25] Analyzing the question under both the Rehabilitation Act and the ADA,[26] the court initially noted that

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Chamberland & David M. Bell, Centers for Disease Control, *HIV Transmission from Health Care Worker to Patient: What is the Risk?*, 116 ANNALS OF INTERNAL MED. 871, 871 (1992). The risk appears minimal when compared with similar estimates about the risks of Hepatitis B transmission, which are 100 times greater. *Id.* at 871 (noting 30% chance of Hepatitis B transmission after needle-stick exposure to infected blood).

20. *UMMSC*, 50 F.3d at 1262.

21. Specifically, the panel recommended that Dr. Doe be allowed to perform all neurosurgical procedures except certain exposure-prone techniques involving a type of surgical wire. *Id.* Additionally, Dr. Doe was to strictly adhere to infection control procedures, and notify both the hospital and the patient if his blood ever contacted that of a patient. *Id.* Dr. Doe was also to donate blood for DNA sampling, in case a patient ever sued the hospital for possible transmission of the virus. *Id.* Notably, the doctor was not required to inform patients of his HIV-positive status before operating on them. *Id.*

For a discussion of tort liability for AIDS transmission, see *infra* notes 127-31 and accompanying text. For a discussion of informed consent requirements when a patient is treated by an HIV-positive health care worker, see *infra* notes 122-33 and accompanying text.

22. *UMMSC*, 50 F.3d at 1262-63. The hospital offered Dr. Doe alternative residencies in non-surgical disciplines, but Doe refused and insisted that the hospital reinstate his surgical privileges. *Id.* Subsequently, UMMSC fired Dr. Doe altogether. *Id.* at 1263.

23. *Id.* at 1264.

24. *Id.* The district court's opinion was not reported in the Federal Supplement.

25. *Id.* at 1265. In deciding this issue, the Fourth Circuit reviewed the case de novo because the district court had granted summary judgment. *Id.* (citing Higgins v. E.I. DuPont de Nemours & Co., 863 F.2d 1162, 1167 (4th Cir. 1988)).

26. The Fourth Circuit summarily affirmed the lower court's rejection of Dr. Doe's Fourteenth Amendment claim. *Id.* at 1267. In his constitutional claim Dr. Doe contended that the hospital's unequal treatment of its employees, based on whether their HIV status was known or unknown, violated the Equal Protection Clause. *Id.* The *UMMSC* court found that "[c]lassifications involving individuals with disabilities are subject only to rational basis scrutiny," and are therefore presumptively constitutional if " 'rationally related to a legitimate state interest.' " *Id.* (quoting Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 440 (1985)). The court found "as a matter of simple logic" that it would be irrational for UMMSC to restrict the activities of its surgeons unless they knew the surgeons had HIV, and that preventing the spread of HIV was an "unquestionably legitimate interest." *Id.* Hence, the court quickly dispensed with the Fourteenth Amendment issue.

both statutes prohibit firing a disabled but "otherwise qualified" employee because of her handicap.[27] The court then noted that to establish a prima facie case of employment discrimination under either statute, an employee must show three elements: "(1) that he has a disability; (2) that he is otherwise qualified for the employment . . . and (3) that he was excluded from the employment . . . due to discrimination solely on the basis of the disability."[28] However, if an employee's ability to perform the job cannot be accomplished through "reasonable accommodation,"[29] or if an employee poses a "direct threat"[30] to others, she is not "otherwise qualified" for employment and therefore has no claim under either the Rehabilitation Act or the ADA.

Thus, the risk of transmitting HIV to patients was the key factor in deciding whether Dr. Doe was "otherwise qualified" to practice surgery under the Rehabilitation Act and the ADA. To evaluate this risk, the Fourth Circuit applied the standard established in *School*

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27. *Id.* at 1264. The Rehabilitation Act states: "No *otherwise qualified* individual with a disability . . . 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." 29 U.S.C. § 794(a) (1994), *quoted in UMMSC*, 50 F.3d at 1265 n.7 (emphasis added).

The ADA states: "[N]o *qualified individual* with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132 (Supp. V 1993), *quoted in UMMSC*, 50 F.3d at 1265 n.8 (emphasis added).

The Fourth Circuit evaluated the *UMMSC* case using the same analysis for both the Rehabilitation Act and the ADA, because their anti-discrimination provisions are substantively similar. *UMMSC*, 50 F.3d at 1265 n.9. Other courts have also read the statutes together. *E.g.*, Helen L. v. DiDario, 46 F.3d 325, 332-33 (3d Cir. 1995); Ethridge v. State of Ala., 860 F. Supp. 808, 812-13 (M.D. Ala. 1994).

An HIV-positive person, whether or not he exhibits symptoms of AIDS, is considered disabled under the Rehabilitation Act. *See* Douglas W. Kamiec, *Justice Department Memorandum on Application of Rehabilitation Act's Section 504 to HIV-Infected Persons*, Daily Lab. Rep. (BNA) No. 195, at D-1 (October 7, 1988) [hereinafter *Justice Dep't Memo*].

28. *UMMSC*, 50 F.3d at 1265; *see* Gates v. Rowland, 39 F.3d 1439, 1445 (9th Cir. 1994) (setting out the same elements in an employment discrimination case in which HIV-positive prisoners were denied employment in a prison food service program).

29. The ADA states: "It may be a defense to a charge of discrimination . . . that an alleged application of qualification standards . . . that . . . deny a job or benefit to an individual with a disability has been shown to be job-related and . . . such performance cannot be accomplished by reasonable accommodation." 42 U.S.C. § 12113(a), *cited in UMMSC*, 50 F.3d at 1265.

30. The Rehabilitation Act specifically excludes from its protection any "individual who has a currently contagious disease or infection and who, by reason of such disease or infection, would constitute a direct threat to the health or safety of other individuals." 29 U.S.C. § 706(8)(D), *cited in UMMSC*, 50 F.3d at 1265. "The term 'direct threat' means a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation." 42 U.S.C. § 12111(3), *cited in UMMSC*, 50 F.3d at 1265.

Board of Nassau County v. Arline,[31] which balanced the gravity of harm if the disease were transmitted against the likelihood infection would occur.[32] The *Arline* test weighed four factors to be considered on the basis of current medical knowledge:

> (a) the nature of the risk (how the disease is transmitted), (b) the duration of the risk (how long is the carrier infectious), (c) the severity of the risk (what is the potential harm to third parties) and (d) the probabilities the disease will be transmitted and will cause varying degrees of harm.[33]

Guided by the *Arline* court's admonition to "defer to the reasonable medical judgments of public health officials,"[34] the *UMMSC* court noted that all such officials agree that the risk of surgeon-to-patient HIV transmission is low.[35] The CDC has estimated the risk ranges from .0024% to .00024% in any given surgery.[36] Over the course of a career, however, the cumulative risk that an HIV-positive surgeon will transmit the virus to a patient is between .8% and 8.1%.[37] The court was also persuaded by a medical study[38] which concluded that surgeons[39] and in approximately 2% of all surgeries, the same instrument that cuts a surgeon comes into contact with a patient's open wound.[40] While the *UMMSC* court recognized that this study did not specifically address HIV transmission, it found the study useful in determining circumstances under which HIV transmission might occur.[41]

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31. 480 U.S. 273 (1987).
32. *See id.* at 285-87.
33. *Id.* at 288.
34. *Id.*
35. *UMMSC*, 50 F.3d at 1263.
36. Chamberland & Bell, *supra* note 19, at 872.
37. *UMMSC*, 50 F.3d at 1263.
38. Jerome I. Tokars et al., *Percutaneous Injuries During Surgical Procedures*, 267 JAMA 2899 (1992), *cited in UMMSC*, 50 F.3d at 1264. Dr. Tokars's study was a product of the Hospital Infections Program at the CDC. *Id.* at 2899. Tokars and his colleagues studied a variety of surgical procedures, and compiled data on the risk of an instrument piercing the doctor's skin and then coming into contact with a patient's open wound. *Id.* at 2899-900. When a needle or other instrument pierces "through the skin," the resulting injury is described as "percutaneous." *See* DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 1256 (28th ed. 1994).
39. Tokars et al., *supra* note 38, at 2900.
40. *Id.* at 2902. The Tokars study concluded that the most common injury to surgeons resulted from a needle stick when performing sutures. *Id.* at 2901. Of all the specialties studied in Dr. Tokars's test, orthopedic surgery carried one of the lowest risks that an instrument which cuts a surgeon will then come into contact with a patient's open wound. *Id.* (revealing risk of blood-to-blood contact in orthopedic surgery as 0.3% to 0.4%, as compared to the 9% risk associated with vaginal hysterectomy, which carried the highest risk of doctor-patient blood-to-blood contact).
41. *UMMSC*, 50 F.3d at 1264 n.6.

Against the backdrop of these statistics, the court also considered the CDC's official guidelines on HIV-positive health care workers (HCW).[42] While the CDC did not recommend restricting the practice of all HIV-positive health care workers who perform "invasive procedures,"[43] it did authorize restricting procedures deemed "exposure-prone."[44] Exposure-prone procedures are those in which a surgeon is likely to cut herself and have her blood come into contact with the patient's open wound or mucous membranes.[45] The CDC stated that "HCWs who are infected with HIV . . . should not perform exposure-prone procedures unless they have sought counsel from an expert review panel and been advised under what circumstances, if any, they may continue to perform these procedures."[46]

In light of the medical data and the CDC Guidelines, the Fourth Circuit found that "UMMSC concluded that all neurosurgical procedures that would be performed by Dr. Doe fit the definition of exposure-prone procedures, and restricted his practice accordingly."[47] The court deferred to the medical judgment of the hospital,[48] and applied the four-factor *Arline* test, concluding that "(1) HIV may be transmitted via blood-to-blood contact in a surgical setting; (2) Dr. Doe will always be infectious; (3) infection with HIV is invariably fatal; and (4) there is an ascertainable risk that Dr. Doe will transmit the disease during the course of his neurosurgical residency."[49] Therefore, the court held that Dr. Doe posed a significant risk to his patients which could not be overcome by reasonable accommodation, and that his

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42. *Id.* at 1263-64.

43. *See CDC Guidelines*, *supra* note 5, at 5. "Invasive procedures" are defined as "surgical entry into tissues, cavities, or organs or repair of major traumatic injuries" associated with any of the following:

> 1) an operating or delivery room, emergency department, or outpatient setting, including both physicians' and dentists' offices; 2) cardiac catheterization and angiographic procedures; 3) a vaginal or cesarean delivery or other invasive obstetric procedure during which bleeding may occur; or 4) the manipulation, cutting, or removal of any oral or perioral tissues, including tooth structure, during which bleeding occurs or the potential for bleeding exists.

Id. at 9 (quoting Centers for Disease Control, *Recommendation for Prevention of HIV Transmission in Health-Care Settings*, 36 MORBIDITY & MORTALITY WKLY. REP.: RECOMMENDATIONS AND REP., 2S, 6-7S (Supp. Aug. 21, 1987)).

44. *CDC Guidelines*, *supra* note 5, at 5.

45. *Id.* at 4. "Exposure-prone" procedures are characterized by the simultaneous presence of the surgeon's fingers and a needle, scalpel, surgical wire, or other sharp instrument in a hard to see or "highly confined" anatomic site. *Id.*

46. *Id.* at 5.

47. *UMMSC*, 50 F.3d at 1266.

48. *Id.* The court stated: "We are reluctant under these circumstances to substitute our judgment for that of UMMSC." *Id.*

49. *Id.* at 1265-66.

termination did not violate either the Rehabilitation Act or the ADA.[50]

It is worth noting that as little as ten years ago, discrimination on the basis of HIV-positive status was a virtually unheard-of legal claim. This can be primarily attributed to the fact that AIDS awareness was not widespread until the fall of 1987, when it was reported that "[v]irtually everyone (more than 99 percent) has heard of AIDS."[51] However, even though Americans had at least heard of AIDS by that time, they were still likely to hold inaccurate opinions about how the disease is spread.[52]

Additionally, it was not until 1987 that persons with contagious diseases qualified as disabled under the Rehabilitation Act.[53] In *School Board of Nassau County v. Arline*[54] the Supreme Court ruled that a person's contagious status could constitute a handicap.[55] The *Arline* case involved a school teacher who was terminated because she had tuberculosis.[56] The school board fired Ms. Arline not because her physical impairment prevented her from performing her job, but rather because they believed her disease posed a threat to others.[57] Based on this distinction, the school board argued that they had not violated the Rehabilitation Act, as the statute was meant only to ban discrimination based on physical incapacity.[58] Rejecting this argument, the Court stated:

> The fact that *some* persons who have contagious diseases may pose a serious health threat to others under certain circumstances does not justify excluding from coverage of the Act *all* persons with actual or perceived contagious diseases. Such exclusion would mean that those accused of being contagious would never have the opportunity to have their condition evaluated in light of medical evidence and a

50. *Id.* at 1266-67.

51. Deborah A. Dawson et al., *AIDS Knowledge and Attitudes for September 1987*, 148 ADVANCE DATA FROM VITAL AND HEALTH STAT. OF THE NAT'L CENTER FOR HEALTH STAT., Jan. 18, 1988, at 1 (reporting data from surveys conducted in August and September of 1987).

52. *Id.* at 4-9. For example, 40% of people surveyed believed they could contract AIDS from being coughed or sneezed on by someone who has AIDS, 47% believed they could contract it from sharing plates, glasses, or utensils with an HIV-positive person, and 31% believed they could contract the disease from public toilets. *See id.* at 6.

53. *See* School Bd. of Nassau County v. Arline, 480 U.S. 273, 285 (1987).

54. *Id.*

55. *Id.* at 285.

56. *Id.* at 276.

57. *Id.* at 281.

58. *Id.* at 282.

determination made as to whether they were "otherwise qualified."[59]

Because of the nature of its facts, the *Arline* decision left unresolved the question "whether a carrier of a contagious disease such as AIDS . . . could be considered, solely on the basis of contagiousness, a handicapped person as defined by the Act."[60] However, the Court seemed aware that its ruling could be used to extend the Rehabilitation Act's protection to HIV-positive individuals, an implication that *Arline's* critics argued would extend the Act beyond manageable grounds.[61] In response to this criticism, the Court predicted its decision would "assist local health officials by helping remove an important obstacle to preventing the spread of infectious diseases: the individual's reluctance to report his or her condition."[62] At a time when public fear of AIDS was rampant,[63] it is reasonable to assume that the Court had more than tuberculosis in mind when it decided *Arline.*

Just nineteen days after the *Arline* decision, Congress officially amended the Rehabilitation Act and extended its protection to include individuals with contagious diseases.[64] The amendment made it clear however, that it would not be considered unlawful discrimination if an employer terminated an individual "who, by reason of such disease or infection, would constitute a direct threat to the health or safety of other individuals."[65]

In light of the *Arline* opinion and the newly amended Rehabilitation Act, the Justice Department issued a memorandum concluding that HIV-positive individuals were protected by the Rehabilitation Act.[66] To be considered handicapped under the Act a plaintiff must demonstrate that he either: "(i) has a physical or mental impairment which substantially limits one or more of such person's major life ac-

59. *Id.* at 285.

60. *Id.* at 282 n.7.

61. "The dissent implies that our holding rests only on our 'own sense of fairness and implied support from the Act.' " *Id.* at 286 n.15; *see id* at 293 (Rehnquist, J., dissenting) ("In *Alexander v. Choate,* . . . this Court stated that '[a]ny interpretation of § 504 must . . . be responsive to two powerful but countervailing considerations—the need to give effect to the statutory objectives and the desire to keep § 504 within manageable bounds.' The Court has wholly disregarded this admonition here." (quoting Alexander v. Choate, 469 U.S. 287, 299 (1985))).

62. *Arline,* 480 U.S. at 286 n.15.

63. *See supra* note 52 and accompanying text (discussing public fears and misperceptions about AIDS after Americans first became aware of the disease in 1987).

64. *See* Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, § 9, 102 Stat. 28, 31 (Mar. 22, 1988) (codified at 29 U.S.C. § 706(8)(D) (1994)).

65. 29 U.S.C. § 706(8)(D) (1994).

66. *Justice Dep't Memo, supra* note 27, at D-1.

tivities, (ii) has a record of such impairment, or (iii) is regarded as having such an impairment."[67] The Justice Department noted that even asymptomatic HIV carriers should be able to meet one or more of these requirements.[68] First, even though an individual may show no outward signs of illness, he is still physically impaired because " 'early stages of the disease may involve subclinical manifestations' " of AIDS.[69] Second, while asymptomatic HIV-positive individuals "would not appear at first glance to have disabling physical effects from their infection that substantially affect . . . life activities,"[70] the knowledge of infection alone is sufficient to limit an individual's decision to have children—out of concern of passing the disease to her fetus, or to engage in sexual relations—to protect her partner, both of which may be considered "major life activities."[71]

The Justice Department concluded that in most employment situations, which involve casual contact only, the low risk of transmitting HIV yields "little, if any justification for treating infected individuals differently from others."[72] Nevertheless, the memo predicted that in certain employment contexts, "reasonable accommodation" would not be sufficient to render an employee "otherwise qualified" for his job:

> While reasonable accommodation is part of the individualized factual inquiry and therefore difficult to discuss in the abstract, it clearly does not require allowing an HIV-infected individual to continue in a position where the infection poses a threat to others. This would appear to be the case with infected health care workers who are involved in invasive surgical procedures, and it may also be the case with respect to other infected health care workers . . . or individuals employed in jobs that entail responsibility for the safety of others.[73]

The Justice Department quite prophetically predicted a bifurcated line of AIDS employment discrimination cases. One type of

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67. 29 U.S.C. § 706(8)(B) (1994).

68. *Justice Dep't Memo*, *supra* note 27, at D-2 to D-3.

69. *Id.* at D-2 (quoting letter from C. Everett Koop, Surgeon General of the United States, to Douglas W. Kamiec, Acting Assistant Attorney General, DAILY LAB. REP. (BNA) No. 195, at D-7 to D-8 (Oct. 7, 1988)). "Subclinical" manifestations are those "of the early stage(s) of an infection or other disease or abnormality before symptoms and signs become apparent or detectable by clinical examination or laboratory tests, or of a very mild form of an infection or other disease or abnormality." DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 1594 (28th ed. 1994).

70. *Justice Dep't Memo*, *supra* note 27, at D-2.

71. *Id.* at D-3.

72. *Id.* at D-4.

73. *Id.* at D-7.

decision, typified by *Chalk v. United States District Court*,[74] involves employment accompanied by no more risk of HIV transmission than casual contact entails. *Chalk* was a case of an HIV-positive school teacher who was given a lateral transfer out of the classroom and into an administrative position.[75] Subsequently, the teacher sought and lost an injunction to prevent the school system from restricting his classroom duties.[76] In reversing the district court, the Ninth Circuit stated: "[T]here is no evidence of any significant risk to children or others at the school. To allow the court to base its decision on the fear and apprehension of others would frustrate the goals of section 504."[77]

The other type of case involves employment accompanied by a discernible, if low, risk of HIV transmission, much like *UMMSC*. One of the early cases in this line was *Doe v. Washington University*,[78] which involved an HIV-positive dental student whose coursework included clinical work with patients.[79] In that case, Washington University disenrolled the student once his HIV status became known.[80] The dental school's administration used the CDC Guidelines as the basis for its decision to dismiss the student.[81] Facing the student's subsequent Rehabilitation Act challenge, the district court held that he was not "otherwise qualified" to practice dentistry,[82] relying on the argument that while "the risk of transmission of HIV from an infected dental worker to a patient may be minimal, there is still *some risk* of transmission."[83]

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74. 840 F.2d 701 (9th Cir. 1988).

75. *Id.* at 703.

76. *Id.* at 704.

77. *Id.* at 711-12.

78. 780 F. Supp. 628 (E.D. Mo. 1991).

79. *Id.* at 629.

80. *Id.* at 630.

81. *Id.* at 629 n.2. At the time, the 1987 CDC Guidelines were in effect, and they called for the HIV-positive health care worker's personal physician to decide, in conjunction with the medical directors of the employing institution, whether the worker should continue to practice. *Id.* The CDC Guidelines were updated in 1991. *See CDC Guidelines*, *supra*, note 5, at 1.

82. *Washington University*, 780 F. Supp. at 635.

83. *Id.* at 633. *Washington University* was decided at the peak of publicity surrounding Kimberly Bergalis, see *supra* notes 2-4 and accompanying text, and the coincidence was not ignored by the court: "Plaintiff asserts . . . that if proper barrier techniques are used an HIV-infected doctor or dentist presents no threat of infecting his patients. This absolute is refuted in the light of the Bergalis tragedy . . . ." *Washington University*, 780 F. Supp. at 633 (footnotes omitted). For a critique of this logic, see *infra* note 164 (noting that the CDC has publicly acknowledged that it may never be known how Kimberly Bergalis actually contracted AIDS).

Similarly, in *Bradley v. University of Texas M.D. Anderson Cancer Center*,[84] the Fifth Circuit ruled that a surgical technician was not "otherwise qualified" under the Rehabilitation Act to continue practicing exposure-prone activities.[85] The *Bradley* court, like the court in *UMMSC*, considered the CDC Guidelines for preventing HIV transmission from health care worker to patient, and weighed the known risks according to the test set forth in *School Board of Nassau County v. Arline*.[86] The court concluded: "[w]hile the risk is small, it is not so low as to nullify the catastrophic consequences of an accident. A cognizable risk of permanent duration with lethal consequences suffices to make a surgical technician with Bradley's responsibilities not 'otherwise qualified.' "[87]

Other courts have ruled similarly given similar facts. In *Scoles v. Mercy Health Corp.*,[88] an orthopedic surgeon was prohibited from performing surgery unless he revealed his HIV status to his patients.[89] The court observed that "[e]ven if the risk is 'exceedingly low' . . . the risk of blood to blood contact between the orthopedic surgeon and patient during an invasive procedure is a real one."[90] Unpersuaded by the Ninth Circuit's holding in *Chalk*,[91] the *Scoles* court distinguished risks associated with casual contact, as was the case in *Chalk*, from risks associated with surgery.[92] The court ultimately concluded that Dr. Scoles was not "otherwise qualified" under the Rehabilitation Act, as he posed a direct threat to his patients.[93]

Only one case stands for the proposition that an HIV-positive health care worker is "otherwise qualified" for employment. In *Doe v. District of Columbia*,[94] a fire department withdrew an offer of employment once it became aware that its prospective employee had HIV.[95] Part of the fireman's job description included rendering emergency non-surgical medical treatment to victims.[96] The district court

84. 3 F.3d 922 (5th Cir. 1993), *cert. denied*, 114 S. Ct. 1071 (1994).

85. *Id.* at 924.

86. *Id.; see supra* note 33 and accompanying text (presenting the *Arline* test).

87. *Bradley*, 3 F.3d at 924.

88. 887 F. Supp. 765 (E.D. Pa. 1994).

89. *Id.* at 767.

90. *Id.* at 769.

91. *See supra* text accompanying notes 74-77 (discussing *Chalk*'s conclusion that discrimination based on unsupported fear of transmitting AIDS is unacceptable when HIV-positive individual merely has casual contact with others).

92. *Scoles*, 887 F. Supp. at 769.

93. *Id.* at 772.

94. 796 F. Supp. 559 (D.D.C. 1992).

95. *Id.* at 564-65.

96. *Id.* at 561.

found that the risk that an HIV-positive fireman would transmit the AIDS virus to a victim while performing his duties was "extremely remote."[97] It therefore ordered the fire department to instate Doe immediately.[98] Because of the non-invasive nature of a fireman's health care duties, the court's application of the *Arline* test weighed in favor of allowing his employment despite his HIV-positive status.[99]

Given the current state of background law, the outcome of the *UMMSC* decision might be characterized as unremarkable. The Fourth Circuit was not the first[100] and will likely not be the last[101] court to hold that performance of invasive procedures by an HIV-positive health care worker constitutes a direct threat to the health of patients, and is therefore unprotected by either the Rehabilitation Act or the ADA.[102] What is remarkable about the *UMMSC* decision is that it represents a point at which the opinions of the medical and legal communities diverge. A careful examination of the way in which the Fourth Circuit interpreted the CDC Guidelines and the *Arline* test reveals this point.[103]

The CDC Guidelines played a pivotal role in both the court's and the hospital's decisions regarding Dr. Doe's future as a surgeon.[104] As

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97. *Id.* at 569.

98. *Id.* at 573. Aside from the court's holding, what is unique about *Doe v. District of Columbia* is the fact that the fire department "presented no opening statement, no evidence, and no closing argument." *Id.* at 560-61. The opinion gave no clues as to why the fire department failed to assert a vigorous defense, but with the only evidence before the court pointing in favor of the petitioner, it would have been surprising if he had lost his case.

99. *Id.* at 569. Coincidentally, another District of Columbia firefighter, who had hepatitis, won a lawsuit when the fire department disqualified him from performing mouth-to-mouth resuscitation. Roe v. District of Columbia, 842 F. Supp. 563, 570 (D.D.C. 1993), *vacated*, 25 F.3d 1115 (D.D.C. 1994) (ordering court to dismiss the complaint as moot). Though hepatitis is vastly more contagious than HIV, see *supra* note 19, the court could find no documented case of transmission through saliva, and therefore ruled that the risk was low enough to favor the fireman under the *Arline* test. *Roe*, 842 F. Supp. at 569.

100. *See supra* notes 78-93 and accompanying text (discussing the *Washington University*, *Bradley*, and *Scoles* decisions, precursors to *UMMSC*, which reached similar conclusions about the low but deadly risks of HIV transmission from health care worker to patient).

101. *See infra* notes 156-58 and accompanying text (discussing Mauro v. Borgess Medical Ctr., 886 F. Supp. 1349 (W.D. Mich. 1995), a recent case which followed the *Bradley* and *UMMSC* rulings).

102. *See supra* notes 78-93 and accompanying text.

103. *See infra* notes 104-19 and accompanying text.

104. The chief of the infectious diseases division at Johns Hopkins Hospital in Baltimore, Maryland, has said that the CDC Guidelines are "viewed by people in medicine almost like law." Christopher J. Gearon, *CDC Won't Set Standard, Business Will*, 9 BALTIMORE BUS. JOUR. No. 8, at 1 (July 26, 1991) (quoting John G. Bartlett). UMMSC is also in Baltimore.

the Fourth Circuit noted, the CDC has advised: "Currently available data provide *no basis* for recommendations to restrict the practice of [health care workers] infected with HIV . . . who perform *invasive procedures not identified as exposure-prone.*"[105] The CDC generally characterized exposure-prone procedures as those having a higher likelihood that the health care worker will cut herself and come into blood-to-blood contact with the patient.[106] Thus, the most pertinent advice from the CDC entails how exposure-prone procedures should be identified and handled:

> Exposure-prone procedures should be identified by medical/surgical/dental organizations and institutions at which the procedures are performed. . . . [Health care workers] who are infected with HIV . . . should not perform exposure-prone procedures unless they have sought counsel from an expert review panel and been advised under what circumstances, if any, they may continue to perform these procedures.[107]

Describing the kinds of experts who should compose the review panel, the CDC recommended, among others, "an infectious disease specialist with expertise in the epidemiology of HIV . . . transmission" and "a member of the [hospital's] infection-control committee, preferably a hospital epidemiologist."[108] Such experts composed the review panel that considered Dr. Doe's continued performance as a neurosurgical resident.[109] The hospital's blood-borne pathogen experts recommended that Dr. Doe continue his surgical practice "with the exception of certain specific procedures involving the use of exposed wire, which the panel deemed to involve too great a risk of transmission of HIV to patients."[110]

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105. *CDC Guidelines*, *supra* note 5, at 5 (emphasis added), *quoted in UMMSC*, 50 F.3d at 1263.

106. *Id.*, *cited in UMMSC*, 50 F.3d at 1263.

107. *Id.*, *cited in UMMSC*, 50 F.3d at 1264.

108. *Id.* Other recommended experts which might be included on the panel were the HIV-positive health care worker's personal physician, a health care worker with expertise in the procedures that the HIV-positive professional performs, and state or local public health officials to provide advice on the appropriate review process. *Id.* The CDC did not mention hospital administrators as recommended members of the panel; rather, they seemed to envision a group of infection control specialists who would make a balanced decision in light of the specific ascertainable risks. *Id.*

109. *UMMSC*, 50 F.3d at 1262.

110. *Id.* In a study of incidents where surgeons cut themselves during surgery, exposed wire was specifically identified within a group of instruments that caused 3% of such injuries. *See* Tokars et al., *supra* note 38, at 2900. The other instruments within the combined 3% risk group were scalpels and bovies. *Id.* The majority of injuries to surgeons—77%—were from suture needles, and within that group, 49% were due to the surgeon's use of his fingers, rather than a tool such as forceps, when performing stitches. *Id.* By definition,

It was, however, a panel of hospital *administrators*, not epidemiologists, who decided that Dr. Doe should be restricted from surgery altogether.[111] The Fourth Circuit accepted this administrative decision, rather than the decision of the blood-borne pathogen experts, as the controlling determination "that most or all of the procedures Dr. Doe would perform as a neurosurgical resident fit within the CDC's definition of exposure-prone procedures and that Dr. Doe should, consistent with the CDC [Guidelines], be prevented from performing them."[112] Thus, the court was unpersuaded by Dr. Doe's argument that only the pathologist-panel's opinion was consistent with a careful reading of the CDC Guidelines.[113] Specifically, Dr. Doe contended that, according to the mandate of *Arline*,[114] the Fourth Circuit should have deferred to the CDC's recommendation that "specialist[s] with expertise in . . . HIV . . . transmission"[115] should determine which exposure-prone procedures an HIV-positive surgeon should discontinue.[116] Doe further urged that restricting his practice according to the pathologists' recommendation would have constituted a reasonable accommodation that would "eliminate any *significant* risk of transmission of HIV to his patients."[117] The *UMMSC* court rejected this argument, stating:

> The types of procedures in which Dr. Doe is engaged as a neurosurgical resident are not so clearly outside the characteristics of exposure-prone procedures identified by the CDC that we can conclude that deference to public health officials requires us to decide that Dr. Doe does not pose a significant risk.[118]

The Fourth Circuit then noted that because "some measure of risk [would] always exist" if Dr. Doe were to continue performing invasive procedures, that risk was significant enough to prevent Doe from being "otherwise qualified" under the Rehabilitation Act and the ADA.[119]

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skin-piercing (a.k.a. "percutaneous") injuries during surgery represent a risk of transmission of HIV because they create the opportunity for blood-to-blood contact between surgeon and patient. *See CDC Guidelines*, *supra* note 5, at 4.

111. *UMMSC*, 50 F.3d at 1262-63.

112. *Id.* at 1264.

113. *Id.* at 1266.

114. 480 U.S. 273, 288 (1987) (stating that "courts normally should defer to the reasonable medical judgments of public health officials").

115. *CDC Guidelines*, *supra* note 5, at 5.

116. *UMMSC*, 50 F.3d at 1266.

117. *Id.* (emphasis added).

118. *Id.*

119. *Id. But see* Chalk v. United States Dist. Court, 840 F.2d 701, 708-09 (9th Cir. 1988) (rejecting theoretical harm of HIV transmission as unsupported by medical evidence);

The question left unanswered by the Fourth Circuit is what motivated the court to accept the recommendation of the hospital administrators over the specialists. It is conceivable that the Fourth Circuit was motivated by underlying policy concerns not overtly expressed in the *UMMSC* opinion. Indeed, some argue that the CDC Guidelines provide inadequate measures for protecting patients from contracting HIV, and hence the courts should supplement the medical guidelines with more stringent legal rulings.[120] Legal writers have argued in favor of the same conclusion reached in *UMMSC*—that where there is a risk of HIV transmission, a health care worker should not be permitted to perform medical procedures.[121]

In *UMMSC*, the court seemed troubled by the fact that the expert panel of pathologists recommended only that Dr. Doe not perform certain exposure-prone procedures, and that he otherwise be allowed to continue practicing *without notifying patients of his HIV status*.[122] This position is consistent with the CDC Guidelines, which imply that informed consent is required if a health care worker will be performing an exposure-prone procedure, but not otherwise.[123] The CDC emphasized "the importance of confidentiality and the privacy rights of infected [health care workers],"[124] and recommended that health care workers "should know their HIV antibody status," but not that patients should have an absolute right to share in that information.[125] The American Medical Association has adopted essentially the same position.[126]

CDC Guidelines, *supra* note 5, at 5 (stating that no medical basis exists for restricting HIV-positive health care workers from performing nonexposure-prone invasive procedures).

120. *See* Mark D. Johnson, Comment, *HIV Testing of Health Care Workers: Conflict Between the Common Law and the Centers for Disease Control*, 42 AM. U. L. REV. 479, 531-34 (1993).

121. *See* Lawrence Gostin, *HIV-Infected Physicians and the Practice of Seriously Invasive Procedures*, HASTINGS CTR. REP., Jan.-Feb. 1989, at 32, 34 (arguing that informed consent is not essential for non-invasive procedures, but that HIV-positive medical professionals should never perform invasive procedures).

122. *UMMSC*, 50 F.3d at 1262 ("However, the [blood-borne pathogen expert] panel did not recommend that Dr. Doe be required to obtain the informed consent of his patients before performing surgical procedures.").

123. *See CDC Recommendations*, *supra* note 5, at 5. (stating that patients should be notified of a doctor's HIV infection "before they undergo exposure-prone invasive procedures").

124. *Id.*

125. *Id.*

126. *See* Abe Aamidor, *Is Your Doctor HIV-Positive? Don't Ask; Most Health-Care Professionals Believe They Don't Have to Tell*, INDIANAPOLIS STAR, Jan. 11, 1996, at B-1 (reporting on discussions at Indiana World AIDS Day). The official policy of the AMA on the issue of informed consent and HIV-positive health care workers is, in part: "[T]he American Medical Association believes that HIV-infected physicians should not perform

In contrast to the medical community's position, at least one court has held that a surgeon has an affirmative duty to disclose his HIV-positive status to patients.[127] The doctrine of informed consent is a state law tort theory, and therefore different jurisdictions have different standards of what a doctor must tell his patient.[128] Yet most Americans want to know if their health care provider is HIV-positive, and many feel that it is only right that an HIV-positive health care worker end her career upon learning that she carries the AIDS virus.[129] Some patients have even been allowed to sue based on infliction of emotional distress resulting from the fear of contracting AIDS from doctors who did not disclose their HIV status.[130] In rejecting the

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invasive procedures *which pose an identifiable risk of transmission*, or should disclose their seropositive status prior to performing the procedure and proceed only if there is informed consent." *AMA Releases Statement on HIV-Positive Physicians*, 92 KANSAS MEDICINE 55 (1991) (quoting in full the official policy statement of the AMA, issued January 17, 1991) (emphasis added). Though the statement reads as if to endorse informed consent for all procedures performed by HIV-positive health care workers, the AMA continued with the caveat, "[s]ome invasive procedures pose no identifiable risk of transmission . . . ." *Id.* Therefore, like the CDC, the AMA appears to advocate informed consent only in the limited circumstances of exposure-prone procedures.

127. Estate of Behringer v. Medical Ctr., 592 A.2d 1251, 1283 (N.J. 1991) (holding that patient had right to know surgeon's HIV status for any and all surgical procedures, notwithstanding the CDC Guidelines, which only require informed consent for those procedures determined by a medical panel to be exposure-prone); *see also In re* Milton S. Hershey Medical Ctr., 634 A.2d 163, 163 (Pa. 1993) (upholding trial court order that hospital notify patients that physician was HIV-positive when treatment was rendered); *cf.* Scoles v. Mercy Health Corp., 887 F. Supp. 765, 772 (E.D. Pa. 1994) (holding that HIV-positive surgeon posed a "direct threat" to his patients, not that he was under a duty to disclose); K.A.C. v. Benson, 527 N.W.2d 553, 561-62 (Minn. 1995) (holding that HIV-positive physician was not liable for negligent non-disclosure because patient was not injured; leaving unresolved whether HIV-positive doctors must always disclose their status to patients).

128. *See* Mary Anne Bobinski, *Risk and Rationality: The Centers for Disease Control and the Regulation of HIV-Infected Health Care Workers*, 36 ST. LOUIS U. L.J. 213, 305 (1991). Bobinski discusses the fact that a slight majority of states assess informed consent on the basis of what a reasonable doctor would tell his patient. *Id.* The remainder of states have joined the trend of patient-oriented standards of informed consent, judged by what a patient would reasonably want to know. *Id.* In patient-oriented jurisdictions, Bobinski notes that "a significant proportion of patients may have difficulty 'rationally' considering HIV-related risks." *Id.* The Supreme Court acknowledged this difficulty in *School Bd. of Nassau Co. v. Arline*, when it stated that "[f]ew aspects of a handicap give rise to the same level of public fear and misapprehension as contagiousness." 480 U.S. 273, 284 (1987).

129. *See supra* notes 3-4 and accompanying text (discussing public opinion polls about fear of AIDS).

130. *See, e.g.* Kerins v. Hartley, 21 Cal. Rptr. 2d 621 (1993) (holding that patient could proceed with suit against doctor's estate for emotional distress due to fear of contracting AIDS, despite the fact that patient was never actually exposed to HIV); Faya v. Almaraz, 620 A.2d 327 (Md. 1993) (holding that plaintiffs could proceed in suit against surgeon's estate despite lack of proof that HIV transmission occurred, based on the fear that they may have contracted HIV from surgeon, who never revealed his HIV status to patients but

argument that Dr. Doe should be allowed to continue his residency and stop performing only a few procedures without otherwise telling his patients he had HIV, the Fourth Circuit's *UMMSC* decision supports a patient-based concept that "the protection of the patient's right of self-determination [is] the cornerstone of informed consent."[131]

As a practical matter, leaving the decision to disclose HIV status to the discretion of the health care worker arguably places the medical professional in a position to serve his own interests above those of his patients.[132] Generally speaking, disclosure of one's HIV-positive status is tantamount to ending one's career.[133] Ironically, even though the medical community does not endorse a patient's absolute right to know the HIV status of his doctor, presumably because patients are likely to refuse services from an HIV-positive doctor, numerous instances of doctors refusing to treat HIV-positive patients have arisen in the courts.[134] These cases serve as a reminder that the risks and fears of HIV transmission in the health care setting run both ways, from doctor to patient and patient to doctor.[135]

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whose status was revealed in the newspaper); K.A.C. v. Benson, 1993 WL 515825 (Minn. App. Dec. 14, 1993) (concluding that initial fear upon learning that one's doctor had AIDS is compensable, regardless of whether HIV transmission occurred). Though plaintiffs have successfully overcome motions to dismiss in suits to recover based on fear of contracting AIDS, in the subsequent dispositions of both *Kerins* and *K.A.C.*, the plaintiffs lost on the merits. *See* K.A.C. v. Benson, 527 N.W.2d 553, 557 (Minn. 1995) (holding as a matter of law that patients who cannot prove actual exposure to the HIV virus are not within the "zone of danger" for purposes of an emotional distress claim) *rev'g* 1993 WL 515825 (Minn. App. Dec. 14, 1993); Kerins v. Hartley, 33 Cal. Rptr. 2d 172, 179 (1994) (adjudicating the final disposition of the *Kerins* case and ruling that no recovery for emotional distress is permitted on only the speculative possibility that the plaintiff might develop AIDS).

131. Thaddeus J. Nodzenski, *HIV-Infected Health Care Professionals and Informed Consent*, 2 S. CAL. INTERDISCIPLINARY L.J. 299, 308 (1993).

132. *See* Johnson, *supra* note 120, at 531-34 (arguing that the CDC Guidelines encourage health care workers to conceal their HIV status at the peril of their patients).

133. Judging from Dr. Doe's experience at UMMSC, the assumption appears warranted.

134. *See, e.g.*, Abbott v. Bragdon, 912 F. Supp. 580 (D. Me. 1995) (granting summary judgment on ADA claim for patient who was refused dental services once doctor learned of patient's HIV-positive status); United States v. Morvant, 898 F. Supp. 1157 (E.D. La. 1995) (granting summary judgment to HIV-positive patients because dentist's refusal to treat them was not based on significant risk to dentist); D.B. v. Bloom, 896 F. Supp. 166 (D.N.J. 1995) (granting default judgment to patient on same basis); Woolfolk v. Duncan, 872 F. Supp. 1381 (E.D. Pa. 1995) (denying physician's motion for summary judgment in part because whether HIV-positive patient was "otherwise qualified" under the Rehabilitation Act and the ADA was a material factual dispute); Howe v. Hull, 874 F. Supp. 779 (N.D. Ohio 1994) (allowing patient who was refused admission into hospital based on his HIV status to proceed with his claim despite doctor's motion for summary judgment).

135. *See supra* note 19 and accompanying text (noting that while it is not certain that Dr. Doe, the petitioner in *UMMSC*, contracted AIDS from a patient, he did test positive

An issue which is related to informed consent is that of mandatory AIDS testing. The CDC has expressly rejected the policy of mandatory HIV testing for all health care workers,[136] though such proposals have been raised in both Congress and the courts as a way to minimize the risk of HIV transmission. A bill presented in the House of Representatives during the height of Kimberly Bergalis's public struggle with AIDS would have mandated regular HIV testing of all medical workers, and would have required patient notification if a health care worker tested positive.[137]

It is not uncommon for hospitals or agencies providing health-related services to the public to have an HIV testing policy for their employees.[138] Although some courts have recognized mandatory HIV testing or disclosure of HIV status as an invasion of privacy rights or a violation of the Fourth or Fourteenth Amendments,[139] some courts

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for the virus after a needle stick during his treatment of an HIV-positive patient). Needle sticks are the most common medium of blood-to-blood contact in the health care setting. Tokars et al., *supra* note 38, at 2902. In two cases very similar to *UMMSC*, surgical health care workers were terminated based on their HIV status, and both plaintiffs reported incurring needle sticks during the course of their employment. Bradley v. Univ. of Tx. M.D. Anderson Cancer Ctr., 3 F.3d 922, 924 (5th Cir. 1993), *cert. denied*, 114 S. Ct. 1071 (1994); Mauro v. Borgess Med. Ctr., 886 F. Supp. 1349, 1352 (W.D. Mich. 1995). See *supra* text accompanying notes 84-87 and *infra* text accompanying notes 156-58 for discussions of both these cases. Arguably, health care workers are at a greater risk of contracting HIV from patients than vice versa because, especially when a surgeon sticks his finger with a needle tip while performing an invasive procedure, a health care worker is exposed to a great quantity of the patient's blood, but the patient is only exposed to a bit of the surgeon's blood. *See* Larry Gostin, *Hospitals, Health Care Professionals and AIDS: The "Right to Know" the Health Status of Professionals and Patients*, 48 MD. L. REV. 12, 21 (1989).

136. *CDC Guidelines*, *supra* note 5, at 6.

137. H.R. 2788, 102d Cong., 1st Sess. (1991); 137 CONG. REC. E2376-02 (daily ed. June 26, 1991). The bill, entitled the "Kimberly Bergalis Patient and Health Providers Protection Act of 1991," never passed.

138. *See, e.g.*, Leckelt v. Board of Comm'rs, 909 F.2d 820 (5th Cir. 1990) (hospital required AIDS test for all employees whom it felt had a high risk of having AIDS); Glover v. Eastern Neb. Comm. Office of Retardation, 867 F.2d 461 (8th Cir.), *cert. denied*, 493 U.S. 932 (1989) (municipal retardation service agency required HIV and hepatitis testing for employees); Local 1812 v. United States Dept. of State, 662 F. Supp. 50 (D.D.C. 1987) (members of foreign service required to undergo AIDS testing as part of medical fitness requirements); Doe v. City of Chicago, 883 F. Supp. 1126 (N.D. Ill. 1994) (police department with mandatory HIV testing as part of job applicant screening); Anonymous Fireman v. City of Willoughby, 779 F. Supp. 402 (N.D. Ohio 1991) (mandatory AIDS testing required as part of annual physical exam for all city fire fighters and paramedics).

139. *See, e.g.*, Hill v. Evans, No. Civ. A. 91-A-626-N, 1993 WL 595676, at *5-*9 (M.D. Ala. Oct. 7, 1993) (not reported in Federal Supplement) (invalidating on Equal Protection grounds a portion of an Alabama statute allowing doctors to perform unconsented AIDS tests on patients even when invasive procedures were not being performed); Doe v. Borough of Barrington, 729 F. Supp. 376, 385 (D.N.J. 1990) (finding a violation of constitutional right to privacy when police officer revealed HIV status of suspect, stating that

have found these interests are outweighed when balanced against the risk of a health care worker spreading HIV to patients.[140] One court has even found it permissible under the Fourth Amendment for doctors to unilaterally perform AIDS tests on patients and inform them of neither the fact that the test was performed nor the results of such, as long as the patient is slated to undergo a procedure where blood-to-blood contact is a risk.[141] Notwithstanding such cases, requiring all health care workers to undergo AIDS testing appears to be an issue which scholarly writers in both the legal and medical professions agree is an impracticable overreaction.[142]

The Fourth Circuit's apparent sympathy for the hospital may reveal another factor underlying the *UMMSC* decision—the concept that a hospital provides a necessary public service, and should not be penalized for erring "on the side of caution in protecting its patients."[143] In dicta, the *UMMSC* court took special notice of the hos-

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"[t]he right to privacy in this information [even] extends to members of the AIDS patient's immediate family").

140. *See, e.g.*, Leckelt v. Board of Comm'rs, 909 F.2d 820, 832-33 (5th Cir. 1990) (concluding hospital's required AIDS test for employees it felt had a high risk of having AIDS was neither a violation of Fourth Amendment right to privacy nor Fourteenth Amendment Equal Protection Clause, because of concerns about infection control); Anonymous Fireman v. City of Willoughby, 779 F. Supp. 402, 418 (N.D. Ohio 1991) (finding that while mandatory AIDS testing for city fire fighters and paramedics did constitute a Fourth Amendment search and seizure, it was not unreasonable considering the compelling interest the city had in ensuring its firefighters were free of AIDS). *But see* Glover v. Eastern Neb. Comm. Office of Retardation, 867 F.2d 461, 463 (8th Cir.), *cert. denied*, 493 U.S. 932, (1989) (concluding HIV and hepatitis testing for employees of a municipal retardation service agency constituted unreasonable Fourth Amendment search and seizure because risk of transmission was minuscule); Doe v. City of Chicago, 883 F. Supp. 1126, 1139 (N.D. Ill. 1994) (finding that police officers adequately stated a Fourteenth Amendment challenge to police department's mandatory HIV testing requirements).

141. Hill v. Evans, No. Civ. A. 91-A-626-N, 1993 WL 595676, at *13 (M.D. Ala. Oct. 7, 1993) (not reported in Federal Supplement) (upholding against a Fourth Amendment challenge a portion of an Alabama statute which allowed unconsented HIV testing of patients in order to protect health care workers, and finding that patient consent was implied "on the basis of necessity"). The *Hill* case demonstrates the points raised *supra* at notes 134-35 and the accompanying text. Patients are not the only ones afraid of contracting AIDS in the health care setting; the risks apply to health care workers as well.

142. *See* American Bar Association AIDS Coordinating Committee, Eric N. Richardson & Salvatore J. Russo, eds., *Calming AIDS Phobia: Legal Implications of the Low Risk of Transmitting HIV in the Health Care Setting*, 28 U. MICH. J.L. REF. 733, 795-96 (1995) (arguing that the costs of mandatory AIDS testing, in terms of money, personal privacy, and the risk that HIV positive medical workers will conceal their status, is too prohibitive to justify implementation of such a plan); *see also* William E. Chavey et al., *Cost-Effectiveness Analysis of Screening Health Care Workers for HIV*, 38 J. OF FAM. PRACTICE 249, 252 (1994) (estimating that the cost for a large hospital to test all health care workers would exceed nine million dollars for each transmission prevented, an extraordinary expenditure of health care resources).

143. *UMMSC*, 50 F.3d at 1266.

pital's actions regarding its termination of Dr. Doe, finding that UMMSC "acted with great sensitivity to the extremely difficult situation faced by Dr. Doe."[144] The court may have recognized that the hospital itself was facing an "extremely difficult" dilemma. The prospect of litigation looms large when a hospital discovers one of its employees is HIV-positive.[145] A hospital is a likely target in lawsuits from employees in two ways: if an employee is infected with the virus while on the job, he may sue for occupational exposure, and if the hospital terminates the employee or discloses his HIV status, the hospital faces liability under the Rehabilitation Act and the ADA,[146] as was the case in *UMMSC*. A hospital also risks suits from patients who are exposed to HIV if the hospital allows an HIV-positive health care worker to continue practicing.[147] Essentially, " '[i]nstitutions employing HIV-infected health care workers are . . . stuck in a legal quagmire.' "[148] Under these circumstances, the Fourth Circuit concluded: "there is nothing in the record to indicate that UMMSC acted with anything other than the best interests of its patients and Dr. Doe at heart."[149]

As explained in this Note, a detailed examination of the *UMMSC* decision reveals areas where legal and medical opinions conflict.[150] Concerns about informed consent and patient safety may have influenced the court to defer to UMMSC's decision to fire Dr. Doe instead of strictly adhering to the CDC Guidelines, which the court could have interpreted to mandate the reinstatement of Dr. Doe's surgical

144. *Id.* at 1266 n.11.

145. *Policy-Makers Tend to View HIV-Positive Health Workers as Risk, ABA Forum Told*, 3 Health Law Rep. (BNA) No. 26, at 879 (June 30, 1994) [hereinafter *HIV-Positive Health Care Workers a Risk*].

146. *Id.*

147. *Id.*; *see supra* note 130 and accompanying text (discussing "fear of AIDS" suits, whereby patients can proceed under state tort law emotional distress theories).

148. *HIV-Positive Health Care Workers a Risk*, *supra* note 145, at 879 (quoting Allyn Taylor, visiting assistant professor, Widener Univ. School of Law, speaking at ABA forum on AIDS and the Law, June 17, 1994). Taylor went on to say that a few states have considered making hospitals immune from all lawsuits stemming from their employment of HIV-positive health care workers. *Id.*

The concept of hospital immunity from suit is grounded in the public policy argument that hospitals provide such a valuable, socially beneficial service that imposing liability on them might unduly divert their resources away from the main goal of patient care. A similar argument has persuaded every state, either by statute or case law, to make blood banks immune from product liability suits based on HIV-tainted blood. *See* PROSSER & KEETON ON TORTS §§104 (5th ed. 1984) (discussing "Blood Shield" statutes which prohibit strict liability suits against blood banks).

149. *UMMSC*, 50 F.3d at 1266.

150. *See supra* notes 104-19 and accompanying text.

privileges.[151] Yet, in deciding that a hospital may legally terminate an HIV-positive surgeon under the Rehabilitation Act and the ADA, the Fourth Circuit relied as much on the current state of medical knowledge about HIV transmission as it did on legal precedent.[152] The history of AIDS employment decisions under the Rehabilitation Act and the ADA is short but consistent, and it reveals that in situations where HIV-positive employees pose an ascertainable threat of transmitting the AIDS virus, courts are likely to uphold termination of their employment.[153]

With the *UMMSC* decision, the Fourth Circuit has joined the Fifth Circuit in holding that a hospital may terminate a surgical health care worker based on the risk of transmitting HIV to patients.[154] When these cases are considered in conjunction with the policy issues that may have underpinned the *UMMSC* decision,[155] it is reasonable to think that future cases involving HIV in a surgical setting will be resolved similarly to *UMMSC*. This has already happened in *Mauro v. Borgess Medical Center*,[156] in which a federal district court found as a matter of law that an HIV-positive surgical technician had "a contagious infection that pose[d] a direct threat to the health and safety of others that [could not] be eliminated by reasonable accommodation."[157] Relying heavily on both *UMMSC* and *Bradley*, the *Mauro* court held that a surgical technician's removal from practice was not discriminatory under either the Rehabilitation Act or the ADA.[158]

It would be a mistake, however, to read *UMMSC* too broadly and interpret it to authorize the termination of any HIV-positive health care worker's employment. The CDC has explicitly recognized that surgical procedures such as those involved in *UMMSC*, *Bradley*, and *Mauro* create a relatively higher risk that AIDS will be transmitted

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151. *See supra* notes 120-49 and accompanying text.

152. This was the case because *School Bd. of Nassau Co. v. Arline* requires that a determination whether an employee is "otherwise qualified" for employment be made in light of current medical knowledge. 480 U.S. 273, 288 (1987); *see supra* notes 31-34 and accompanying text (discussing the *Arline* holding).

153. *See supra* notes 78-93 and accompanying text.

154. *See* Bradley v. Univ. of Tx. M.D. Anderson Cancer Ctr., 3 F.3d 922 (5th Cir. 1993), *cert. denied*, 114 S. Ct. 1071 (1994); *see supra* notes 84-87 and accompanying text.

155. *See supra* notes 120-49 and accompanying text.

156. 886 F. Supp. 1349 (W.D. Mich. 1995).

157. *Id.* at 1354.

158. *Id.* The court stated that it had "carefully reviewed both [*UMMSC* and *Bradley*] and [found] them materially indistinguishable and properly reasoned. . . . Because there is a real possibility of transmission, however small, and because the consequence of transmission is invariably death, the threat to patient safety . . . is direct and significant." *Id.* at 1353.

when compared to other activities.[159] Even after these decisions, courts must "conduct an individualized inquiry and make appropriate findings of fact"[160] to determine whether the risk of transmitting HIV is legally sufficient to justify employment termination of HIV-positive health care workers who are not involved in surgical procedures.[161]

In the years since Americans first became aware of AIDS,[162] irrational fears about contracting the disease through casual contact have waned.[163] However, America still remembers the tragedy of Kimberly Bergalis, who died of AIDS in 1991 after she was apparently infected by her dentist.[164] Although legal and medical experts agree

159. *See CDC Guidelines*, *supra* note 5, at 4.

160. School Bd. of Nassau Co. v. Arline, 480 U.S. 273, 287 (1987).

161. As *Doe v. District of Columbia* suggests, it is not a foregone conclusion that all HIV-positive health care workers are unqualified to perform their jobs because of a health risk they pose to others. 796 F. Supp. 559, 570 (D.D.C. 1992); *see supra* notes 94-99 and accompanying text.

162. *See supra* notes 51-52 and accompanying text.

163. The example of Earvin "Magic" Johnson, a highly visible person in the center of the AIDS controversy, helps to demonstrate how public fears of AIDS have subsided. The L.A. Lakers star retired in 1991 after announcing his HIV-positive status. Susan Brink et al., *Beating the Odds: Fending off the AIDS Virus Isn't Just a Magic Trick*, U.S. NEWS & WORLD REP., Feb. 12, 1996, at 60. After a brief comeback in 1992, he retired again because "rival players publicly frett[ed] about catching AIDS on the basketball court." *Benched by Fear: Magic Retires Again*, U.S. NEWS & WORLD REP., Nov. 16, 1992, at 22. However, when Johnson made a second comeback in 1996 he was greeted with "an avalanche of support." Brink et al., *supra* at 60. A national poll conducted in February 1995 revealed that 37% of Americans view AIDS as the country's worst health problem. *Id.* at 68 A similar poll, conducted in 1987, revealed that a much higher percentage—70%—thought the same thing. *Id.*

164. According to the CDC, only five people, including Bergalis, are thought to have contracted AIDS from a health care provider, and all five cases have been traced to the same Florida dentist, David Acer. Carol Ciesielski et al., *Transmission of Human Immunodeficiency Virus in a Dental Practice*, 116 ANNALS OF INTERNAL MED. 798, 798 (1992). In a controversial epilogue to Kimberly Bergalis' story, scientific evidence presented in 1993 challenged the commonly accepted belief that the five cases were indeed caused by the HIV-positive dentist. One genetic study indicated that the CDC overstated its conclusion that Acer infected his patients. Ronald W. DeBry et al., *Dental HIV Transmission?*, NATURE, Feb. 25, 1993, at 691, 691. According to the study, it was equally likely that Acer did *not* infect Bergalis and the others. *Id.* The CDC has conceded that it may never be known precisely how Acer transmitted the virus to his patients. Ciesielski et al., *supra* at 803.

Besides the scientific evidence, the civil litigation between Acer's HIV-positive patients and his insurance company yielded some quite unsavory allegations which were intended to prove all the patients could have contracted the disease another way. *60 Minutes: Kimberly's Story* (CBS television broadcast, June 19, 1994) (transcript available on 1994 WL 3763876). For example, in the course of the proceedings, the insurance company procured deposition testimony and a medical exam which revealed that Bergalis, who claimed to be a virgin, had been sexually active and had a venereal disease. *Id.* Similarly, of the other patients who allegedly contracted AIDS from Acer, the insurance company produced evidence that several among them had engaged in high-risk activity such as intravenous drug use, promiscuous sexual activity, and frequenting of prostitutes. *Id.* Ulti-

that the risk of transmission from health care worker to patient is minimal,[165] the fact remains that such transmission is possible.[166] The legal profession, the medical profession, and the public all aspire to the same goal: health care without fear of contracting AIDS. The Fourth Circuit tried to achieve that goal in *UMMSC*, but one might wonder if the decision will have the opposite effect. By holding that a hospital may with impunity fire an HIV-positive surgeon, the Fourth Circuit may encourage health care workers to conceal their HIV status. In other words, instead of "assist[ing] local health officials by helping remove an important obstacle to preventing the spread of infectious diseases,"[167] the *UMMSC* decision may have erected a roadblock.

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mately, Acer's insurance company settled out of court with the HIV-positive patients for close to $10 million. *Id.*

165. Four 1993 medical studies cast serious doubt on the likelihood that HIV transmission will occur from surgeon to patient. The studies involved two dentists and two surgeons, all of whom voluntarily resigned after learning they were HIV-positive. Former patients were then contacted to determine if any transmissions occurred before the doctors resigned. No patient was found to have contracted HIV from any of the infected health care workers. *See* Paul M. Arnow et al., *Maintaining Confidentiality in a Look-Back Investigation of Patients Treated by a HIV-Infected Dentist*, 108 PUB. HEALTH REP. (BNA) No. 3 at 273, 273-74 (May/June 1993) (testing of 41 patients spanning 31 months of potential exposure yielded no HIV-positive results); Gordon M. Dickinson et al., *Absence of HIV Transmission From an Infected Dentist to His Patients*, 269 JAMA 1802, 1802 (1993) (testing of 1,192 patients spanning nearly 6 years of potential exposures from dentist yielded 5 HIV-positive patients, but none had same strain of virus as dentist, indicating he did not infect them); Audrey Smith Rogers et al., *Investigation of Potential HIV Transmission to the Patients of an HIV-Infected Surgeon*, 269 JAMA 1795, 1795 (investigation of 1,131 patients spanning six years of potential exposure yielded no cases of surgical transmission); C. Fordham von Reyn et al., *Absence of HIV Transmission From an Infected Orthopedic Surgeon: A 13-Year Look-Back Study*, 269 JAMA 1807, 1807 (1993) (testing of 1,174 patients spanning 13 years of potential exposures yielded no cases of transmission by surgeon). All four studies concluded that the Kimberly Bergalis case is an anomaly, and that the risk of transmission is extremely low when practitioners adhere to infection control practices recommended in the CDC Guidelines.

166. *See supra* notes 38-40 and accompanying text (discussing study which revealed the frequency with which surgeons accidentally prick their fingertips during invasive procedures, thought to be the most conducive method of bloodborne pathogen transmission).

167. School Bd. of Nassau Co. v. Arline, 480 U.S. 273, 286 n.15 (1987) (noting that "the individual's reluctance to report his or her condition" is a dangerous effect of irrational responses to those with contagious diseases).

United States v. Burgos: Balanced Blasting for Deadlocked Juries

> *This gentleman has been standing alone against us. He doesn't say the boy is not guilty. He just isn't sure. Well, it's not easy to stand alone against the ridicule of others, even when there's a worthy cause. So he gambled for support, and I gave it to him. I respect his motives. The boy on trial is probably guilty. But I want to hear more. Right now the vote is ten to two.*[1]

The dramatic jury deliberations in the 1956 film *Twelve Angry Men* centered on one juror's courageous search for truth when facing eleven other jurors who were certain of the defendant's guilt. Rational and intelligent debate triumphed in the film, with the jurors ultimately returning a unanimous acquittal. No trial judge appeared among the cast of characters.[2]

In reality, the decision-making process of a criminal jury often works less efficiently. Occasionally, juries reach a stalemate, with neither side willing to change its position. In such situations, the trial judge frequently intervenes and delivers an instruction known as an *Allen* charge,[3] admonishing jurors to reconsider their views and exerting pressure on them to reach a verdict.

The jury in *United States v. Burgos* received such an instruction when jurors declared that they were deadlocked after four hours of deliberations.[4] After the judge delivered the *Allen* charge and the jurors resumed discussion, it took them just two hours to return a guilty verdict, convicting Antonio Luis Burgos of a cocaine conspiracy charge.[5]

The United States Court of Appeals for the Fourth Circuit granted Burgos a new trial, criticizing the coercive nature of the traditional *Allen* instruction[6] and prescribing the language judges in the jurisdiction should use in instructing deadlocked juries.[7] The court emphasized that it was issuing a "mandate" to judges. In giving an

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1. REGINALD ROSE, TWELVE ANGRY MEN 225 (1956) (excerpt from screenplay, stage directions omitted).

2. *Id.*

3. *See* Allen v. United States, 164 U.S. 492, 501 (1896); *infra* notes 29-32 and accompanying text.

4. United States v. Burgos, 55 F.3d 933, 935 (4th Cir. 1995).

5. *Id.* Burgos was sentenced to 210 months in prison. *Id.*

6. For a discussion of the potentially coercive effects of an *Allen* charge, see *infra* notes 57-72 and accompanying text.

7. *Burgos*, 55 F.3d at 940-41.

Allen instruction, the judges must incorporate into the charge a specific reminder to jurors siding with the majority *and* jurors voting with the minority to reconsider their positions in light of the other side's views.[8] Thus, the Fourth Circuit officially abolished the use of the "pure" *Allen* charge,[9] and adopted a less coercive, more balanced instruction.[10]

This Note begins with a description of the facts in *Burgos*[11] and then discusses the *Burgos* opinion and Fourth Circuit cases leading up to *Burgos*.[12] Next, it analyzes the *Burgos* decision by comparing the Fourth Circuit's treatment of the *Allen* charge with its use in other circuits.[13] The Note asserts that given the long-standing tradition of the *Allen* charge and the need for juries to reach a verdict whenever possible to minimize expenses and ease the clogged machinery of the criminal justice system, elimination of the instruction would be unrealistic.[14] In support of this assertion, the Note discusses past empirical studies that evaluated the impact of the *Allen* charge on juries.[15] Finally, the Note concludes that the Fourth Circuit has reached a prudent compromise, which should sufficiently limit undue coercion exercised by trial courts through use of the *Allen* instruction.[16]

In May 1993, a South Carolina postal inspector discovered cocaine base in a package mailed from Brooklyn, New York, and addressed to John Pringle in Sumter, South Carolina.[17] An investigation revealed that during the previous two months either John Pringle or Matthew Mack had received five other packages from the same Brooklyn address.[18] Mack told authorities that Burgos had been arranging drug sales for him in Brooklyn and that he had received cocaine from Burgos and sent cash to other New York suppliers at Burgos's request.[19] Pringle corroborated Mack's claim, stating that he

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8. *Id.* at 941.

9. Several other circuits have similarly rejected the *Allen* charge and adopted alternative instructions. *See, e.g.*, United States v. Cortez, 935 F.2d 135, 141-42 (8th Cir. 1991); United States v. Vachon, 869 F.2d 653, 659 (1st Cir. 1989); United States v. Fioravanti, 412 F.2d 407, 420 (3d Cir.), *cert. denied*, 396 U.S. 837 (1969).

10. *See infra* notes 101-08 and accompanying text.

11. *See infra* notes 17-28 and accompanying text.

12. *See infra* notes 29-114 and accompanying text.

13. *See infra* notes 115-43 and accompanying text.

14. *See infra* notes 144-76 and accompanying text.

15. *See infra* notes 147-55, 161-72 and accompanying text.

16. *See infra* notes 177-92 and accompanying text.

17. *Burgos*, 55 F.3d at 934.

18. *Id.*

19. *Id.*

had occasionally bought crack cocaine from Burgos.[20] A grand jury indicted Burgos on two counts, charging him with conspiracy to possess with intent to distribute cocaine base and possession with intent to distribute more than fifty grams of cocaine base.[21]

After four hours of deliberation, the *Burgos* jury informed the court that it was unable to reach a verdict.[22] The judge, on his own motion, then delivered an *Allen* charge to the jury.[23] The jury recon-

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20. *Id.* Pringle's mother and sister also testified at trial, saying they learned of Burgos' involvement with drugs in April 1993, when the mother opened a package of cocaine addressed to John Pringle. *Id.* at 935. The mother and sister testified that Burgos had come to their house and apologized for having the cocaine sent there. *Id.* During the investigation, Pringle's mother and sister identified Burgos, who is Hispanic, from a photographic spread of Burgos and seven African-American men. *Id.* This photo identification gave rise to Burgos's second assignment of error on appeal. *Id.* at 941. Burgos argued that the trial court should have suppressed the women's in-court identification of Burgos, since the women had seen the suggestive photo display. *Id.* at 934, 941-43. The appellate court found no prejudice to Burgos on this ground, since the women were well acquainted with him and would have been able to identify him without the photos. *Id.* at 942-43.

21. *Id.* at 935. The court impaneled a jury on January 10, 1994, and the trial began on January 18, 1994. *Id.* The jurors began their deliberation the afternoon of January 19th. *Id.*

22. *Id.*

23. The charge provided in its entirety:

> I have observed you during the course of the trial. It has not been a lengthy trial. I believe that this jury is comprised of very intelligent and very dedicated people. And I don't believe we are going to find a jury better equipped than you to decide this matter.
>
> If you don't decide it, then, of course, we have got to convene another 12 persons. And I tell you, I don't believe there are another 12 people who exceed you in intelligence and the ability to decide this case.
>
> Now, you have not had it long. You have had it since 12:30 today. You had your lunch brought in. It is now 5:25 by this clock. That clock is a little fast. That's not an awfully long period of time.
>
> There's a jury out in California that as of last night the last time I heard they had the case—their case nearly three weeks. We have had juries in this building to deliberate for several days. So it is not unusual for the jury after a few hours in a case that's considered close—I don't know whether—I don't know how close you view the case—but we have had juries who were not able to see the case exactly alike.
>
> There is, of course, a duty on jurors to review the evidence, to deliberate with each other to consider the reasonable view of others. You know, it is not easy to back away from an opinion that has earlier been expressed. If I have taken a possession [sic] [position] amongst a group of people, sometimes my pride doesn't allow me to revisit and to later say in light of what somebody else has said that maybe yours is the better point of view.
>
> Now, I'm not asking anybody—let me make this clear, I'm not asking anybody to give up a firmly held belief. You don't have to do that. But I do ask you to think about it.
>
> I have had juries to proceed into the evening. In fact, we have had some—we have had juries to stay in here until past midnight, two and three in the morning. I'm not—I don't impose that requirement on any jury. I give you the right to

vened two days later and deliberated for approximately two hours before returning a verdict of guilty.[24]

On appeal, the Fourth Circuit held that the "often meandering [and] somewhat confusing charge"[25] the trial court had given to the *Burgos* jury could have led jurors in the minority to conclude the court was asking them to think about giving up their firmly held be-

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decide your schedule, whether you would like to work additionally this evening, in which event we make a meal available to you, or whether you would like to take a break and come back in the morning.

Some judges do it the other way. They send the jury in and say you stay in until you decided. [sic] I don't do it that way. I recognize that you have got personal responsibilities, and you have matters that compete for your time and your attention, family responsibilities.

In any event, I am going to ask you to give some further consideration to this matter. And in the meantime, if you feel that you would like to hear the testimony of anyone [sic] or more witnesses who have testified, or in the event that you would like to hear me talk some more of an instruction, I doubt that, I already know that I've talked too long. In any event, I'm willing to try again to clarify any issues that may be a problem for you.

Remember, in the final analysis, that the Government has the burden to prove by evidence the guilt of the accused on both of the counts. If the evidence offered by the Government has not convinced you beyond a reasonable doubt of the guilt of the defendant, it is your duty to find him not guilty. If the evidence, on the other hand, does convince you, the jury, beyond a reasonable doubt that the defendant is guilty, it is your duty to find him guilty.

Now I'm sure there are some things that you haven't been able to agree upon. Once again, it is never my intention—it is not my duty to try and coerce you. The case is in your hands now. You are the judges of the credibility of the witnesses, the weight to be given their testimony. You are the judges of the bottom line.

Now, having said all of that, Mr. Foreman, I am going to ask you to go back into the room and give some further thought to the question, whether given some further time for discussion into this evening, you might be able to resolve this matter; or whether by reason of, you know, any anxieties over personal matters that might arise, you want to go home, come back in the morning. And whether there is any testimony—I don't know whether you would want to consider that. If you decide that you want to recess for the evening, you might in the morning decide or overnight give some thought to whether—let's hear the testimony of thus and such witness again. Or you might decide, let's ask that judge to describe whatever principles it is that may have you in a quandary once again. So, I leave it to you. You can decide to work on into the evening. If you do, I am going to ask you what you want to do about an evening meal, because we owe you that courtesy, or whether you want to call it a night and come back in the morning. And also remember my offer to provide for you any assistance that the court can.

Best of luck to you. I don't envy you your job. It is a difficult one. We appreciate you very much. We couldn't operate without you. I know we won't find 12 jurors better equipped to decide this case than you are.

Id. at 938-39 (citation omitted).

24. *Id.* at 935.

25. *Id.* at 938.

liefs.[26] The court of appeals concluded that the charge was not sufficiently balanced to avoid coercing the minority into joining the majority.[27] In granting Burgos a new trial, the court wrote: " 'A decision so arrived at is not the unanimous verdict of each juror, but simply the decision of a majority of the twelve.' "[28]

The *Allen* charge—also known as the dynamite charge, the shotgun instruction, the third degree instruction, the nitroglycerin charge and the hammer instruction[29]—got its original name from the 1896 Supreme Court case, *Allen v. United States*.[30] In that case, a jury considering a homicide charge asked the court for further instructions. Summarizing the lengthy instruction, the Court wrote:

> in a large proportion of cases absolute certainty could not be expected; that although the verdict must be the verdict of each individual juror, and not a mere acquiescence in the conclusion of his fellows, yet they should examine the question submitted with candor and with a proper regard and deference to the opinions of each other; that it was their duty to decide the case if they could conscientiously do so; that they should listen, with a disposition to be convinced, to each other's arguments; that, if much the larger were for conviction, a dissenting juror should consider whether his doubt was a reasonable one which made no impression upon the minds of so many men, equally honest, equally intelligent with himself. If, upon the other hand, the majority was for acquittal, the minority ought to ask themselves whether they might not reasonably doubt the correctness of a judgment which was not concurred in by the majority.[31]

In approving this instruction, the Supreme Court stated: "It certainly cannot be the law that each juror should not listen with deference to the arguments and with a distrust of his own judgment, if he finds a large majority of the jury taking a different view of the case."[32]

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26. *Id.* at 940.

27. *Id.* at 940-41.

28. *Id.* at 940 (quoting United States v. Martin, 756 F.2d 323, 326 (4th Cir. 1985)).

29. SAUL M. KASSIN & LAWRENCE S. WRIGHTSMAN, THE AMERICAN JURY ON TRIAL: PSYCHOLOGICAL PERSPECTIVES 193 (1988).

30. 164 U.S. 492 (1896).

31. *Id.* at 501. The trial court took its instructions in *Allen* from instructions that the Supreme Court of Massachusetts approved in Commonwealth v. Tuey, 62 Mass. (8 Cush.) 1 (1851).

32. *Allen*, 164 U.S. at 501. The Supreme Court reaffirmed the propriety of the *Allen* charge in Lowenfield v. Phelps, 484 U.S. 231 (1988). In *Lowenfield*, the petitioner sought reversal of his sentence on the grounds that the trial court's supplemental instructions and inquiries during the sentencing phase of his trial coerced the jury into returning a death sentence. *Id.* at 233. Two days into the sentencing phase of deliberations, the *Lowenfield*

In the years since *Allen*, the instruction has assumed many forms, some emphasizing the importance of "openmindedness and concession" and some the "importance of a verdict to the parties, the public, and the court."[33] The Fourth Circuit addressed the "increasing criticism" of *Allen* instructions more than twenty-five years ago in *United*

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jury sent the trial court a note stating that it was having difficulty reaching a unanimous decision. *Id.* at 234. Despite the state law provision permitting the court, in the event of a hung jury at the sentencing phase, to impose a life sentence in lieu of the death penalty, the judge delivered an *Allen* charge to the jury. *Id.* at 235. Thirty minutes later jurors returned with a verdict sentencing petitioner to death. *Id.*

The petitioner argued that, since there would have been no retrial had the jury hung, one of the primary purposes of the *Allen* charge, "the avoidance of societal costs of retrial," was absent. *Id.* at 238. Therefore, he asserted that the delivery of an *Allen* charge under these circumstances violated his rights under the Due Process Clause and the Eighth Amendment. *Id.* The Court dismissed the petitioner's argument and stated that the validity of its observations in *Allen* were "beyond dispute." *Id.* at 237-38. It examined and approved the supplemental instructions under the standard of review set forth in Jenkins v. United States, 380 U.S. 445 (1965) (per curiam), which considers the "totality of the circumstances" surrounding the administration of an *Allen* charge to determine whether statements by the trial judge constituted coercion. *Lowenfield*, 484 U.S. at 237 (citing *Jenkins*, 380 U.S. at 446). For a discussion of *Jenkins*, see *infra* notes 182-89 and accompanying text. The *Lowenfield* Court found that even though a hung jury would not have resulted in a retrial, Louisiana had a strong interest in "having the jury 'express the conscience of the community on the ultimate question of life or death.' " *Id.* (quoting Witherspoon v. Illinois, 391 U.S. 510, 519 (1968)).

33. *See* KASSIN & WRIGHTSMAN, *supra* note 29, at 193. These authors concluded that the modified *Allen* charge proposed by the American Bar Association (ABA) is the best alternative. *Id.* at 195. The ABA recommendation states:

> 5.4 Length of deliberations; deadlocked jury.
>
> (a) Before the jury retires for deliberation, the court may give an instruction which informs the jury:
>
> (i) that in order to return a verdict, each juror must agree thereto;
>
> (ii) that jurors have a duty to consult with one another and to deliberate with a view to reaching an agreement, if it can be done without violence to individual judgment;
>
> (iii) that each juror must decide the case for himself, but only after an impartial consideration of the evidence with his fellow jurors;
>
> (iv) that in the course of deliberations, a juror should not hesitate to reexamine his own views and change his opinion if convinced it is erroneous; and
>
> (v) that no juror should surrender his honest conviction as to the weight or effect of the evidence solely because of the opinion of his fellow jurors, or for the mere purpose of returning a verdict.
>
> (b) If it appears to the court that the jury has been unable to agree, the court may require the jury to continue their deliberations and may give or repeat an instruction as provided in subsection (a). The court shall not require or threaten to require a jury to deliberate for an unreasonable length of time or for unreasonable intervals.
>
> (c) The jury may be discharged without having agreed upon a verdict if it appears there is no reasonable possibility of agreement.

ABA Project on Minimum Standards for Criminal Justice, STANDARDS RELATING TO TRIAL BY JURY § 5.4, at 145-46 (Approved Draft 1968).

States v. Sawyers,[34] a trial of six defendants for conspiracy to commit bribery.[35] The indictment charged that two of the defendants had promised extensive state government contracts to various business firms in exchange for money.[36] These two defendants then channeled the money into small corporations that they owned and controlled.[37] Finally, a larger corporation, owned equally by all six defendants, would take over the smaller corporations and divide the money among all of the owners.[38]

The *Sawyers* jury deliberated for about fifteen hours before sending a note to the court that said:

> We have a juror that stated: "the judge will get all over those that vote not guilty."
> This juror has cursed, made slanderous remarks along with another juror throwing chewings [sic] gum. These two jurors are sister-in-law [sic] and want to go home. The vote is 10 guilty & 2 not guilty.
> It is a solid-vote and no one will give.[39]

After receiving the note, the trial judge delivered a lengthy *Allen* charge, encouraging those in the minority and those in the majority to reconsider their positions.[40] The judge told the jurors there was "no reason to believe" that the case would ever be submitted to more competent jurors or that better evidence would be presented.[41] After

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34. 423 F.2d 1335, 1340 (4th Cir. 1970).
35. *Id.* at 1336.
36. *Id.* at 1337.
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.* at 1337-38 & n.4.
41. *Id.* at 1338 n.4. The trial judge included the following statements in his instruction:

> The trial has been expensive to both the prosecution and the defense. If you should fail to agree on a verdict, the case is left open and undecided. Like all cases, it must be disposed of sometime. There appears no reason to believe that another trial would not be equally expensive to both sides. Nor does there appear any reason to believe that the case can be tried again better or more exhaustively than it has been, on either side. Any further jury must be selected in the same manner and from the same source as you have been chosen. So there appears no reason to believe that the case would ever be submitted to twelve men and women more intelligent, more impartial, or more competent to decide it, or that more or clearer evidence could be produced on behalf of either side.

Id.

one further clarification,[42] the jury deliberated for about one-and-a-half hours before convicting four of the defendants.[43]

The appellants objected to the supplemental instructions on four grounds.[44] First, appellants argued the court should have reminded the jury of the burden of proof during the instruction.[45] Second, appellants contended that the judge's statement that no better or more exhaustive evidence could be produced at a retrial was improper since the defense rested at the end of the prosecution's case without producing evidence.[46] The appellants' third contention was that since the instruction was given in response to the jury's note, it confirmed jurors' beliefs "that the judge would 'get all over those that vote not guilty.' "[47] Finally, the appellants argued that the judge's statements: "You may be as leisurely in your deliberations as the occasion requires" and "you shall take all the time which you may feel is necessary"[48] were "coercive in view of the approaching Labor Day weekend."[49]

The Fourth Circuit held that the supplemental charges in *Sawyers* were not so coercive as to warrant a new trial.[50] The court reasoned that since a defendant has the "double opportunity" of winning acquittal (because the jury believes her innocent or because the prosecution fails to prove its case beyond a reasonable doubt), some "reasonable degree of encouragement to arrive at a verdict" is not unfair to the defendants.[51] The court also reasoned that for the trial judge to comment that a retrial would not be better or more exhaustive was not unfair, since the judge had no cause to believe defendants would change their strategy or offer different evidence if the case were tried again.[52]

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42. *Id.* at 1339. About 15 minutes after the *Allen* charge was delivered, the jury sent the court a second note asking what would happen if two or more of the defendants, but not all, were found guilty. *Id.* The judge told the jury that it could convict some defendants and acquit others, but because of the nature of the charge, more than one defendant would have to be found guilty of engaging in the illegal activity in order for a conspiracy to exist. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.* (quoting the jury's note).

47. *Id.* at 1339.

48. *Id.* at 1338 n.4.

49. *Id.* at 1339.

50. *Id.*

51. *Id.*

52. *Id.* at 1339-40. The court dismissed the defendants' third and fourth objections as mere restatements of their argument that the charge was coercive. *Id.* at 1340.

In addition, the *Sawyers* court specifically recognized the "balance" present in the trial judge's instruction.[53] The judge twice told the jurors not to surrender their conscientious convictions because of other jurors' opinions or for the sole purpose of returning a verdict.[54] The court found nothing in the judge's words or mannerisms that reflected impatience with minority jurors.[55] Finally, the court considered the complexity of the trial and the length of deliberations, and concluded that the judge would have abandoned his duty to "keep the criminal dockets current" if he had accepted the jury's first assertion that all jurors could not agree.[56]

In addition, the Fourth Circuit addressed general criticism of the *Allen* instruction,[57] which it said arose from two faulty premises: first, that a trial judge is in effect coercing a verdict by persuading a retired jury to deliberate longer, and, second, that defendants have a right to a hung jury.[58] The court did not agree with the appellant that urging the jury to deliberate further in an attempt to reach a verdict was coercion.[59] The court found that a trial judge's "calmly dispassionate *balanced* effort . . . to induce a verdict"[60] did not invade the jury's province as decision-maker.[61] The court further reasoned that the right to a hung jury was simply *part of* the right to a verdict of acquittal when the jury could not ascertain the facts upon which guilt would

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53. *Id.*

54. *Id.*

55. *Id.* The court recognized that the judge's knowledge of the jury's numerical division was relevant in determining his motive for giving an *Allen* instruction under Brasfield v. United States, 272 U.S. 448, 450 (1926). The *Brasfield* Court reversed the defendant's conviction after the trial judge inquired into how the hung jury was divided numerically. The Court "deem[ed] it essential to the fair and impartial conduct of the trial, that the inquiry itself should be regarded as ground for reversal." *Id.* In *Sawyers*, the Fourth Circuit, however, said that such knowledge was not relevant in determining the potential impact of the instructions on minority jurors. United States v. Sawyers, 423 F.2d 1335, 1340 (4th Cir. 1970). The court wrote: "They always know their minority status, and if fearfully inclined, may presumably suspect a disgruntled judge can find them out." *Id.*

56. *Sawyers*, 423 F.2d at 1340.

57. *See* ABA Project on Minimum Standards for Criminal Justice, STANDARDS RELATING TO TRIAL BY JURY § 5.4 (b) commentary at 155 (Approved Draft 1968).

58. *Sawyers*, 423 F.2d at 1340.

59. *Id.* at 1341.

60. *Id.* (emphasis added). See *infra* notes 101-14 and accompanying text for a discussion of the *Burgos* mandate for a balanced charge.

61. United States v. Sawyers, 423 F.2d 1335, 1341-42 (4th Cir. 1970). The court asked, rhetorically:

> Why is the trial judge in the federal system given the power to comment on the evidence, and to place the burden of proof, and to advise [jurors] that it is their duty to accept the law as he gives it to them, unless it is to help the jury arrive at a true verdict?

Id. at 1342.

depend.[62] The court thus concluded that a defendant could not assert the right to a hung jury, but could claim the right to have the jury speak without coercion.[63]

Although the *Sawyers* court did not agree with the defendants that the use of the traditional *Allen* charge was per se reversible error, it "strongly recommended" that trial courts employ a modified version of the instruction, one that instructed jurors in the minority *and* in the majority to consider the other side's views.[64]

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62. *Id.* at 1340-41. The court stated:

> The so-called "right" to a hung jury is at most no greater than the right to an irrational verdict. With respect to either "right," it is clear that a defendant may not insist upon a jury instruction advising jurors they may irrationally acquit and that any one of them may deliberately hang the jury. Yet the power of jurors to do both is beyond question.

Id. at 1341 (citations omitted). *But cf.* United States v. Fioravanti, 412 F.2d 407, 416 (3rd. Cir.), *cert. denied*, 396 U.S. 837 (1969) (arguing that "[t]he possibility of a hung jury is as much a part of our jury unanimity schema as are verdicts of guilty or not guilty"); *infra* notes 115-24 and accompanying text (discussing the *Fioravanti* decision); *infra* note 153 and accompanying text (discussing the role deadlocked juries play in a system of unanimous verdicts).

63. *Sawyers*, 423 F.2d at 1341.

64. *Id.* at 1342. The *Sawyers* court cited with favor the instruction recommended by the Judicial Conference of the United States Courts:

> 5.4 Length of deliberations; deadlocked jury.
>
> (a) Before the jury retires for deliberation, the court may give an instruction which informs the jury:
>
> (I) that in order to return a verdict, each juror must agree thereto;
>
> (II) that jurors have a duty to consult with one another and to deliberate with a view to reaching an agreement, if it can be done without violence to individual judgment;
>
> (III) that each juror must decide the case for himself, but only after an impartial consideration of the evidence with his fellow jurors;
>
> (IV) that in the course of deliberations, a juror should not hesitate to reexamine his own views and change his opinion if convinced it is erroneous;
>
> (V) *that each juror who finds himself in the minority shall reconsider his views in light of the opinions of the majority, and each juror who finds himself in the majority shall give equal consideration to the views of the minority*[;]
>
> (VI) that no juror should surrender his honest conviction as to the weight or effect of the evidence solely because of the opinion of his fellow jurors, or for the mere purpose of returning a verdict.
>
> (b) If it appears to the court that the jury has been unable to agree, the court may require the jury to continue [its] deliberations and may give or repeat an instruction as provided in subsection (a). The court shall not require or threaten to require a jury to deliberate for an unreasonable length of time or for unreasonable intervals.

Sawyers, 423 F.2d at 1342 n.7 (citing SUPPLEMENT TO REPORT OF THE COMMITTEE ON THE OPERATION OF THE JURY SYSTEM OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 2 (1969)). The Judicial Conference charge is the same instruction recommended by the ABA, with the addition of the emphasized paragraph and the deletion of the last para-

In his dissent, Judge Sobeloff argued that the court should consider the appropriateness of the *Allen* instruction in relation to the jury's first note (in which the jury advised the judge of its numerical division and of conflict in the deliberation room)[65] since jurisdictions that permitted use of the dynamite charge did so only when neither the charge's language, nor the circumstances, rendered the charge coercive.[66] Judge Sobeloff contended that special hazards of coercion existed after a judge learned of the jury's numerical split.[67] Only when the judge does not know the breakdown of votes, he reasoned, will jurors view an *Allen* charge as addressed to the entire panel.[68]

The dissent concluded that the trial judge's "bland boiler-plate language about the majority also considering the views of the minority" was insufficient to relieve minority jurors of the sense that they alone were under the judge's watchful eye.[69] Judge Sobeloff contended that jury members' fears that the judge would " 'get all over those that vote not guilty' " called for reassurance that the judge was a neutral party.[70] The dissent concluded that when the judge provided no such reassurance in his charge, jurors may have felt that the judge impelled them to convict.[71] Judge Sobeloff dramatically warned that " '[d]ynamite,' it must not be forgotten, is dangerous and should be handled with care."[72]

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graph in the Bar Association instruction. See *supra* note 33 for the text of the ABA instruction.

65. *Sawyers*, 423 F.2d at 1344-45 (Sobeloff, J., dissenting); *see supra* text accompanying note 39. Judge Sobeloff said the chief question for consideration was whether the judge's ensuing instruction, which did not mention the jury's note, was a proper response to the circumstances. *Sawyers*, 423 F.2d at 1345 (Sobeloff, J., dissenting). Though Judge Sobeloff wrote that the case at hand did not call upon the court to determine the propriety of the *Allen* charge in all circumstances, he expressed his misgivings about the use of the charge. *Id.* at 1347-48 (Sobeloff, J., dissenting).

66. *Sawyers*, 423 F.2d. at 1347 (Sobeloff, J., dissenting).

67. *Id.* at 1348 (Sobeloff, J., dissenting).

68. *Id.* at 1349 (Sobeloff, J., dissenting).

69. *Id.* (Sobeloff, J., dissenting).

70. *Id.* (Sobeloff, J., dissenting).

71. *Id.* (Sobeloff, J., dissenting). The dissent hypothesized that jurors may have reasoned as follows:

> (1) [T]he judge has been told the precise division and he knows about the statement made in the jury room that a verdict of not guilty would incur his displeasure; yet (2) he has said nothing in reply to assure us of his neutrality; but instead (3) he has stressed the importance of reaching a verdict; therefore, (4) to avoid the judge's disfavor, I will vote guilty.

Id. at 1349-50 (Sobeloff, J., dissenting).

72. *Id.* at 1347 (Sobeloff, J., dissenting).

Three years later, the Fourth Circuit reviewed a "mild" *Allen* charge in *United States v. Davis*.[73] Judge Sobeloff, writing for the majority in *Davis*, upheld the defendant's conviction, holding that the charge conformed to accepted Fourth Circuit standards.[74] The court reiterated its suggestion from *Sawyers* that trial courts use the Judicial Conference version of the American Bar Association charge.[75] In *United States v. Hogan*,[76] however, the court once again upheld the convictions of two defendants after, in each case, a judge delivered an *Allen* charge that did not comport with the American Bar Association charge.[77]

What originated in *Sawyers* as a recommendation to trial judges to administer a balanced *Allen* charge,[78] became a reprimand in *United States v. Stollings*.[79] In *Stollings*, the defendant appealed his conviction on perjury charges, arguing that the *Allen* charge was objectionable on two grounds.[80] First, Stollings asserted that the charge was not in the form of the American Bar Association charge that the Fourth Circuit had strongly recommended in *Sawyers*, *Davis* and *Hogan*.[81] Second, Stollings contended that the circumstances surrounding the *Allen* instruction made it unduly coercive in this case.[82]

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73. 481 F.2d 425 (4th Cir.), *cert. denied*, 414 U.S. 977 (1973). In *Davis*, a defendant convicted on bank robbery charges claimed the trial court erred in issuing the charge when the jury returned a note four hours into deliberations stating it had reached an impasse. *Id.* at 426, 428.

74. *Id.* at 429. The *Allen* charge given by the judge in *Davis* made no reference to a minority or majority position of the jurors and encouraged all jurors to listen with deference and regard to others' opinions. *Id.* at 428 n.2. Judge Sobeloff wrote that his position in *Davis* was not inconsistent with his dissent in *Sawyers*, explaining that the *circumstances* in *Sawyers*, and not the charge itself, made use of the charge prejudicial and unfair to Sawyers. *Davis*, 481 F.2d at 429 n.3. Judge Sobeloff added that he personally thought that the Fourth Circuit should abandon altogether the pure *Allen* charge and adopt in its place the ABA standard. *Id.* "The questionable benefits of the charge do not, in my judgment, justify the unending litigation and confusion it breeds. But since my brethren disagree, the standard of our circuit remains unchanged." *Id.*

75. *Id.* at 429.

76. 486 F.2d 222 (4th Cir. 1973) (per curiam), *cert. denied*, 416 U.S. 941 (1974).

77. *Id.* at 223.

78. *See Burgos*, 55 F.3d at 941.

79. United States v. Stollings, 501 F.2d 954 (4th Cir.), *cert. denied*, 416 U.S. 941 (1974); *see Burgos*, 55 F.3d. at 941.

80. *Stollings*, 501 F.2d at 956.

81. *Id.*

82. *Id.* Stollings' trial lasted five days. After the jury had been deliberating for about two-and-a-half hours, the district judge called the jurors back to the courtroom and asked if they had reached a verdict. *Id.* The jury said it had not and the judge asked it to return to deliberations. *Id.* One hour later, the judge sent for the jury again and asked if it was "hung." When the foreman said it was, the judge then issued the dynamite charge, encouraging those in the minority to reconsider their position. *Id.* at 955.

The Fourth Circuit affirmed Stollings' conviction, noting that the court had not reversed convictions in *Sawyers*, *Davis* or *Hogan* for use of the same charge used in *Stollings*.[83] However, the court noted that neither *Davis* nor *Hogan* had been decided at the time of Stollings' trial.[84] It cautioned that in subsequent cases it would "feel free" to treat use of *Allen* charges, other than the balanced charge that it had recommended in *Sawyers*, as reversible error.[85]

With regard to Stollings' second assignment of error, the court agreed with the appellant that the trial judge had acted prematurely when he delivered the *Allen* charge.[86] The court concluded, however, that the judge did not exceed his discretion for three reasons: the legal issues were simple, the jury deliberated for a "not insignificant period of time" after the charge was given, and the crime, perjury in connection to a fraudulent election committed by a politically active deputy sheriff, was likely to "raise the spectre of possible improper influence on the jury if the opportunity were afforded."[87]

True to its warning in *Stollings*,[88] the Fourth Circuit reversed the defendants' convictions in *United States v. Mitchell*[89] on the basis of impermissible *Allen* instructions.[90] The court noted that it had never found the use of a "pure" *Allen* charge (one using the language from *Allen* itself) to be reversible error.[91] In this case, however, the judge strayed from the original *Allen* language in telling jurors to " 'open up [your minds] and reevaluate [your] opinions . . . [and] reconsider the opinions and statements of your fellow jurors, and do it open-mindedly, not *stubbornly*, but open-mindedly in the *spirit of coopera-*

83. *Id.* at 956. The charge that the trial court used in this case, and which the Fourth Circuit disapproved, had earlier been approved in Orton v. United States, 221 F.2d 632 (4th Cir. 1955).

84. *Stollings*, 501 F.2d at 956.

85. *Id.*

86. *Id.*

87. *Id.* This final justification for the judge's behavior is curious. One has difficulty discerning what benefit an *Allen* charge would confer on a situation ripe for improper influence. The court apparently was trying to force a verdict before an improper influence pervaded jury deliberations. This runs counter to the idea that an *Allen* charge is not supposed to force a verdict for the sake of obtaining a verdict. *See* United States v. Fioravanti, 412 F.2d 407, 420 (3d. Cir.), *cert. denied*, 396 U.S. 837 (1969).

88. *Stollings*, 501 F.2d at 956; *see supra* text accompanying note 85.

89. 720 F.2d 370 (4th Cir. 1983).

90. *Id.* at 371-72. The court warned in *Stollings* that it would "feel free" to reverse a conviction if the *Allen* charge was given in a form other than that recommended in *Sawyers*. *Stollings*, 501 F.2d at 956. The *Mitchell* defendants' convictions, however, were not reversed on the grounds that the trial court did not give the *Sawyers*-version of the instruction. *Mitchell*, 720 F.2d at 372. Instead, the *Mitchell* court found the instructions in that case "expanded impermissibly upon *Allen*." *Id.*

91. *Id.* at 371.

tion.' "[92] The court disapproved of this wording, particularly the use of the word "stubbornly."[93] In addition, the court objected to the judge's intimation that the defendants would be unlikely to plead guilty if a mistrial resulted, thereby requiring an entirely new trial.[94] The court said jurors could have taken the latter statements to mean the trial court thought the defendants were guilty, and it thus concluded that the prejudice was plain.[95]

In *United States v. West*[96] the trial court issued an *Allen* instruction including an explicit reference to the expense that would be incurred in holding another trial.[97] The court upheld the defendants' conviction on drug charges, stating that the reference to the cost of a new trial was improper but was not reversible error.[98] The court noted that the version of the charge it had approved in *Sawyers* did not refer to the social costs of a hung jury, but found that the *West* instruction as a whole did not unduly emphasize the cost factor.[99] The court reiterated the *Stollings* warning that using an *Allen* charge in a form other than the one that it had approved in *Sawyers* could constitute reversible error.[100]

Finally, in *Burgos*, the court wrote that the modified *Allen* charge approved in *Sawyers* would operate as a *mandate,* rather than simply a recommendation, for courts seeking to blast juries out of deadlock.[101] The court noted that it had traditionally upheld an *Allen* charge as long as it was " 'fair, neutral and balanced,' "[102] stating that, "[a]t the heart of our *Allen* charge jurisprudence is the basic principle that a defendant has 'the right to have the jury speak without being coerced.' "[103] The court noted that a tension existed between the simple rule of *Sawyers* and *Stollings*, and the fact that a conviction had never been overturned for failure to give the recommended version of the

92. *Id.* at 372.

93. *Id.*

94. *Id.*

95. *Id.*

96. 877 F.2d 281 (4th Cir. 1989).

97. *Id.* at 290 n.6.

98. *Id.* at 291.

99. *Id.*

100. *Id.* However, in *United States v. Russell*, the court again refused to overturn a defendant's conviction on the grounds that the trial court had issued a "pure" and not a *Sawyers*-version modified *Allen* charge. 971 F.2d 1098, 1107 n.19 (4th Cir. 1992).

101. *Burgos*, 55 F.3d at 941.

102. *Id.* at 936 (quoting Carter v. Burch, 34 F.3d 257, 264 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 1101 (1995)).

103. *Id.* (quoting United States v. Sawyers, 423 F.2d 1335, 1341 (4th Cir. 1970)).

charge.[104] Since the trial court's instruction in *Burgos* struck "at the very heart of *Sawyers*' concerns,"[105] the court took the opportunity to apply a straightforward rule that district courts giving an *Allen* charge must specifically remind jurors in the minority *and* jurors in the majority to reconsider their positions with the other side's arguments in mind.[106] The court did not specify what additional language the charge could include,[107] but warned that failure to incorporate the balanced reminder would result in automatic reversal.[108]

The *Burgos* court wrote that the most egregious mistake a judge could make in giving an *Allen* instruction was to suggest that jurors surrender their conscientious convictions.[109] The court found that the judge's qualified assertion that he was not "asking anybody to give up a firmly held belief," followed by the statement, "[b]ut I do ask you to think about it," could have led jurors to believe they *should* consider giving up their firmly held beliefs.[110] The court reasoned that these phrases, when heard with the preceding remarks about pride preventing one from reconsidering his position, may have led minority jurors to conclude the remarks were directed more at them than the majority.[111]

The *Burgos* court explained that courts must evaluate a suspect *Allen* charge at least in part from the perspective of a minority juror because such jurors may be more fearful a judge will disapprove of their positions and be able to discover their identities.[112] The court found that nothing in the judge's instruction made it clear that the majority and minority positions were equally credible.[113] In considering the way jurors may have viewed the judge's remarks, the court

104. *Id.* at 937-38 (citing United States v. Russell, 971 F.2d 1098, 1107 n.19 (4th Cir. 1992)).

105. *Id.* at 938.

106. *Id.* at 941.

107. *Id.* at 941 n.9. The court said that it did not intend to limit the ability of trial judges to tailor *Allen* instructions for particular juries. *Id.* It left judges with the responsibility of formulating the entire instruction, with the understanding that the balancing language would be included. *Id.*

108. *Id.* at 941.

109. *Id.* at 939.

110. *Id.* at 940. For the full text of the instruction in *Burgos*, see *supra* note 23.

111. *Burgos*, 55 F.3d at 940. The court also noted its disapproval of the "parade of horribles" that the judge presented, which included tales of juries deliberating until the early hours of the morning. *Id.* at 939 n.6. The judge followed these illustrations with the statement, "I don't do it that way." *Id.* The court wrote that if the judge had no intention of treating jurors this way, the use of statements that could potentially scare jurors into reaching a judgment was needless. *Id.*

112. *Id.* at 940.

113. *Id.* at 940-41.

concluded that qualifying statements, such as "it is not my duty to try and coerce you," did not remedy the harm done by his instruction.[114]

Other circuits have also objected to *Allen* charges that single out minority jurors. Writing for the Third Circuit Court of Appeals in *United States v. Fioravanti*[115] nearly thirty years ago, Judge Aldisert lambasted use of the instruction, failing to find any sound basis for the hypothesis that it generated verdicts and eliminated hung juries.[116] The *Fioravanti* court objected most strongly to the trial court's statement that a juror should " 'listen with deference to arguments of fellow jurors and distrust of his own judgment if he finds a large majority of the jury taking a different view of the case from [his own].' "[117] Judge Aldisert ridiculed the idea of the balanced approach taken later in *Burgos*, asserting that nothing would be achieved by admonishing the majority to distrust its position in the same way as the minority.[118]

Curiously, the court did not overturn Fioravanti's conviction, despite its vehement objection to the instruction.[119] The court justified its decision on two grounds. First, it allowed the conviction to stand because the judge had delivered the *Allen* charge as part of the main body of jury instructions and not as a supplemental charge to blast the jury from deadlock.[120] Second, the court of appeals affirmed the trial court because the circuit had previously approved use of the *Allen* charge "albeit grudgingly and in a somewhat restricted form."[121]

The court announced that in cases tried after the *Fioravanti* decision, it would "not let a verdict stand which may have been influenced in any way by an *Allen* Charge."[122] Specifically, it prohibited trial judges from giving an instruction that directed minority jurors to dis-

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114. *Id.* at 940. The *Burgos* court cited with approval a charge given in *United States v. Martin* though the charge was not as strong as the one approved in *Sawyers*. *Burgos*, 55 F.3d at 940-41 (citing United States v. Martin, 756 F.2d 323 (4th Cir. 1985) (en banc)). In *Martin*, the trial judge told jurors:

> As I said, you haven't got to give up a firm conviction just to go with the crowd, however, if you've got a firm conviction about the case one way or the other, that doesn't mean you shouldn't listen to reason and think with the others and reason with the others and see if those of you who, as I said, if you are in the minority on the Jury, listen to the views of the majority; and if you're on the majority on the Jury, you listen to the views of the minority. And don't get yourselves in a position where you turn your back and say do what you want, I'm through.

756 F.2d at 325.

115. 412 F.2d 407 (3d Cir.), *cert. denied*, 396 U.S. 837 (1969).

116. *Id.* at 415-17.

117. *Id.* at 415.

118. *Id.* at 417.

119. *Id.* at 419.

120. *Id.*

121. *Id.*

122. *Id.* at 420.

trust their judgment.[123] Thus, the Third Circuit, despite its rhetoric condemning the dynamite charge, tacitly approved use of an instruction much like that which *Burgos* mandated.[124]

The First Circuit has intentionally refrained from suggesting specific wording for an *Allen* charge but does insist that the instruction meet three requirements.[125] First, the charge must make clear that jurors in the minority *and* in the majority are to reexamine their positions.[126] Second, the jury must be informed that it need not reach a verdict.[127] Finally, the instruction also must reemphasize the burden of proof.[128]

The Eighth Circuit similarly requires trial courts to use a balanced instruction.[129] It specifically considers four factors in determining whether an *Allen* charge was coercive: the content of the instructions; the time spent deliberating after hearing the charge; the total time of deliberation; and indicia in the record of coercion or pressure on the jury.[130]

The D.C. Circuit is among those that explicitly restrict use of the dynamite instruction. It requires use of the supplemental instruction

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123. *Id.*

124. *See id.*; *cf. Burgos*, 55 F.3d at 941 (mandating a balanced instruction); United States v. Sawyers, 423 F.2d 1335, 1343 (4th Cir. 1970) ("What appears to be withdrawn from the discretion of the district judges in the main body of [the *Fioravanti*] opinion is all but restored in final footnote 32."). Footnote 32, at the end of the *Fioravanti* opinion, permits trial courts to give the following supplemental instruction:

> "It is your duty, as jurors, to consult with one another, and to deliberate with a view to reaching an agreement[,] if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence in the case with your fellow jurors. In the course of your deliberations, do not hesitate to re-examine your own views, and change your opinion, if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence[,] solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict."

Fioravanti, 412 F.2d at 420 (quoting Hon. William C. Mathes & Hon. Edward J. Devitt, FEDERAL JURY PRACTICE AND INSTRUCTIONS § 79.01, at 440 (1965)); *see also* United States v. Smith, 857 F.2d 682, 684 n.4 (10th Cir. 1988) (citing the "Aldisert charge" with approval and indicating that its "distinction [from the *Allen* charge] is that the 'Aldisert' version calls upon *every* juror to reflect upon the correctness of his preliminary appraisal of the evidence, not just the *minority*."). *But see Sawyers*, 423 F.2d at 1346 n.7 (Sobeloff, J., dissenting) (disagreeing with majority's interpretation of *Fioravanti*); *Fioravanti*, 412 F.2d at 419 ("Our refusal to reverse this conviction should not be taken to mean that we have tacitly approved of the Charge.").

125. *See* United States v. Vachon, 869 F.2d 653, 659 (1st Cir. 1989).

126. *Id.*

127. *Id.*

128. *Id.*

129. United States v. Cortez, 935 F.2d 135, 141 (8th Cir. 1991).

130. *Id.* at 141-42.

endorsed by the American Bar Association, which makes no mention of majority or minority status.[131]

Even if the form of an *Allen* instruction is acceptable, other restrictions on its use may apply.[132] For instance, the Court of Appeals for the Ninth Circuit reversed the defendant's conviction in *United States v. Seawell*[133] *after the trial judge twice delivered a permissible Allen* instruction to the jury.[134] The jury deliberated for about one-and-a-half hours before notifying the judge that the jurors could not agree.[135] The judge gave a balanced *Allen* charge and sent the jurors back for further deliberations.[136] Three-and-a-half hours later, the jurors again announced they were deadlocked and the judge repeated the instruction.[137] Less than an hour later, the jurors returned with a guilty verdict.[138] The Ninth Circuit indicated that repeating the charge was tantamount to telling the jury that since it had failed to reach a verdict, it had not followed the instruction the first time it was given: "Given a second time, . . . the charge no longer serves as an instruction; no matter how it may be softened it becomes a lecture sounding in reproof."[139]

The Courts of Appeals for the Second and Fifth Circuits, however, have recently reaffirmed their support for the "pure" *Allen* charge. Last year, the Second Circuit explicitly approved of the trial court's use of the original *Allen* instruction in *United States v. Melendez*,[140] specifically disagreeing with the defendants' assertion that the judge had a duty to admonish those in the majority to consider the arguments and opinions of the minority.[141] In 1993, the Fifth Circuit expressed enthusiastic support for the charge in *United States*

131. *See* United States v. Dorsey, 865 F.2d 1275, 1278 (D.C. Cir. 1989); *supra* note 33 (containing the text of the ABA recommendation).

132. See *infra* notes 182-89 and accompanying text for a discussion of the "totality of the circumstances" test defined in Jenkins v. United States, 380 U.S. 445 (1965) (per curiam).

133. 550 F.2d 1159 (9th Cir. 1977).

134. *Id.* at 1163.

135. *Id.* at 1160-61.

136. *Id.* at 1161 & n.2.

137. *Id.* at 1161-62.

138. *Id.* at 1162.

139. *Id.* at 1163.

140. 60 F.3d 41, 52 (2d Cir. 1995).

141. *Id.* The *Melendez* court further held that it would not consider the amount of time spent deliberating after an *Allen* charge in determining whether the instruction was coercive. *Id.* at 51.

v. Straach,[142] writing that "*Allen*'s age-old wisdom was intelligently applied in this case."[143]

The "wisdom" of the *Allen* charge is that it apparently succeeds in jarring juries out of deadlock.[144] The desirability of this effect depends upon whether the instruction is blasting irrational jury members into agreement with reasoned jurors or forcing legitimate dissenters to succumb to the majority position.[145] Research suggests both situations occur.[146]

The University of Chicago's Jury Project, an extensive study of juries in criminal trials in the 1950s, provided some indication of the way dynamite charges may affect the decision-making process.[147] The study indicated that about five percent of all criminal trials end in hung juries.[148] Of the juries that do hang, nearly half (forty-two percent) are hung by one or two minority jurors.[149] Furthermore, juries are twice as likely to deadlock in close cases,[150] with most jurors' disagreements based on their views of evidentiary matters and *not* over their feelings toward the defendant.[151] This data may lend support to Judge Aldisert's assertion in *Fioravanti* that hung juries are a critical part of the system of unanimous verdicts.[152] If one views the initial split in jurors' positions as an indicia of the closeness or ambiguity of the case, then juries deadlock on precisely the cases that are too muddled to warrant criminal verdicts.[153]

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142. 987 F.2d 232 (5th Cir. 1993).

143. *Id.* at 243.

144. *See* KASSIN & WRIGHTSMAN, *supra* note 29, at 194 ("Even in the absence of hard data, 90 years' worth of anecdotes seems to compel the tentative conclusion that [the dynamite charge is as effective as its reputation suggests] it is.").

145. *Id.*

146. *See id.*

147. *See* HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY 453-91 (1966). The authors studied data from 3,576 criminal jury trials in 1954, 1955 and 1958. *Id.* The University of Chicago Jury Project is one of the earliest and best known attempts to study jurors from the perspectives of law and social science. Valerie P. Hans & Neil Vidmar, *The American Jury at Twenty-Five Years*, 16 LAW & SOC. INQUIRY 323, 324 (1991). Hans and Vidmar call for the replication of the study to reflect changes in jury composition and functioning over the last four decades. *Id.* at 347-49.

148. KALVEN & ZEISEL, *supra* note 147, at 453. The authors generalized that juries beginning with an overwhelming majority for either conviction or acquittal are unlikely to hang. *Id.* at 462.

149. *Id.* at 461.

150. *Id.* at 457.

151. *Id.* at 456.

152. *See* United States v. Fioravanti, 412 F.2d 407, 416 (3d. Cir.), *cert. denied*, 396 U.S. 837 (1969).

153. *See* KASSIN & WRIGHTSMAN, *supra* note 29, at 194. *Allen* charges have occasionally been criticized as presenting a threat to the requirement that a jury find a defendant guilty beyond a reasonable doubt. *Cf. Burgos*, 55 F.3d at 940 (explaining the potentially

Research also has shown that the more time a jury spends deliberating, the greater the chances are that it will not reach a unanimous verdict.[154] If more time in the jury room increases the chance of deadlock, it is a special cause for suspicion when a jury in disagreement reaches a unanimous verdict after receiving an *Allen* instruction and being told to deliberate further. Thus, each time an *Allen* instruction generates a verdict from a deadlocked jury it must be affecting the deliberation process in some way.[155] The question remains whether such influence equals coercion.

The Fourth Circuit in *Burgos* attempted to strike a balance between the benefits of giving a jury-prodding instruction[156] and the potential harm it could bring to the verdict's integrity.[157] The court's analysis in *Burgos* is sound.[158] In reviewing the instruction at issue in

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coercive effects of an unbalanced *Allen* charge); United States v. Martin, 756 F.2d 323, 326 (4th Cir. 1985) ("A decision so arrived at is not the unanimous verdict of each juror, but simply the decision of a majority of the twelve."); *Fioravanti*, 412 F.2d at 417-18 ("The requirement of a unanimous jury verdict for criminal cases in the federal courts and in all but a handful of states is eloquent testimonial that something more than a majority vote is desired." (footnotes omitted)). Since a jury may not convict a defendant unless each individual juror considers him guilty beyond a reasonable doubt, if a guilty verdict results from majority influence rather than from each juror's subjective belief that this standard has been met, the *Allen* charge may result in the doubt of a single juror being *per se* unreasonable. *Id.* at 419; *see also* Note, *On Instructing Deadlocked Juries*, 78 YALE L.J. 100, 119 (1968) (arguing that most verdicts represent the convictions only of a majority of critical size, not unanimity) [hereinafter Note, *Deadlocked Juries*]. However, Kalven and Zeisel found that the likelihood that a guilty minority will hang a jury is about as great as the likelihood that an acquittal minority will hang the jury. KALVEN & ZEISEL, *supra* note 142, at 461. If *Allen* charges are coaxing verdicts from deadlocked juries, therefore, they are just as likely to be generating acquittals as convictions. *But see* Janet E. Findlater, *Retrial After a Hung Jury: The Double Jeopardy Problem*, 129 U. PA. L. REV. 701, 734-35 (1981) (speculating that hung jury cases involve "in all probability" a higher percent of innocent defendants than other cases).

154. KALVEN & ZEISEL, *supra* note 147, at 459-60; *see also* Note, *Deadlocked Juries*, *supra* note 153, at 108 ("[A]s deliberations progress, the two sides take more and more radical positions, their arguments increasing in violence and irrationality." (citations omitted)).

155. For a commentary distinguishing improperly hung juries from properly deadlocked ones and postulating that the law's aim is to bring the former to agreement, while allowing the latter to remain at an impasse see Note, *Deadlocked Juries*, *supra* note 153, at 129.

156. The main benefit of dynamite instructions is that they sometimes prevent mistrials, saving time, money and the need for a new trial. *See* KASSIN & WRIGHTSMAN, *supra* note 29, at 193.

157. *See* KASSIN & WRIGHTSMAN, *supra* note 29, at 194.

158. The next logical step for the Fourth Circuit was to transform its previous recommendations into a mandate. However, considering the trial judge in *Burgos* employed none of the objectionable language, the case was not only an unlikely candidate for reversal based on *Sawyer* and *Stollings*, but also an unlikely vehicle for the emergence of this strict mandate. For the full text of the instruction given by the trial judge in *Burgos*, see *supra* note 23.

Burgos, the court examined the charge from the perspective of minority jurors.[159] The court reasoned that if jurors understood the trial court's instruction to mean they should reconsider their firmly held beliefs, which would be a reasonable conclusion based on the wording of the charge, minority jurors would be more likely to believe that they were the targets of such an instruction.[160]

Psychology Professor Saul Kassin conducted an experiment that supports the proposition that *Allen* charges exert particular pressures on minority jurors.[161] Subjects in the experiment read about a criminal case, thinking they were to participate in a mock jury.[162] Mock jurors then "deliberated" by passing notes, with each subject receiving one or two (of a total of three) notes which disagreed with his position.[163] For the subjects who did not change their votes, the divisions persisted.[164] The experimenter-judge then delivered two different sets of instructions to separate juries.[165] One group heard a traditional *Allen* instruction, while the other group received no instruction, with the judge simply informing them that verdicts had to be unanimous and they should continue in their deliberations.[166] Minority jurors changed their votes more often than majority jurors after receiving the *Allen* charge, but minority jurors who received no instruction did not.[167] Minority jurors who heard the dynamite charge also reported feeling more pressure from the experimenter than jurors in the no-instruction group.[168] Professor Kassin found that immediately after receiving the *Allen* instruction, majority jurors used fewer informational influence strategies, such as citing facts and laws relevant to the case.[169] Instead, majority jurors increased the normative social pressure on those in the minority by criticizing dissenting jurors and refus-

159. *Burgos*, 55 F.3d at 940.

160. *Id.* For support of this view, see Note, *Deadlocked Juries*, *supra* note 153, at 139. The author explained: "If [the judge] addresses his remarks primarily to dissenters, the judge will appear to support the majority, even though what he says goes no further than to ask the minority to participate in the discussions and to allow the persuasion mechanisms to operate." *Id.*

161. *See* Saul M. Kassin, *The American Jury: Handicapped in the Pursuit of Justice*, 51 OHIO ST. L.J. 687, 703-07 (1990). However, since the subjects in the experiment deliberated by passing notes, Professor Kassin cautioned that data gleaned from these studies should be considered tentatively with regard to real trials. *Id.* at 707.

162. *Id.* at 706.

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. *See id.*

168. *Id.* at 706-07.

169. *Id.* at 707.

ing to reconsider their positions.[170] Professor Kassin concluded that the dynamite charge had tipped the forces operating over the mock jurors in an undesirable direction, empowering the majority and handicapping the minority.[171] He wrote that the effectiveness of alternative instructions in eliciting verdicts from deadlocked juries through informational rather than normative influences remained to be seen.[172]

One commentator has argued that in order to avoid coercing jurors, *Allen* instructions should state that a hung jury is an alternative to verdicts of guilty or not guilty.[173] Requiring a trial court to instruct juries that deadlock is an acceptable outcome, however, would defeat the purpose of the dynamite charge in emphasizing the importance of reaching a consensus if at all possible. Furthermore, juries generally appear to be aware of the possibility that they may fail to reach a verdict and a mistrial will result.[174] Many *Allen* charges result in response to jurors' assertions that they are a hung jury. An instruction informing jurors that deadlock is an option may be appropriate in the limited context in which jury members ask the court what their options are if they fail to disagree, as jurors did in *United States v. Arpan*.[175] But, it was unnecessary for the Fourth Circuit to include

170. *Id.*

171. *Id.*

172. *Id.*

173. David M. Stanton, Note, *United States v. Arpan: How Does the Dynamite Charge Affect Jury Determinations?*, 35 S.D. L. REV. 461, 474-75 (1990). Stanton made this argument in response to the Eighth Circuit's holding that the defendant did not have a right to an initial instruction on the option of a hung jury, and that accurate answers to jury questions were supported by law. *See* United States v. Arpan, 887 F.2d 873, 876-77 (8th Cir. 1989) (en banc). The *Arpan* jury had asked the court how it was to record a split decision. The trial court told the jury that only unanimous verdicts were recordable. *Id.* at 875. A second note from the jury stated that it had only been able to agree on one count and asked what would happen if it left a blank space on the verdict form. *Id.* The trial court then delivered an *Allen* charge. *Id.* Finally, the jury announced it had reached a verdict on two of four counts and asked how its deadlock on the two remaining counts would affect the verdicts. *Id.* The court told jurors they could return the unanimous verdicts and continue deliberations on the other counts. *Id.* at 876.

174. *See, e.g., Burgos*, 55 F.3d at 935 (stating that the jury informed the trial court it could not reach a verdict); United States v. Russell, 971 F.2d 1098, 1107 (4th Cir. 1992) (same); United States v. Stollings, 501 F.2d 954, 955 (4th Cir.) (stating that jury foreman answered affirmatively when judge asked if jury was "hung"), *cert. denied*, 416 U.S. 941 (1974). *But see* CATHY E. BENNETT & ROBERT B. HIRSCHHORN, BENNETT'S GUIDE TO JURY SELECTION AND TRIAL DYNAMICS IN CIVIL AND CRIMINAL LITIGATION § 16.36, at 308 (Eda Gordon ed., 1993) ("In post trial interviews jurors routinely say that the Allen Charge is misinterpreted to mean that they must make a decision."). Bennett and Hirschhorn suggest that attorneys for both sides should request five minutes of argument to clarify the meaning of an *Allen* instruction. *Id.*

175. *Arpan*, 887 F.2d at 875.

such a requirement given that the *Burgos* jury informed the court it could not reach a verdict.[176] Since jurors told the trial court they could not agree, they arguably considered deadlock to be a legitimate outcome.

Whether the modified instruction mandated in *Burgos* eliminates the coercive effect of an *Allen* charge is not clear. But, by requiring trial courts to admonish majority and minority jurors to consider the other faction's views, the modified dynamite instruction ideally operates to dislodge obstinate, irrational dissenters from their minority stance, while allowing legitimate dissenters to feel as secure in their position as majority jurors do in theirs.

Important policy reasons justify encouraging juries to reach a verdict.[177] New trials are expensive, and the criminal justice system is backlogged with cases.[178] If *Allen*-type instructions work without coercing jurors into consensus, eliminating them from an already overloaded system is neither desirable nor wise. Rather than altogether eliminating a charge that is well ingrained in American jurisprudence,[179] and possibly increasing the occurrence of mistrials due to hung juries, the Fourth Circuit has attempted to minimize the charge's coerciveness without disabling it completely.[180] The Fourth Circuit's decision to allow the trial judge to tailor the instruction for individual juries also may enable the charge to operate more effectively by allowing judges to depart from the impersonal, boiler-plate language that appears in many jury instructions.[181]

Other checks besides the *Burgos* mandate restrain coercive jury instructions. In *United States v. Jenkins*,[182] the jury sent the judge a

176. *See Burgos*, 55 F.3d at 935.

177. *See* B. Michael Dann, *"Learning Lessons" and "Speaking Rights": Creating Educated and Democratic Juries*, 68 IND. L.J. 1229, 1270 (1993) (noting the "substantial direct and indirect economic, human and social costs" of retrials resulting from hung juries).

178. The time that elapses between arrest and adjudication in criminal trials and the sheer number of prosecutions illustrate this backlog. In 1992, an average of 300 days passed between arrest and sentencing in felony cases tried by juries in state courts. U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS—1994, at 492 tbl. 5.57 (1994). In 1990, 60,521 defendants were prosecuted in United States District Courts. *Id.* at 449 tbl. 5.18.

179. *See supra* notes 29-32 and accompanying text.

180. For another suggestion on how to reduce the risk of mistrial due to deadlocked juries, see Dann, *supra* note 177, at 1269-79. The author, a Superior Court Judge in Arizona, suggests that trial judges give jurors the option of telling the judge and lawyers which issues continue to divide them. *Id.* at 1271. The court may then decide to clarify instructions, give further instructions, direct further argument by counsel, or allow further presentation of evidence. *Id.* at 1269.

181. For support of the view that jury instructions should be as case-specific as possible, see Dann, *supra* note 177, at 1257.

182. 380 U.S. 445 (1965) (per curiam).

note stating it was unable to reach a verdict because of insufficient evidence in a robbery case.[183] The judge called jurors into the courtroom and, as part of his response, stated: " 'You have got to reach a decision in this case.' "[184] The Supreme Court, in a short, per curiam opinion, reversed the conviction, finding that under all of the circumstances the charge was coercive.[185] The Supreme Court and lower courts have applied a Jenkins "totality of the circumstances" analysis in reviewing allegedly coercive instructions and comments by the trial court.[186] In *Ellis v. Reed*,[187] the Fourth Circuit applied the *Jenkins* test in refusing to grant a writ of habeas corpus on the grounds that a state trial judge inquired about a jury's numerical division.[188] The defendant also raised the issue of the propriety of the *Allen* charge on appeal, but the Fourth Circuit did not scrutinize that issue under the *Jenkins* test.[189] Presumably, if an *Allen* instruction incorporated the language required in *Burgos* but also included potentially coercive language, the Fourth Circuit would evaluate the instruction's coerciveness under a *Jenkins* test.

While hung juries may be viewed as an assurance of the jury system's integrity rather than as a sign of its failure,[190] in many cases deadlock clearly can lead to undue delay and wasted resources.[191] Given the dynamics of the jury as a decision-making body, it is a group subject to influence and pressure from many sources.[192] Certainly, the justice system does not seek to eliminate *all* nonevidentiary influences which act upon jury members. For instance, instructions from the judge that jurors take their duties seriously, that they consider and weigh all the evidence, and that they make their decisions conscientiously and rationally are admonitions designed to shape jurors' behavior. At the same time, other sources of coercion, including the appearance of partiality by the judge and improper pressure from stubborn, inflexible jurors, must be minimized if not eradicated. The Fourth Circuit in *Burgos* wisely recognized that the *Allen* charge can fall within either camp of influences, sometimes functioning as a posi-

183. *Id.* at 446.
184. *Id.*
185. *Id.* The Supreme Court based its ruling in *Jenkins* on its supervisory power over the federal courts, not the Constitution. Lowenfield v. Phelps, 484 U.S. 231, 239 n.2 (1988).
186. *See Lowenfield*, 484 U.S. at 237-39 (discussed *supra* note 32); Ellis v. Reed, 596 F.2d 1195, 1199 (4th Cir. 1979).
187. 596 F.2d 1195 (4th Cir. 1979).
188. *Id.* at 1199-1200.
189. *Id.* at 1196-97.
190. KALVEN & ZEISEL, *supra* note 147, at 453.
191. *See* United States v. Melendez, 60 F.3d 41, 51 (2d Cir. 1995).
192. *See* Kassin, *supra* note 161, at 706.

tive force in jury deliberations, while at other times exerting improper influence. The charge mandated by *Burgos* strikes the necessary balance by blasting *all* jurors into further deliberations and furthering the purpose of judicial resolution.

LESLIE SHEA RIGGSBEE

State v. McCarver: The Role of Jury Unanimity in Capital Sentencing

As of January 1996, thirty-eight states in America allow capital punishment.[1] Most of these states, including North Carolina,[2] give the jury in a capital case the responsibility of determining whether a convicted murderer will be sentenced to die,[3] in the belief that in pronouncing sentence on the defendant a jury expresses the moral judgment of the community, doing so more accurately than a judge would.[4] However, jury sentencing has created difficulties in administering the death penalty throughout its history.[5] The problem in giving a jury unlimited discretion to impose a death sentence is that it gives twelve human beings free rein to introduce all of their human frailties, passions, and prejudices into a literal life-and-death decision. In the 1970s, the Supreme Court recognized the inherent dangers of unlimited jury discretion in capital sentencing, and in a series of landmark cases interpreted the Eighth Amendment to require limits on that discretion.[6] As may be expected, the solution is not perfect. Courts have struggled for almost twenty-five years with the problem of how best to channel a jury's sentencing discretion to achieve a result consistent with constitutional and traditional notions of justice.

This problem confronted the North Carolina Supreme Court last September. During the sentencing phase of a capital trial, a jury was given a standardized jury instruction form that asked several questions

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1. DEATH ROW USA (NAACP Legal Defense and Education Fund, New York, N.Y.), Winter 1995, at 1.

2. *See* N.C. GEN. STAT. § 15A-2000 (Supp. 1994).

3. *See* William J. Bowers, *The Capital Jury Project: Rationale, Design, and Preview of Early Findings*, 70 IND. L.J. 1043, 1045-50 (1995). A few anomalous states, notably Arizona and Idaho, give the trial judge the final sentencing authority. *See id.* at 1049 n.30; ARIZ. REV. STAT. ANN. § 13-703(B) (West 1987 & Supp. 1994-95); IDAHO CODE § 19-2515 (1987).

4. *See, e.g.*, Witherspoon v. Illinois, 391 U.S. 510, 519 (1968) ("[A] jury that must choose between life imprisonment and capital punishment can do little more—and must do nothing less—than express the conscience of the community on the ultimate question of life or death.").

5. *See, e.g.*, Furman v. Georgia, 408 U.S. 238, 249-53 (1972) (Douglas, J., concurring) (relating history of discriminatory application of the death penalty); Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 361-70 (1995). *See generally* WELSH S. WHITE, THE DEATH PENALTY IN THE NINETIES: AN EXAMINATION OF THE MODERN SYSTEM OF CAPITAL PUNISHMENT (1991) (outlining the modern system of capital punishment).

6. *See infra* notes 39-62 and accompanying text.

designed to guide their sentencing discretion.[7] One of these questions asked whether the jury "unanimously" found that the mitigating circumstances were insufficient to outweigh any aggravating circumstances.[8] The trial judge instructed the jury that their decision would have to be unanimous for a "no" answer as well as for a "yes" answer.[9] The defendant appealed, claiming that this instruction constituted reversible error.[10] In *State v. McCarver*,[11] the North Carolina Supreme Court not only upheld the instruction, but went further, stating that *every* "outcome determinative" sentencing question in a capital case requires a unanimous answer by the jury.[12]

This Note discusses the *McCarver* majority's holding requiring jury unanimity for "outcome determinative" capital sentencing questions.[13] After briefly explaining the facts of the case,[14] the Note discusses the jurisprudence of capital sentencing,[15] both in the United States Supreme Court[16] and in North Carolina.[17] It then analyzes the decision in *McCarver*,[18] and concludes that although the holding represents one possible interpretation of the jury instruction at issue, it is an indefensible one, inconsistent with the North Carolina Constitution, the North Carolina death penalty statute, the United States Supreme Court's death penalty jurisprudence, and the realities of modern jury decision-making.[19]

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7. State v. McCarver, 341 N.C. 364, 390-92, 462 S.E.2d 25, 39-41 (1995), *cert. denied*, 116 S. Ct. 1332 (1996). See *infra* text accompanying notes 22-25 for the complete text of the instructions.

8. *McCarver*, 341 N.C. at 391, 462 S.E.2d at 39. "Mitigating factors" are circumstances regarding the crime, the defendant, etc., put into evidence by a capital defendant that tend to weigh against the imposition of the death penalty in a given case. *See* N.C. GEN. STAT. § 15A-2000(f) (Supp. 1994). Aggravating factors consist of similar evidence presented by the prosecution that weighs in favor of the imposition of the death penalty. *See* N.C. GEN. STAT. § 15A-2000(e) (Supp. 1994).

9. McCarver, 341 N.C. at 389, 462 S.E.2d at 39.

10. *Id.* at 388, 462 S.E.2d at 38.

11. 341 N.C. 364, 462 S.E.2d 25 (1995), *cert. denied*, 116 S. Ct. 1332 (1996).

12. *Id.* at 390, 462 S.E.2d at 39. "Outcome determinative" questions, according to the *McCarver* majority, are those to which a "no" answer mandates a life sentence for the defendant. *Id.* at 393, 462 S.E.2d at 41. Justice Frye, joined by Justice Whichard, dissented only as to this aspect of the majority's holding. *Id.* at 409, 462 S.E.2d at 51 (Frye, J., concurring in part and dissenting in part). The justices were unanimous as to the rest of the decision. *Id.* at 373, 462 S.E.2d at 26.

13. *See infra* notes 20-152 and accompanying text.

14. *See infra* notes 20-38 and accompanying text.

15. *See infra* notes 39-92 and accompanying text.

16. *See infra* notes 39-78 and accompanying text.

17. *See infra* notes 79-92 and accompanying text.

18. *See infra* notes 93-147 and accompanying text.

19. *See infra* notes 148-52 and accompanying text.

On September 8, 1992, a Cabarrus County jury convicted Ernest Paul McCarver of first-degree murder and robbery with a dangerous weapon.[20] In accordance with North Carolina's death penalty statute,[21] the trial judge gave the jurors the following form, titled "Issues and Recommendation as to Punishment," to direct their sentencing decision:

> *ISSUE ONE*
>
> Do you unanimously find from the evidence, beyond a reasonable doubt, the existence of one or more of the following aggravating circumstances?[22]
>
> . . . .
>
> If you answered Issue One "No," skip Issues Two, Three, and Four, and indicate Life Imprisonment under "Recommendation as to Punishment," on the last page of this form.
>
> If you answered Issue One "Yes," proceed to Issue Two.

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20. *McCarver*, 341 N.C. at 373-74, 462 S.E.2d at 30.

21. N.C. GEN. STAT. § 15A-2000 (Supp. 1994).

22. The North Carolina death penalty statute contains a list of statutory aggravating factors which constitute the only aggravating factors a capital jury may consider in its sentencing decision. N.C. GEN. STAT. § 15A-2000(e) (Supp. 1994). These aggravating factors are:

> (1) The capital felony was committed by a person lawfully incarcerated.
>
> (2) The defendant had been previously convicted of another capital felony . . . .
>
> (3) The defendant had been previously convicted of a felony involving the use or threat of violence to the person . . . .
>
> (4) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting escape from custody.
>
> (5) The capital felony was committed . . . in the commission of . . . any homicide, robbery, rape or a sex offense, arson, burglary, kidnapping, or aircraft piracy or the unlawful [use] of a destructive device or bomb.
>
> (6) The capital felony was committed for pecuniary gain.
>
> (7) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.
>
> (8) The capital felony was committed against a [law enforcement officer, officer or the court, or witness against the defendant] while engaged in the performance of his official duties or because of the exercise of his official duty.
>
> (9) The capital felony was especially heinous, atrocious, or cruel.
>
> (10) The defendant knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person.
>
> (11) The murder for which the defendant stands convicted was part of a course of conduct in which the defendant engaged and which included the commission by the defendant of other crimes of violence against another person or persons.

Id.

ISSUE TWO

Do you find from the evidence the existence of one or more of the following mitigating circumstances?[23]

. . . .

If you answered Issue Two "Yes," then answer Issue Three.

If you answered Issue Two "No," then skip Issue Three and answer Issue Four.

ISSUE THREE[24]

Do you unanimously find beyond a reasonable doubt that the mitigating circumstance or circumstances found by one or more of you is, or are, insufficient to outweigh the aggravating circumstance or circumstances found unanimously by you in Issue One?

. . . .

If you answer Issue Three "No," then indicate Life Imprisonment under "Recommendations as to Punishment."

If you answer Issue Three "Yes," then proceed to Issue Four.

ISSUE FOUR

Do you unanimously find beyond a reasonable doubt that the aggravating circumstances or circumstances found unanimously by you in Issue One is, or are, sufficiently substantial to call for the imposition of the Death Penalty when considered with the mitigating circumstance or circumstances found by one or more of you?

. . . .

---

23. The death penalty statute also contains a list of mitigating factors. N.C. GEN. STAT. § 15A-2000(f) (Supp. 1994). The primary difference between aggravating factors and mitigating factors is the presence of mitigating factor number 9: "Any other circumstance arising from the evidence which the jury deems to have mitigating value." *Id.* This section of the statute allows the jury to consider any mitigating evidence not mandated by statute that the defendant wishes to put forth, as required by Lockett v. Ohio, 438 U.S. 586, 604-05 (1978) and Eddings v. Oklahoma, 455 U.S. 104, 113-14 (1982). *See infra* notes 56-62 for further discussion of *Lockett* and *Eddings*.

24. Issue Three as given by the trial court differed slightly from that in the North Carolina Pattern Jury Instructions, which read:

> If you unanimously find beyond a reasonable doubt that the mitigating circumstances found are insufficient to outweigh the aggravating circumstances found, you would answer Issue Three, "Yes." If you do not so find, or have a reasonable doubt as to whether they do, you would answer Issue Three, "No." If you answer Issue Three, "No," it would be your duty to recommend that the defendant be sentenced to life imprisonment.

Defendant-Appellant's Brief at 83-84, State v. McCarver, 341 N.C. 364, 462 S.E.2d 25 (1995) (No. 384A92) (citing NORTH CAROLINA PATTERN JURY INSTRUCTIONS-CRIMINAL § 150.10 (1993)).

> If you answer Issue Four "No," indicate Life Imprisonment under "Recommendation as to Punishment" on the Last Page of this form.
>
> If you answer Issue Four "Yes," indicate Death under "Recommendation as to Punishment."[25]

After nearly four hours of deliberation, the jury presented a written question to the judge regarding Issue Three, which read: "Must there be twelve votes, 'Yes,' or twelve votes, 'No,' to reach a unanimous decision?"[26] After conferring with counsel, the trial judge instructed the jury: "The answer to that is, Yes, it must be a unanimous twelve person decision as to any answer you reach to that issue, whether it be Yes or whether it be No."[27] McCarver's counsel objected, stating that by the plain language of the form, a failure to answer "yes" unanimously should be regarded as a "no" vote.[28] The trial judge, although noting the possible ambiguity in the wording of the question, overruled the objection.[29] McCarver was subsequently sentenced to death,[30] and appealed as of right to the North Carolina Supreme Court.[31] Among the assignments of error made in his appeal brief, McCarver charged that the trial court erred in instructing the jury that it must be unanimous to answer "no" to Issue Three, and that this instruction lowered the state's burden of proof, improperly coerced a verdict, and deprived him of his federal and state constitutional rights.[32]

In an opinion written by Chief Justice Mitchell, the North Carolina Supreme Court rejected McCarver's claims, affirming both the guilty verdict and the death sentence.[33] As to McCarver's charge that the trial court had erred in instructing the jury regarding Issue Three, the court upheld the instruction, holding that not only Issue Three but "any issue which is *outcome determinative* as to the sentence a defend-

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25. Appeal Record at 120-27, State v. McCarver, 341 N.C. 364, 462 S.E.2d 25 (1995) (No. 384A92).

26. *McCarver*, 341 N.C. at 389, 462 S.E.2d at 39.

27. *Id.*

28. *Id.* at 414, 462 S.E.2d at 54 (Frye, J., concurring in part and dissenting in part).

29. *Id.* (Frye, J., concurring in part and dissenting in part).

30. *Id.* at 374, 462 S.E.2d at 30. Although the jurors found fourteen mitigating circumstances and only two aggravating circumstances, they answered "yes" to Issues Three and Four on the "Issues and Recommendation" form, thereby recommending a sentence of death. Appeal Record at 120-27, State v. McCarver, 341 N.C. 364, 462 S.E.2d 25 (1995) (No. 384A92).

31. *McCarver*, 341 N.C. at 373, 462 S.E.2d at 29. N.C. GEN. STAT. § 7A-27(a) (Supp. 1994) provides for an appeal of right to the North Carolina Supreme Court for all death-sentenced defendants.

32. *McCarver*, 341 N.C. at 388, 462 S.E.2d at 38.

33. *Id.* at 409, 462 S.E.2d at 51.

ant in a capital trial will receive—whether death or life imprisonment—must be answered unanimously by the jury."[34] Chief Justice Mitchell explained that any other reading of the "Issues and Recommendations" form would force juries to recommend life imprisonment when they were not unanimous, in violation, he claimed, of both the North Carolina Constitution and the death penalty statute.[35] He also cited policy reasons favoring a unanimity requirement, stating that such a requirement both would prevent juries from abdicating their responsibility to decide upon a sentence and would guard against arbitrary and capricious sentences.[36]

Justice Frye, joined by Justice Whichard, concurred in part but dissented as to the majority's assessment of the necessity of a unanimity requirement.[37] Although Justice Frye did not address the majority's policy concerns, he claimed that neither the North Carolina Constitution nor the death penalty statute required a unanimous decision to answer "no" to Issue Three, and that absent a constitutional or statutory command the plain reading of the question should prevail.[38]

The seemingly simple basis of the dispute between the justices belies the complexities beneath. For more than twenty years, courts have attempted to place guidelines on jurors' sentencing discretion in capital cases in order to assure a just application of this nation's most extreme sanction. The impetus for this campaign was provided by the Supreme Court's 1972 landmark decision in *Furman v. Georgia*.[39] In *Furman*, the Court held that the unlimited sentencing discretion given to juries by Georgia's capital sentencing scheme created an impermissible risk of arbitrarily imposed death sentences, and was therefore unconstitutional.[40] In so holding, the Court set forth a core principle of its death penalty jurisprudence which still guides its decisions: To comply with the Eighth Amendment prohibition against cruel and unusual punishment, a state must eliminate substantial risks that the

34. *Id.* at 390, 462 S.E.2d at 39. Drawing upon Justice Scalia's dissent in McKoy v. North Carolina, 494 U.S. 433, 463 (1990) (Scalia, J., dissenting), the *McCarver* majority declared that Issues One, Three, and Four were outcome-determinative. *McCarver*, 341 N.C. at 393, 462 S.E.2d at 41.

35. *Id.* at 392, 462 S.E.2d at 41. This Note asserts that the Chief Justice erred in his assertion. *See infra* notes 94-112 and accompanying text.

36. *McCarver*, 341 N.C. at 389-90, 462 S.E.2d at 39.

37. *Id.* at 409-16, 462 S.E.2d at 51-55 (Frye, J., concurring in part and dissenting in part).

38. *See id.* (Frye, J., concurring in part and dissenting in part).

39. 408 U.S. 238 (1972).

40. *See id.* at 249 (Douglas, J., concurring in the judgment); *id.* at 310 (Stewart, J., concurring in the judgment); *id.* at 313 (White, J., concurring in the judgment).

death penalty will be inflicted arbitrarily or capriciously.[41] Unfortunately, the *Furman* decision created additional difficulties. Most states employing the death penalty at that time allowed unlimited jury sentencing discretion; therefore, the *Furman* holding represented a *de facto* invalidation of the death penalty across the United States.[42] However, the *Furman* Court stopped short of providing a solution to the arbitrariness introduced by jury discretion, merely holding that such arbitrariness was unconstitutional.[43] State legislatures were thus left to their own devices to come up with a response to the Supreme Court's directive to reduce discretion-based arbitrariness, and came up with a variety of solutions. When viewed broadly, these methods may be divided into two categories.[44]

Some states, notably Georgia,[45] Florida,[46] and Texas,[47] chose to guide capital juries' discretion. The "guided discretion" statutes generally provided for a bifurcated capital trial in which a defendant's

41. The legal principles underlying the *Furman* holding are not easily discerned. The actual opinion of the court was delivered in a two-paragraph *per curiam* opinion holding the Georgia statute at issue to be unconstitutional. *Furman*, 408 U.S. at 239-40 (1972) (per curiam). All nine Justices filed separate opinions—Justices Douglas, Brennan, Stewart, White, and Marshall concurring and Chief Justice Burger, Justice Blackmun, Justice Powell, and then-Associate Justice Rehnquist dissenting. *Id.* at 240. The interpretation advanced in the text is the one most frequently cited. *See, e.g.*, Lockett v. Ohio, 438 U.S. 586, 601 (1978) ("[T]o comply with *Furman*, sentencing procedures should not create 'a substantial risk that the death penalty [will] be inflicted in an arbitrary and capricious manner.' " (citations omitted)); Gregg v. Georgia, 428 U.S. 153, 189 (1976) (opinion of Stewart, Powell, & Stevens, JJ.) ("*Furman* mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action."); Gary Goodpaster, *The Trial For Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. REV. 299, 307 n.39 (1983) ("[W]hile *Furman's* immediate concern is standardless jury discretion to impose the death penalty, its ultimate concerns are arbitrariness and its consequences."); Raymond J. Pascucci et al., *Special Project: Capital Punishment in 1984: Abandoning the Pursuit of Fairness and Consistency*, 69 CORNELL L. REV. 1129, 1136 (1984) ("*Furman* and its progeny held that the state must suitably direct and limit discretion in the capital sentencing process in order to minimize the risk of arbitrary or capricious action . . . .").

42. Indeed, Justice Blackmun called attention to this implication of the *Furman* holding in his dissent: "Not only are the capital punishment laws of 39 states and the District of Columbia struck down [by *Furman*], but also [all of the] provisions of the federal statutory structure that permit the death penalty apparently are voided." *Furman*, 408 U.S. at 411 (Blackmun, J., dissenting).

43. See *supra* note 41 for an explanation of the Court's reticence on this point.

44. *See* Bowers, *supra* note 3, at 1045; Scott W. Howe, *Resolving the Conflict in the Capital Sentencing Cases: A Desert-Oriented Theory of Regulation*, 26 GA. L. REV. 323, 363-64 (1992).

45. *See* Gregg v. Georgia, 428 U.S. 153, 162-63 (1976).

46. *See* Proffitt v. Florida, 428 U.S. 242, 247-48 (1976).

47. *See* Jurek v. Texas, 428 U.S. 262, 268-69 (1976).

sentence was determined independently from his guilt.[48] In the sentencing proceeding, jurors were directed to answer a number of questions regarding the defendant and the nature of the crime designed to channel the sentencing process toward a more "appropriate" sentence in each case.[49] Other states chose a different approach. Rather than guide juror discretion, their legislatures chose to eliminate it entirely, making the death penalty mandatory for certain crimes. North Carolina[50] and Louisiana,[51] for example, enacted statutes of this nature.

In 1976, just two days before the nation's Bicentennial, the Supreme Court finished its evaluation of the two approaches, handing down a set of opinions that would determine the future course of the death penalty nationwide. In *Woodson v. North Carolina*,[52] the Court held that the Eighth Amendment "requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death," and held the mandatory death penalty statutes unconstitutional because they did not allow for

48. *See Gregg*, 428 U.S. at 162-68 (describing Georgia's guided discretion statute); *Proffitt*, 428 U.S. at 247-51 (describing Florida's guided discretion statute); *Jurek*, 428 U.S. at 273-74 (describing Texas' guided discretion statute). The Florida statute differed from the Georgia and Texas statutes in that the jury's sentencing recommendation was not binding upon the trial judge, who imposed the final sentence. *See Proffitt*, 428 U.S. at 248-49.

49. *See Gregg*, 428 U.S. at 164; *Proffitt*, 428 U.S. at 248; *Jurek*, 428 U.S. at 267.

50. *See* Woodson v. North Carolina, 428 U.S. 280, 286 (1976) (describing North Carolina's mandatory death penalty statute). The North Carolina statute made the death penalty mandatory for first-degree murder. *Id.*

51. *See* Roberts v. Louisiana, 428 U.S. 325, 329 (1976) (describing Louisiana's mandatory death penalty statute). The Louisiana statute also mandated the death penalty for first-degree murder, the Louisiana definition of which approximated modern statutory definitions of felony murder. *Id.*

52. 428 U.S. 280 (1976). Like *Furman*, *Woodson* was a "fractured" decision. The Court announced its decision in an opinion written by Justice Stewart and joined by Justices Powell and Stevens. *Id.* at 282 (opinion of Stewart, Powell, and Stevens, JJ.). Justices Brennan and Marshall each wrote separate opinions concurring in the judgment. *Id.* at 305 (Brennan, J., concurring in the judgment); *id.* at 306 (Marshall, J., concurring in the judgment).

The Court has offered some guidance in discerning the precedential effect of divided decisions like *Woodson*: "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . .' " Marks v. United States, 430 U.S. 188, 193 (1977) (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976)). Thus, in *Woodson*, the Stewart-Powell-Stevens opinion may be viewed as the Court's holding, as both Justice Brennan and Justice Marshall's opinions were based on the premise that the death penalty is *per se* unconstitutional. *Woodson*, 428 U.S. at 305 (Brennan, J., concurring in the judgment); *id.* at 306 (Marshall, J., concurring in the judgment).

such consideration.[53] Conversely, the Court upheld the "guided discretion" statutes contested in *Gregg v. Georgia*[54] and its companion cases because the statutes allowed jurors to assess the moral appropriateness of the death penalty in each individual case, thus providing the necessary constitutional safeguards.[55]

Two years later, the Court applied the *Woodson* doctrine specifically to mitigating circumstances in *Lockett v. Ohio*.[56] Sandra Lockett was the "getaway" driver in an attempted robbery that had gone awry, resulting in the murder of a pawnshop owner.[57] She was charged as an accessory to murder and subsequently sentenced to death.[58] At her sentencing hearing, Lockett attempted to introduce evidence of "her character, prior record, age, lack of specific intent to cause death, and her relatively minor part in the crime," but the Ohio death penalty statute only permitted consideration of three mitigating factors: (1) whether the victim had induced or facilitated the crime, (2) whether the defendant acted under coercion or duress, and (3) whether the crime was primarily a product of the defendant's adverse mental condition.[59] Chief Justice Burger, writing for a plurality of the Court, found the Ohio death penalty statute unconstitutional on its face, explaining:

> [W]e conclude that the Eighth and Fourteenth Amendments require that the sentencer . . . 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. . . .

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53. *Woodson*, 428 U.S. at 304 (opinion of Stewart, Powell, and Stevens, JJ.). Although only this aspect of the *Woodson* decision is significant to this Note, the Court listed several other reasons for its holding. First, North Carolina had abolished a mandatory death penalty in 1949, and subsequent pre-*Furman* attempts to reinstate it had failed. *Id.* at 299-300. Second, the Court believed that the mandatory sentencing statutes represented efforts to comply with *Furman* rather than societal consensus on a mandatory death penalty. *Id.* at 298. Finally, the Court indicated its displeasure with the mandatory statutes, accusing the states of merely "paper[ing] over the problem of unguided and unchecked jury discretion." *Id.* at 302.

54. 428 U.S. 153 (1976). Another "famously fractured" opinion, the holding in *Gregg* was announced by the same troika (Justices Stewart, Powell, and Stevens) that wrote the controlling opinion in *Woodson*. *Id.* at 158 (opinion of Stewart, Powell, and Stevens, JJ.). See *supra* note 52 for an explanation of the precedential value of plurality decisions.

55. 428 U.S. at 196-207 (opinion of Stewart, Powell, and Stevens, JJ.).

56. 438 U.S. 586 (1978).

57. *Id.* at 589-91.

58. *Id.* at 591, 594.

59. *Id.* at 597, 593-94 (citing OHIO REV. CODE ANN. §§ 2929.03-2929.04 (Anderson 1975)).

> . . . [A] statute that prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments.[60]

Four years later, *Eddings v. Oklahoma*[61] expanded *Lockett*'s reach to include evidence beyond that relating to the defendant's character and record or the circumstances of the offense, holding that a sentencer may not refuse to consider *any* relevant evidence offered in mitigation of a death sentence.[62]

In *Mills v. Maryland*[63] the Court considered the application of the *Lockett* doctrine to a requirement of jury unanimity.[64] At issue in *Mills* was a capital jury sentencing instruction similar to North Carolina's Issue Two.[65] The instructional form read in pertinent part: "Based on the evidence we [the jury] unanimously find that each of the following mitigating circumstances which is marked 'yes' has been proven to exist by A PREPONDERANCE OF THE EVIDENCE and each mitigating circumstance marked 'no' has not been proven by A PREPONDERANCE OF THE EVIDENCE."[66] Mills claimed that a jury could read this instruction as precluding consideration of *any* mitigating evidence unless all twelve jurors agreed on the existence of a particular mitigating circumstance. This interpretation, Mills argued, created the possibility of a situation in which one holdout juror could force the other eleven members of a jury into imposing a death sentence by refusing to find the existence of any mitigating circumstances that would call for a sentence less than death.[67] Citing

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60. *Id.* at 604-05 (plurality opinion) (footnotes omitted).

61. 455 U.S. 104 (1982).

62. *Id.* at 113-14.

63. 486 U.S. 367 (1988).

64. *Id.* at 373-75.

65. *Id.* See *supra* text accompanying note 23 for the text of Issue Two of the North Carolina sentencing instructions.

66. 486 U.S. at 387 (appendix to the opinion of the Court).

67. *Id.* at 373-74. The *Mills* majority, echoing the concerns of the Maryland Supreme Court judge who dissented from the opinion affirming Mills' death sentence, came up with another situation seemingly inconsistent with *Lockett*:

> All 12 jurors might agree that some mitigating circumstances were present, and even that those mitigating circumstances were significant enough to outweigh any aggravating circumstance found to exist. But unless all 12 could agree that the same mitigating circumstance was present, they would never be permitted to en-

Lockett,[68] the *Mills* majority invalidated the instruction in question and remanded the case for re-sentencing,[69] stating that "[a] jury following the instructions set out in the verdict form could be 'precluded from considering, *as a mitigating factor,* [an] aspect of a defendant's character or record [or a] circumstanc[e] of the offense that the defendant proffer[ed] as a basis for a sentence less than death.'"[70]

Less than two decades after *Woodson*, North Carolina's capital punishment system again came under constitutional attack in *McKoy v. North Carolina*.[71] At the time of *McKoy*, North Carolina capital juries were given a form with an instruction similar to the one at issue in *Mills*.[72] The form included the question, "[Issue Two:] Do you *unanimously* find from the evidence the existence of one or more of the following mitigating circumstances?"[73] The judge at McKoy's trial had further instructed the jury, " 'If you do not unanimously find this mitigating circumstance by a preponderance of the evidence, so indicate by having your foreman write "No," in that space' on the verdict form."[74] In upholding the statute, the North Carolina Supreme Court distinguished McKoy's case from *Mills*, stating that Issue Four in the North Carolina scheme, which asked jurors to consider whether the aggravating circumstances were sufficient to call for the death penalty, allowed individual jurors to include mitigating evidence that had previously been excluded.[75]

The United States Supreme Court, however, declined to validate "the state court's inventive attempts to distinguish *Mills*," and struck down the contested jury instruction.[76] As it had in *Mills*, the Court hypothesized that the North Carolina instruction could produce a situ-

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gage in the weighing process or any deliberation on the appropriateness of the death penalty.

Id. at 374 (citing Mills v. State, 527 A.2d 3, 25-26 (Md. 1987) (McAuliffe, J., dissenting)).

68. *Id.* at 374-75.

69. *Id.* at 384.

70. *Id.* at 380 (quoting Skipper v. South Carolina, 476 U.S. 1, 4 (1986)).

71. 494 U.S. 433 (1990).

72. *See id.* at 435-36.

73. *Id.* at 436 (emphasis added).

74. *Id.* at 436.

75. State v. McKoy (McKoy I), 323 N.C. 1, 40, 372 S.E.2d 12, 33 (1988). Justice Whichard, who joined Justice Frye's dissent in *McCarver*, *see supra* note 12 and accompanying text, wrote the majority opinion in *McCoy I*. *Id.* at 6, 372 S.E.2d at 14. His apparent change of heart is puzzling—if he was in favor of a unanimity requirement to *find* mitigating circumstances, it seems that he likewise would favor a unanimity requirement in *balancing* them.

76. *McKoy*, 494 U.S. at 439, 444. The Court also rejected the argument that the unanimity requirement was valid as a parallel to the requirement of unanimity to find aggravating factors. *Id.* at 443.

ation in which one holdout juror could prevent the rest of the jury from considering any mitigating circumstances, or in which all jurors could find *some* mitigating circumstances, but none unanimously.[77] As such, the Court reasoned that the requirement "impermissibly limit[ed] jurors' consideration of mitigating evidence," and was therefore unconstitutional.[78]

The majority of North Carolina case law on the topic of jury unanimity in capital sentencing has focused on the issue discussed in *McKoy v. North Carolina*—whether a jury must be unanimous to find the existence of mitigating circumstances. Nonetheless, some of these decisions have given insight into the general philosophy of the North Carolina courts on the issue of the jury's role in capital sentencing, and as such are useful for discussion here. In 1983, in *State v. McDougall*,[79] the North Carolina Supreme Court recognized the importance of properly instructing juries on sentencing in capital cases, and formalized the issues to be submitted to the jury, placing them in a format substantially similar to that used later by McCarver's jury.[80] However, the *McDougall* instructions were silent as to a requirement of unanimity.[81]

The question of unanimity, at least as to the finding of aggravating and mitigating circumstances, was resolved that same year in *State*

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77. *Id.* at 438-40. Justice Marshall, who wrote the majority opinion, stated that McKoy's case "present[ed] an even clearer case for reversal than *Mills v. Maryland*." *Id.* at 444 n.8. He pointed out that the issue in *Mills* was whether or not the jury could interpret the instruction in an unconstitutional manner, and that even the dissent in *Mills* had agreed that an interpretation of the *Mills* instruction requiring jury unanimity to find mitigating circumstances was unconstitutional. *Id.* (citing Mills v. Maryland, 486 U.S. 367, 391-95 (1988) (Rehnquist, C.J., dissenting)). By contrast, the instruction in *McKoy* expressly set forth a requirement of jury unanimity to find the existence of mitigating factors. *Id.*

78. *Id.* at 444.

79. 308 N.C. 1, 301 S.E.2d 308 (1983).

80. *Id.* at 32-33, 301 S.E.2d at 327. The format suggested by the *McDougall* court was:

> (1) Do you find from the evidence beyond a reasonable doubt the existence of one or more of the following aggravating circumstances?
>
> (2) Do you find from the evidence the existence of one or more of the following mitigating circumstances?
>
> (3) Do you find beyond a reasonable doubt that the mitigating circumstance or circumstances you have found is, or are, insufficient to outweigh the aggravating circumstance or circumstances you have found?
>
> (4) Do you find beyond a reasonable doubt that the aggravating circumstance or circumstances found by you is, or are, sufficiently substantial to call for the imposition of the death penalty when considered with the mitigating circumstance or circumstances found by you?

Id.

81. See *supra* note 80 for the text of the *McDougall* instructions.

v. Kirkley.[82] The *Kirkley* court imposed a requirement of unanimity to find the existence of aggravating circumstances, noting that both the North Carolina Constitution and the North Carolina statute pertaining to sentencing in capital cases required a unanimous vote to impose a death sentence; further, said the court, it had held in prior cases that imposition of the death penalty in a capital case must be made by a unanimous vote of the twelve jurors.[83] At the same time, the *Kirkley* court imposed a requirement of unanimity to find *mitigating* circumstances, stating that "consistency and fairness dictate [such a requirement]. . . . [W]e see no reason to distinguish the method a jury must use in finding the existence or nonexistence of aggravating and mitigating circumstances during the sentencing procedure."[84]

Despite a large number of challenges, the North Carolina Supreme Court consistently upheld the *Kirkley* unanimity requirement throughout the 1980s.[85] So, when Dock McKoy challenged the unanimity requirement in 1988 on the grounds that it violated the then-recent United States Supreme Court decision in *Mills v. Maryland*,[86] it came as no surprise that the North Carolina Supreme Court rejected his claim[87] as well. However, after the Supreme Court reversed that decision in *McKoy v. North Carolina*,[88] the North Carolina court had to decide whether the unconstitutional jury instruction represented a fatal deficiency in North Carolina's death penalty statute.[89] The court opted to save the statute, claiming that the unanimity requirement was merely a judicially imposed rule and not a necessary part of the statutory scheme:[90]

> We are confident that [*McKoy v. North Carolina*] did not invalidate North Carolina's capital sentencing statute *or any*

82. 308 N.C. 196, 302 S.E.2d 144 (1983), *overruled in part by* State v. Shank, 322 N.C. 243, 367 S.E.2d 639 (1988), *overruled in part by* State v. Rouse, 339 N.C. 59, 451 S.E.2d 543 (1994).

83. *Id.* at 218, 302 S.E.2d at 156-57 (citing State v. Cherry, 298 N.C. 86, 257 S.E.2d 551 (1979)).

84. *Id.* at 218-19, 302 S.E.2d at 157.

85. *See, e.g.*, State v. Brown, 327 N.C. 1, 29, 394 S.E.2d 434, 451 (1990); State v. Huff, 325 N.C. 1, 62, 381 S.E.2d 635, 670 (1989); State v. Holden, 321 N.C. 125, 159, 362 S.E.2d 513, 534 (1987); State v. Brown, 320 N.C. 179, 216-17, 358 S.E.2d 1, 25-26 (1987); State v. Noland, 312 N.C. 1, 24, 320 S.E.2d 642, 656 (1984); State v. Maynard, 311 N.C. 1, 33, 316 S.E.2d 197, 214 (1984); State v. Oliver, 309 N.C. 326, 353, 307 S.E.2d 304, 322-23 (1983).

86. 486 U.S. 367 (1988); *see supra* notes 63-70 and accompanying text.

87. State v. McKoy (McKoy I), 323 N.C. 1, 44, 372 S.E.2d 12, 35-36 (1988). See *supra* notes 74-75 and accompanying text for further discussion of *McKoy I*.

88. 494 U.S. 433 (1990); *see supra* notes 76-78 and accompanying text.

89. State v. McKoy (McKoy II), 327 N.C. 31, 37, 394 S.E.2d 426, 429 (1990).

90. See *infra* notes 103-07 and accompanying text for further discussion of this aspect of the North Carolina Supreme Court's decision in *McKoy II*.

> *part thereof.* At most the decision invalidated *only our jury instructions* requiring unanimity on mitigating circumstances in a capital sentencing proceeding. . . .
>
> . . . .
>
> . . . [D]efendant argues [that] *McKoy* [*v. North Carolina*] in effect invalidates the entire [capital punishment] scheme, including the statute. . . . [W]e find no reference in *McKoy* to the facial validity of our statute. The entire discussion centers on the challenged jury instructions, which became part of our capital sentencing scheme under this Court's decision in [*State v.*] *Kirkley*[91]. . . .
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> . . . *Kirkley* did not hold that unanimity in finding mitigating circumstances is necessarily mandated either by N.C.G.S. §15A-2000 or our constitution. Rather, . . . *Kirkley* upheld the unanimity jury instruction as a matter of appropriate trial procedure in the interest of "consistency and fairness." . . . *Kirkley* regarded the unanimity requirement as a judicially imposed rule governing trial procedure and *not a necessary product of the capital sentencing statute.*[92]

Although several North Carolina Supreme Court cases after *McKoy II* tangentially discussed the issue of jury unanimity in other areas of capital sentencing,[93] the question of whether a negative answer to Issue Three must be unanimous was open for the *McCarver* court to decide. In *McCarver*, Chief Justice Mitchell cited two bases of support for a unanimity requirement: textual provisions of the North Carolina Constitution and the death penalty statute, and policy considerations favoring a unanimity requirement.[94]

Chief Justice Mitchell noted that "the sentence recommendation . . . must be unanimous under constitutional and statutory provi-

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91. 308 N.C. 196, 302 S.E.2d 144 (1983), *overruled in part on other grounds by* State v. Shank, 322 N.C. 243, 367 S.E.2d 639 (1988), *overruled in part on other grounds by* State v. Rouse, 339 N.C. 59, 451 S.E.2d 543 (1994).

92. *McKoy II*, 327 N.C. at 37, 39, 38, 394 S.E.2d at 429, 430 (emphasis added).

93. *See, e.g.*, State v. Jones, 339 N.C. 114, 137, 451 S.E.2d 826, 836 (1994) (holding that the court may not inform the jury that a life sentence will be imposed if it does not reach a unanimous sentence recommendation); State v. Keel, 337 N.C. 469, 493-94, 447 S.E.2d 748, 761-62 (1994) (rejecting contention that language of Issue Three permits the jury to recommend death if it feels that mitigating circumstances are of equal weight to aggravating circumstances); State v. Green, 336 N.C. 142, 174-75, 443 S.E.2d 14, 33-34 (1994) (rejecting contention that "unanimity" language of Issue Three permits jurors to ignore mitigating factors); State v. Baldwin, 330 N.C. 446, 454, 412 S.E.2d 31, 36 (1992) (holding that requirement of unanimous sentence recommendation is not required by the North Carolina Constitution).

94. *McCarver*, 341 N.C. at 389-90, 462 S.E.2d at 39.

sions."[95] However, the entire text of Article I, Section 24 of the North Carolina Constitution, the provision cited by the Chief Justice as support, reads as follows: "Right of jury trial in criminal cases. No person shall be convicted of any crime but by the unanimous verdict of a jury in open court. The General Assembly may, however, provide for other means of trial for misdemeanors, with the right of appeal for trial *de novo*."[96] As Justice Frye pointed out in his dissent,[97] this provision speaks only to convictions, not sentences, and as such would seem inapplicable to Ernest McCarver's case.

Unlike the North Carolina Constitution, the death penalty statute does contain a requirement of unanimity for the sentence recommendation, stating that "[t]he *sentence recommendation* must be agreed upon by a unanimous vote of the 12 jurors."[98] However, the statute is not nearly as explicit as to the steps the jurors must take before they make their recommendation. In fact, the only part of the statute that specifically mentions the weighing of mitigating and aggravating factors does not mention unanimity, requiring only that "[w]hen the jury recommends a sentence of death, the foreman of the jury shall sign a writing on behalf of the jury which writing shall show . . . [t]hat the mitigating circumstance or circumstances are insufficient to outweigh the aggravating circumstance or circumstances found."[99]

The *McCarver* majority's claims of constitutional and statutory support not only lack explicit textual corroboration but are contradicted by North Carolina case law. The North Carolina Supreme Court expressly disavowed any state constitutional requirement of jury unanimity in capital sentencing procedures in *State v. Baldwin*,[100] stating: "Never has this Court construed Article I, Section 24 or any other provision of the North Carolina Constitution as requiring that a

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95. *Id.* at 390, 462 S.E.2d at 39.

96. N.C. CONST. art. I, § 24.

97. Justice Frye stated in his dissent:

> [N.C. CONST. art. I, § 24] requires a unanimous verdict of a jury in open court in order to convict a person of a crime. In this case, as in all capital cases in North Carolina, we do not get to a capital sentencing proceeding until after a jury has convicted the defendant of the capital crime by a unanimous verdict in open court. *The majority's proposition relates to any sentencing recommendation, not a conviction.*

McCarver, 341 N.C. at 410, 462 S.E.2d at 51 (Frye, J., concurring in part and dissenting in part) (emphasis added).

98. N.C. GEN. STAT. § 15A-2000(b)(3) (Supp. 1994) (emphasis added).

99. *Id.* § 15A-2000(c)(3). In any case, this section would seem to provide little support for a generalized requirement regarding mitigating circumstances; the jury is only required to produce the writing required by this section when they recommend a sentence of death. *Id.*

100. 330 N.C. 446, 412 S.E.2d 31 (1992).

defendant's *sentence* be based upon a unanimous recommendation of a jury."[101] In a footnote, the court further explained:

> In *State v. Kirkley* . . . we stated that "a verdict of death in a capital case must be by unanimous vote of the twelve jurors." We note, however, that our holding in [*State v.*] *Cherry* and our subsequent statement in *Kirkley* concerned the sentencing procedure established by the legislature in N.C.G.S. § 15A-2000. Neither of these cases in any way intimated that the unanimity required in a jury's sentencing recommendation is constitutionally mandated.[102]

In addition to explicitly declaiming any sort of state constitutional mandate for the issues in the instructional form, North Carolina case law implicitly separates the instructional form from the statutory regime. In *State v. McKoy (McKoy II)*,[103] Dock McKoy, fresh from his victory in the United States Supreme Court, claimed that the jury instructions invalidated by the Court were an integral part of the statutory regime, and as such the entire statute was unconstitutional.[104] In an effort to save the death penalty statute, the *McKoy II* court took great pains to separate the sentencing instructions from the statute, characterizing the sentencing form as "only our jury instructions" and "not a necessary product of the capital sentencing statute."[105] This would seem to lead to the conclusion that the instructions bear little relation to the statutory scheme. Yet, in *McCarver* the court lauded the importance of the instructions to the administration of the statutory regime, stating that they "ensure[ ] that the jury *properly* fulfills its duty to deliberate *genuinely* for a *reasonable* period of time," and that "[t]he legislature intended such a unanimity requirement."[106] The two approaches are inconsistent; either the instructions are a necessary part of a sentencing scheme that therefore should have been ruled unconstitutional in *McKoy II*, or they are not necessary to the statute and were not intended by the legislature to be so considered.[107]

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101. *Id.* at 454, 412 S.E.2d at 36.

102. *Id.* at 454 n.1, 412 S.E.2d at 36 n.1 (citation omitted).

103. 327 N.C. 31, 394 S.E.2d 426 (1990).

104. *See id.* at 37, 394 S.E.2d at 429.

105. *McKoy II*, 327 N.C. at 37, 38, 294 S.E.2d at 429, 430. See *supra* notes 89-92 and accompanying text for further discussion of this aspect of *McKoy II*.

106. *McCarver*, 341 N.C. at 392-93, 462 S.E.2d at 41 (emphasis in original).

107. There is a third alternative, albeit a rather facile one: that the legislative intent behind § 15A-2000 somehow supports instructions like Issues One, Three and Four as "outcome determinative" integral parts of the statutory scheme, but that Issue Two is entirely a consistency- and fairness-based creation of the judiciary, completely ancillary to the legislative intent and the statutory scheme itself.

Although the North Carolina Constitution and the death penalty statute support a unanimity requirement only for an actual sentencing recommendation, Chief Justice Mitchell made a rather circuitous argument for treating the "outcome determinative" pre-sentencing issues in the same fashion. The Chief Justice reasoned in *McCarver* that a "no" response to whether aggravating factors outweigh mitigators is in fact a "sentence recommendation" because the jury must impose a life sentence as a result.[108] He then took the next logical step, imposing a unanimity requirement for all such "outcome determinative" issues. However, in making this generalization he failed to distinguish between an actual sentence recommendation and the jury's decisions *en route* to that final decision.[109] This is not a mere semantic distinction, for the nature of the decision a jury must make is different in each instance.

The only time in the sentencing process when the jurors are "charged with the heavy responsibility of subjectively . . . assessing the appropriateness of imposing the death penalty upon a particular defendant for a particular crime"[110] is at the very end of the sentencing process. At this point, the jury is acting as the "conscience of the community," actually handing down a sentence, and the provision in the death penalty statute requiring unanimity reflects the gravity of their decision.

In contrast, answering the preliminary questions on the jury instruction sheet merely requires the jury to decide whether to preemptively remove the defendant from consideration for the death penalty. When answering these questions, the jury does not choose between life imprisonment and death, but between life imprisonment and further consideration of the death penalty's propriety in that case. A "no" answer to Issue Three does not "save" the defendant from death, because a "yes" answer does not equal a death sentence. Therefore, this decision does not merit the heightened procedural protection of a unanimity requirement, as does the actual sentencing stage.[111] In any

108. *McCarver*, 341 N.C. at 393-94, 462 S.E.2d at 41-42.

109. In fact, the North Carolina Pattern Jury Instructions, which McCarver's trial judge did not use, explicitly separate the pre-sentencing question from the sentence recommendation itself, stating that once the jury answers "no" to Issue Three, it is *then* their duty to recommend a life sentence. NORTH CAROLINA PATTERN JURY INSTRUCTIONS—CRIMINAL § 150.10 (1993). See *supra* note 24 for the pertinent text of the instructions.

110. State v. Goodman, 298 N.C. 1, 34, 257 S.E.2d 569, 590 (1979).

111. This Note also disputes the majority's claim that allowing the exercise of discretionary mercy by a jury prior to the sentencing recommendation would render a death penalty regime unconstitutionally arbitrary, and cites the Supreme Court's approval of discretionary mercy in response to the majority's claims. *See infra* notes 113-19 and accompanying text.

event, a requirement of unanimity for pre-sentencing questions, whether "outcome determinative" or not, is neither explicitly nor implicitly supported by the death penalty statute or the North Carolina Constitution, the claims of the *McCarver* majority notwithstanding.[112]

However, Chief Justice Mitchell also relies upon "policy reasons" for his decision. His first claim is that the unanimity requirement will eliminate unconstitutional arbitrariness from the capital sentencing process by preventing a jury from exercising mercy on a wholly discretionary basis.[113] This assertion appears to reflect a misreading of the Supreme Court's Eighth Amendment jurisprudence. The *McCarver* majority casts discretionary mercy as an evil to be eliminated, but its true role is as an essential part of a valid death penalty scheme under the Eighth Amendment.[114]

Presumably drawing from *Mills* and *McKoy*, Chief Justice Mitchell hypothesized a situation in which a single juror voting "no" to Issue Three could force a jury to impose a life sentence instead of the death penalty.[115] He claimed that this is the kind of "arbitrariness" that the unanimity requirement will prevent.[116] In *Gregg*, however, the United States Supreme Court spoke to just this concern:

> The petitioner . . . argues that the requirements of *Furman* [i.e., to minimize arbitrariness] are not met here because the jury has the power to decline to impose the death penalty even if it finds that one or more statutory aggravating circumstances are present in the case. *This contention misinterprets Furman.* . . .
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> . . . .

112. In his dissent, Justice Frye recognized that there was a difference between the sentencing recommendation and the consideration of matters leading to that recommendation, but rested his argument on a strict construction of the death penalty statute and the North Carolina Constitution, and not the reasons behind their requirements. *See McCarver*, 341 N.C. at 409-11, 462 S.E.2d at 51-52 (Frye, J., concurring in part and dissenting in part). Justice Frye also alluded to a fundamental inconsistency behind the majority's holding as it concerned Issue One: As the state bears the burden of proving aggravating circumstances beyond a reasonable doubt, then requiring the jury to vote unanimously to answer "no" to this issue would represent a fundamental contradiction to the notion of burden of proof. *Id.* at 415 n.1, 462 S.E.2d at 54 n.1 (Frye, J., concurring in part and dissenting in part); *cf.* State v. Kirkley, 308 N.C. 196, 219, 302 S.E.2d 144, 157 (1983) ("Each circumstance must be established by the party who bears the burden of proof and if he fails to meet his burden of proof on any circumstance, [it] may not be considered in that case.").

113. *See McCarver*, 341 N.C. at 390, 393-94, 462 S.E.2d at 39, 42.

114. *See infra* notes 115-17 and accompanying text.

115. *McCarver*, 341 N.C. at 393, 462 S.E.2d at 41.

116. *Id.* at 393-94, 462 S.E.2d at 42; *cf.* Mills v. Maryland, 486 U.S. 367, 373-74 (1988) (positing a similar hypothetical situation); McKoy v. North Carolina, 494 U.S. 433, 439-40 (1990) (citing *Mills* hypothetical).

> *Nothing in any of our cases suggests that the decision to afford an individual defendant mercy violates the Constitution. Furman* held only that, in order to minimize the risk that the death penalty would be imposed on a capriciously selected group of offenders, the decision to impose it had to be guided by standards so that the sentencing authority would focus on the particularized circumstances of the crime and the defendant.[117]

Thus, *Gregg* flatly contradicts the *McCarver* majority's implication that allowing the jury to have discretionary mercy would render North Carolina's death penalty unconstitutionally arbitrary. In fact, the Court has implied that a system *without* the possibility of discretionary mercy might very well be unconstitutional, stating that " 'the power to be lenient [also] is the power to discriminate,' . . . but a capital punishment system that did not allow for discretionary acts of leniency 'would be totally alien to our notions of criminal justice.' "[118] To put it simply, the Eighth Amendment forbids "cruel and unusual" punishments.[119] There is nothing cruel or unusual about a punishment that allows for more leniency than the circumstances might warrant.

Chief Justice Mitchell's second policy rationale for requiring unanimity on Issue Three is that unanimity will encourage a meaningful and deliberative sentencing process more in accord with the importance of a capital jury's decision.[120] This is a valid concern, and indeed, North Carolina case law reflects the high regard in which the court has held jurors' duties in this situation.[121] However, Justice Mitchell's beliefs regarding the salutary benefits to be gained by requiring unanimity are not grounded in the reality of how capital juries actually make their decisions.

Quite recently, a consortium of criminologists, social psychologists, law school faculty members, and other researchers embarked upon a multi-disciplinary study of how capital jurors make their life or

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117. Gregg v. Georgia, 428 U.S. 153, 203, 199 (1976) (opinion of Stewart, Powell, and Stevens, JJ.) (emphasis added); *see also* Walton v. Arizona, 497 U.S. 639, 666 (1990) (Stevens, J., dissenting) ("[T]he size of the class [of death-eligible defendants] may be narrowed to reduce sufficiently [the] risk of arbitrariness, even if a jury is then given complete discretion to show mercy when evaluating the individual characteristics of those who have been found eligible.").

118. McCleskey v. Kemp, 481 U.S. 279, 312 (1987) (citations omitted).

119. U.S. CONST. amend. VIII.

120. *McCarver*, 341 N.C. at 390, 462 S.E.2d at 39.

121. *See, e.g.*, State v. Hucks, 323 N.C. 574, 584, 374 S.E.2d 240, 246 (1988) (recognizing "[t]he uniqueness of the jury's life-or-death function in a capital sentencing proceeding"); State v. Smith, 305 N.C. 691, 710, 292 S.E.2d 264, 276 (1982) (emphasizing the importance of the capital jury's responsibility to hand down a sentence).

death decisions, titled the Capital Jury Project (CJP).[122] The CJP is now underway in fourteen states,[123] including North Carolina, and the early findings, drawn from full capital trials conducted after 1988, reveal some startling facts about the decision-making processes of capital jurors. Although the CJP's findings have ramifications far beyond North Carolina's jury instructions, for purposes of this Note, they suggest that the *McCarver* majority's claim that a unanimity requirement will produce positive effects in capital sentencing is erroneous because it is based on a misconception of how capital juries make their decisions.

Chief Justice Mitchell asserted that the *McCarver* unanimity requirement will have three positive effects upon capital sentencing: First, it will ensure "*real* and *full* deliberation" by capital juries.[124] Second, it will prevent juries from shirking their responsibility to make sentence recommendations and thereby act as the community's proxy in capital cases.[125] Finally, the combination of the above two effects will tend to prevent arbitrary and capricious death sentences violative of the Eighth Amendment.[126]

The first assertion, that a unanimity requirement will encourage deliberation, is not supported by the CJP findings. The reality of capital sentencing seems to be that a majority of capital jurors have made up their minds regarding their sentencing decision before the sentencing phase of the trial even begins. In the 634 cases collected, 50.2% of the jurors had chosen between a life and death sentence soon after finding the defendant guilty.[127] Of these jurors, 64.6% described themselves as "absolutely convinced" of their decision, while another

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122. *See generally* Bowers, *supra* note 3 (introducing the Capital Jury Project and summarizing early findings). The stated objectives of the CJP are:

> 1. To examine and systematically describe jurors' exercise of capital sentencing discretion;
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> 2. To identify the sources and assess the extent of arbitrariness in jurors' exercise of capital discretion; and
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> 3. To assess the efficacy of the principal forms of capital statutes in controlling arbitrariness in capital sentencing.

Id. at 1077.

123. The participating states, selected to represent a nationwide cross-section of guided discretion capital punishment statutes, are Alabama, California, Florida, Georgia, Indiana, Kentucky, Louisiana, New Jersey, North Carolina, Pennsylvania, South Carolina, Tennessee, Texas, and Virginia. *Id.* at 1079.

124. *McCarver*, 341 N.C. at 389, 462 S.E.2d at 39 (quoting McKoy v. North Carolina, 494 U.S. 433, 452 (1990) (Kennedy, J., concurring)).

125. *Id.*

126. *Id.* at 390, 462 S.E.2d at 39.

127. Bowers, *supra* note 3, at 1089.

30.5% described themselves as "pretty sure."[128] Even more alarmingly, 74.1% of all jurors surveyed believed that the judge's sentencing instructions simply provided a framework for a decision that most jurors had already made.[129]

While further jury deliberation prompted by a unanimity requirement would seem to combat this phenomenon, the results from the CJP researchers in Kentucky reveal an alarming underside to this argument. The Kentucky researchers published their observations on "cross-over" jurors, jurors who made their sentencing decisions prior to the sentencing phase and then changed their minds prior to imposing a sentence.[130] The consistent theme that emerged from the Kentucky study was that most jurors who changed their minds did so not because of "real and full deliberation" of the aggravating and mitigating factors, but through a desire to avoid a retrial stemming from a hung jury.[131] An earlier non-CJP study of Florida jurors was even more alarming; 64.8% of the jurors surveyed stated that the statutory aggravating and mitigating guidelines had "little or no influence" on their sentencing decisions.[132] Thus, observations of actual capital juries suggests that additional deliberation leads at best to artificial unanimity based on motivations outside of the sentencing procedure, and at worst to a decision in which jurors have had longer to concentrate on completely erroneous sentencing factors.

In addition to having practical shortcomings, Chief Justice Mitchell's first contention stands on shaky theoretical ground. His reasoning confuses the jury's *objective* determination of a defendant's guilt or innocence with its *subjective* decision as to the appropriate sentence. Lengthy deliberation certainly could benefit a jury divided on the objective question of a defendant's guilt, giving more time to sift facts, review testimony, assess the credibility of witnesses, and the like. A sentencing decision, however, is almost entirely subjective, depending upon the jurors' respective moral beliefs.[133] It is difficult to

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128. *Id.* at 1090.

129. *Id.* at 1093.

130. *See* Marla Sandys, *Cross-Overs—Capital Jurors Who Change Their Minds About the Punishment: A Litmus Test for Sentencing Guidelines*, 70 IND. L.J. 1183, 1188 (1995).

131. *Id.* at 1206.

132. William S. Geimer & Jonathan Amsterdam, *Why Jurors Vote Life or Death: Operative Factors in Death Penalty Cases*, 15 AM. J. CRIM. L. 1, 24 (1987-88).

133. Justice Powell pointed out this distinction in Bullington v. Missouri, 451 U.S. 430, 450 (1981) (Powell, J., dissenting):

> Underlying the question of guilt or innocence is an objective truth: the defendant, in fact, did or did not commit the acts constituting the crime charged. . . . In contrast, . . . [t]he sentencer's function is not to discover a fact, but to mete out just deserts as he sees them.

imagine why a few hours' additional deliberation would prompt a juror to change her deeply-held moral beliefs, and equally difficult to find a reason that the criminal justice system would ask her to do so.[134] A community is made up of many discrete individuals with differing values and convictions; a sentencing decision designed to "reflect the conscience of the community"[135] should likewise reflect these dissimilarities and should not be subjected to external pressures to conform in the name of unanimity.

Chief Justice Mitchell also claimed that a requirement of unanimity would prevent the jury from evading its responsibility to pronounce the judgment of the community upon a capital defendant.[136] However, the CJP's survey of capital jurors indicates that most jurors have jettisoned any sense of duty before even entering the courtroom. The researchers asked capital jurors:

> When you were considering the punishment, did you think that whether the defendant lived or died was . . . [1] Strictly the jury's responsibility and no one else's . . . [2] Mostly the jury's responsibility, but the judge or appeals courts take over responsibility whenever they overrule or change the jury's decision . . . [3] Partly the jury's responsibility and partly the responsibility of the judge and appeals courts who review the jury's sentence in all cases . . . [4] Mostly the responsibility of the judge and appeals courts; we make the first decision but they make the final decision.[137]

Only 27.2% of the jurors felt that it was strictly the jury's responsibility; 18.6% felt that it was mostly the responsibility of the trial judge and the appeals courts.[138] If a juror does not feel responsible for whether the defendant lives or dies, no amount of additional time is

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Id.

134. In fact, the Fourth Circuit recently stated that "[t]he most egregious mistake that can be made [in instructing a deadlocked jury] is for a . . . court to suggest, in any way, that jurors surrender their conscientious convictions." United States v. Burgos, 55 F.3d 933, 989 (4th Cir. 1995) (citing United States v. Russell, 971 F.2d 1098, 1108 (4th Cir. 1992)). For an in-depth discussion of *Burgos*, see Shea Riggsbee, Note, United States v. Burgos: *Balanced Blasting for Deadlocked Juries*, 74 N.C. L. REV. 2036 (1996).

135. *McCarver*, 341 N.C. at 389, 462 S.E.2d at 39 (quoting McKoy v. North Carolina, 494 U.S. 433, 452 (1990) (Kennedy, J., concurring)).

136. McCarver, 341 N.C. at 389, 462 S.E.2d at 39.

137. Bowers, *supra* note 3, at 1096.

138. *Id.* at 1096-97. Of the 655 jurors, 155 came from states, unlike North Carolina, in which the jury's sentence recommendation is not binding, and the trial judge can override the jury's sentencing decision. *Id.* at 1095 n.233 (table). This distribution, of course, could skew the results away from feelings of jury responsibility. However, when asked to rank various actors in the process in terms of responsibility for the sentence, the difference between "judge override" and "jury binding" states was slight: In the "judge override" states, 10.3% of the jurors felt that either the individual jurors or the jury collectively was most

going to make the juror assume a duty which has already been shirked.[139]

The Chief Justice's third contention was that a unanimity requirement in the sentencing instructions will tend to prevent arbitrary or capricious sentencing.[140] However, observations of capital juries indicate that jury instructions have much less impact upon the jury's decision than Chief Justice Mitchell attributes to them, and may even *increase* the arbitrary nature of the decision. A number of studies indicate that jurors' comprehension of instructions is marginal at best.[141] In fact, the CJP's North Carolina researchers focused on this aspect of the capital sentencing process in the published report of their findings,[142] revealing that a startling percentage of North Carolina jurors incorrectly understood various aspects of the capital sentencing instructions.[143]

The North Carolina jurors surveyed inadequately comprehended a number of aspects of the instructions, including the domain from which aggravating and mitigating factors could be drawn, the required burden of proof, and significantly, the very presence or absence of a unanimity requirement.[144] The jurors were asked questions about what the sentencing instructions required them to do.[145] In all, less

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responsible for a defendant's punishment; the figure was only 16.9% in the "jury binding" states. *Id.*

139. Indeed, one commentator suggests that statutory guidelines actually *replace* jurors' sense of responsibility with the authority of law. *See* Robert Weisberg, *Deregulating Death*, 1983 SUP. CT. REV. 305, 373.

140. *McCarver*, 341 N.C. at 390, 462 S.E.2d at 39.

141. *See, e.g.*, Susie Cho, *Capital Confusion: The Effect of Jury Instructions on the Decision to Impose Death*, 85 J. CRIM. L. & CRIMINOLOGY 532 (1994); Theodore Eisenberg & Martin T. Wells, *Deadly Confusion: Juror Instructions in Capital Cases*, 79 CORNELL L. REV. 1 (1993); James Luginbuhl, *Comprehension of Judges' Instructions in the Penalty Phase of a Capital Trial*, 16 LAW & HUM. BEHAV. 203 (1992); Matt Nichols, Note, Victor v. Nebraska: *The "Reasonable Doubt" Dilemma*, 73 N.C. L. REV. 1709, 1709 n.3 (1995) (collecting sources).

142. James Luginbuhl & Julie Howe, *Discretion in Capital Sentencing Instructions: Guided or Misguided?*, 70 IND. L.J. 1161, 1161 (1995).

143. For example, 42% of the North Carolina jurors surveyed thought that all jurors had to agree on a mitigating circumstance before it could be considered. *Id.* at 1166. This, of course, is in direct opposition to *McKoy v. North Carolina*, in which the United States Supreme Court held that such a unanimity requirement would be unconstitutional. *See supra* notes 76-78 and accompanying text. A startling 48% of jurors felt that they could choose between life and death if they found one or more mitigating factors and *no* aggravators, Luginbuhl & Howe, *supra* note 142, at 1172, even though the death penalty statute expressly forbids the death penalty in such a case. *See* N.C. GEN. STAT. § 15A-2000(b), (c) (Supp. 1994).

144. Luginbuhl & Howe, *supra* note 142, at 1167.

145. *Id.* at 1165-66. For example, the jury was asked: "1. Among factors in favor of a death sentence, could [you] consider: a. any aggravating factor that made the crime

than fifty percent of the North Carolina jurors answered more than one-half of the survey questions correctly; only four percent answered all six of the questions correctly.[146] This prompts the question: How will adding a unanimity requirement to the sentencing instructions effect *any* change in jurors' decisions if jurors do not understand the sentencing instructions in the first place? The Chief Justice's hypothesis that a unanimity requirement will have beneficial effects on capital sentencing loses all credibility when viewed in the light of actual research of capital juries.

It would be easy to dismiss the *McCarver* holding as a fit of pique or mean-spiritedness, but the *McCarver* majority did not break any jurisprudential rules in holding that a jury must answer all "outcome determinative" questions unanimously. In interpreting the jury instruction at issue, Chief Justice Mitchell turned to the death penalty statute, the North Carolina Constitution and case law, and even weighed public policy considerations in an attempt to find a just interpretation.[147] However, while the Chief Justice's methodology is sound, unfortunately his reasoning is not.

The *McCarver* majority lists two rationales behind its holding:[148] First, that the unanimity requirement is mandated by both the North Carolina Constitution and by North Carolina's death penalty statute,[149] and second, that "overwhelming policy reasons" favor a unanimity requirement.[150] Neither of these theories, however, holds up under closer analysis. The claim of state constitutional and statutory support is contrary both to the text of the documents and to North Carolina case law on the subject,[151] while the Court's policy reasons are contrary to the United States Supreme Court's Eighth Amendment jurisprudence and moreover do not reflect how capital juries ac-

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worse[;] b. only a specific list of aggravating factors mentioned by the judge[; or] c. don't know/no answer[?]" *Id.* at 1165.

146. *Id.* at 1168. To answer a question "correctly," a juror had to give the legally correct response, for example, answering "no" if asked whether all jurors had to agree on a mitigating factor for it to be considered. *Id.* at 1166-67.

147. *See supra* notes 94-121 and accompanying text.

148. The Court stated:

> Since the sentence recommendation, *if any*, must be unanimous under constitutional and statutory provisions, and particularly in light of the overwhelming policy reasons for a unanimity requirement, we conclude that any issue which is *outcome determinative* as to the sentence a defendant in a capital trial will receive-whether death or life imprisonment-must be answered unanimously by the jury.

McCarver, 341 N.C. at 390, 462 S.E.2d at 39.

149. *See id.* at 392-93, 462 S.E.2d at 41.

150. *See id.* at 389, 462 S.E.2d at 39.

151. *See supra* notes 95-112 and accompanying text.

tually make their decisions.[152] The holding in *McCarver* is therefore flawed, and further disfavors a group that already has few defenders in our society: convicted capital defendants. The purpose behind the Supreme Court's Eighth Amendment jurisprudence was to prevent society's bias against these outcasts from entering the jury box, and to encourage the exercise of mercy by capital juries to mitigate any bias that remained. The impact of the *McCarver* holding is clear: It will now be more difficult for North Carolina jurors to exercise their power of discretionary mercy, further dampening any hope for the fair and just application of the death penalty in North Carolina.

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152. *See supra* notes 113-46 and accompanying text.

Over the *Edge*: The Fourth Circuit's Commercial Speech Analysis in *Penn Advertising* and *Anheuser-Busch*

In August of 1995, President Clinton proposed regulations designed to curtail cigarette use by minors.[1] Included in the regulations was a prohibition on outdoor advertising of tobacco products within 1000 feet of schools and playgrounds.[2] The proposal sparked sharp criticism from cigarette manufacturers and politicians from tobacco-producing states.[3] It also prompted immediate legal challenges, including a free speech challenge.[4]

Later that same month, the United States Court of Appeals for the Fourth Circuit decided a case involving a challenge to a local government's prohibition on outdoor advertising of cigarettes.[5] The City of Baltimore, Maryland enacted an ordinance outlawing the advertising of cigarettes in some "publicly visible location[s]" in an effort to reduce the consumption of cigarettes by minors.[6] A Baltimore advertising company disputed the constitutionality of the ordinance,[7] but

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1. 60 Fed. Reg. 41,314 (1995) (to be codified at 21 C.F.R. pts. 801, 803, 804, & 897) (proposed Aug. 11, 1995). "The goal of the proposed rule is to help the country . . . reduce the number of children and adolescents who use tobacco products by roughly one half by the year 2000." *Id.*; *see also* Ann Devroy & John Schwartz, *Clinton Moves To Limit Teenage Smoking, Tobacco Firms Sue To Bar Restrictions On Ads and Sales*, WASH. POST, Aug. 11, 1995, at A1.

2. 60 Fed. Reg. at 41,315.

3. *See, e.g.*, Ann Devroy & John Schwartz, *FDA Given Power For Cigarette Rules, Clinton Seeks To Curb Teenage Smoking*, WASH. POST, Aug. 10, 1995, at A1. In particular, North Carolina Governor Jim Hunt stated that the proposal "would produce 'a big fight.' " *Id.*

4. *See, e.g.*, Devroy & Schwartz, *supra* note 1, at A1; Scott Higham, *Suits May Stall Smoking Fight For Years*, BALTIMORE SUN, Aug. 11, 1995, at 1A. More recently, however, one North Carolina cigarette manufacturer has pledged not to oppose the President's proposed advertising restrictions as part of the settlement of a different lawsuit. Steve Sakson, *Cigarette Settlement: Who Wins, And Why*, NEWS & OBSERVER (Raleigh, N.C.), Mar. 14, 1996, at 16A; *see also* Jennifer M. Wilson, *Tobacco Lawsuit No-Go*, DAILY TAR HEEL (Chapel Hill, N.C.), Mar. 28, 1996, at 1 ("All states except Minnesota dropped their suits against Liggett in March after the company agreed . . . [among other things] to observe limits on advertising, promotion and sales, as proposed last August by the FDA.").

5. Penn Advertising, Inc. v. Mayor & City Council of Baltimore, 63 F.3d 1318 (4th Cir. 1995), *vacated and remanded*, 64 U.S.L.W. 3868 (U.S. July 1, 1996).

6. BALTIMORE, MD., CITY CODE art. 30, § 10.0-1(I) (1994).

7. *Penn Advertising*, 63 F.3d at 1321-22. The ordinance was scheduled to take effect in April of 1994, but enforcement was stayed while the ordinance was challenged. *Id.* The source of the constitutional conflict is, of course, the First Amendment, as it applies to state and local governments through the Fourteenth Amendment. The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend I.

the Fourth Circuit, relying heavily on the Supreme Court's decision in *United States v. Edge Broadcasting Co.*,[8] permitted the restrictions to stand.[9] Since the legal challenge to President Clinton's proposal was also brought in the Fourth Circuit,[10] the Baltimore advertising decision appeared to have significant implications for the constitutionality of the federal regulations.[11] However, on July 1, 1996, the Supreme Court granted certiorari and vacated the Fourth Circuit's decision in the advertising case.[12]

In addition to vacating the Fourth Circuit's opinion, the Supreme Court remanded the case for further consideration[13] in light of its recent decision in *44 Liquormart, Inc. v. Rhode Island*.[14] In *Liquormart*, a complex eight-part opinion with three separate concurrences, the Court invalidated state restrictions on the advertising of alcoholic beverage prices.[15] Though all nine Justices concurred in the judgment and six joined the portion of the opinion that held that the Twenty-first Amendment does not allow states to abridge First Amendment rights,[16] *Liquormart* failed to attract a majority of the Court to any

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Neither the protections afforded by the First Amendment nor the rest of the Bill of Rights originally applied to state and local governments. For example, in Barron v. Mayor & City Council of Baltimore, 32 U.S. (7 Pet.) 243 (1833), a plaintiff claimed that the city's drainage project ruined his wharf, and demanded compensation under the Fifth Amendment. *Id.* at 244, 246. However, the Supreme Court ruled in favor of Baltimore, stating that "[t]hese amendments contain no expression indicating an intention to apply them to the state governments." *Id.* at 250.

8. 509 U.S. 418 (1993). In *Edge Broadcasting*, the Supreme Court overturned a Fourth Circuit decision that had invalidated restrictions on advertising. *Id.* at 436. Additionally, the Supreme Court sternly rebuked the Fourth Circuit for the manner of its decision in *Edge*. *Id.* at 425 n.3 ("We deem it remarkable and unusual that . . . the Court of Appeals affirmed a judgment that an Act of Congress was unconstitutional . . . in an unpublished per curiam opinion.").

9. *Penn Advertising*, 63 F.3d at 1326.

10. *See, e.g.*, Glenn Collins, *FDA Cigarette-Regulation Suit Assigned To Judge With Some Pro-Tobacco History*, LOUISVILLE COURIER-J., Aug. 16, 1995, at 7B; Higham, *supra* note 4, at 1A; Wade Lambert & Milo Geyelin, *FDA's Planned Tobacco-Ad Rules Spur Suits Over Agency's Powers*, WALL ST. J., Aug. 14, 1995, at B6.

11. *See, e.g.*, Milo Geyelin, *Court Rules Cigarette Billboards Can Be Limited to Protect Minors*, WALL ST. J., Sept. 7, 1995, at B2; *Major Areas of Tobacco-Health Legal Brawling*, NEWS & OBSERVER (Raleigh, N.C.), Mar. 14, 1996, at 16A. *But see* Mark R. Ludwikowski, Comment, *Proposed Government Regulation of Tobacco Advertising Uses Teens To Disguise First Amendment Violations*, 4 COMMLAW CONSPECTUS, Winter 1996, 105, 115 (1996) (drawing a distinction between the proposed regulations and Baltimore's ordinance).

12. Penn Advertising, Inc. v. Schmoke, 64 U.S.L.W. 3868 (U.S. July 1, 1996).

13. *Id.* at 3868.

14. 116 S. Ct. 1495 (1996).

15. *Id.* at 1501.

16. *Id.* at 1515 (Justices Stevens, Ginsburg, Kennedy, Scalia, Souter and Thomas). While the Twenty-first Amendment is best known as the repeal of prohibition, it also bestowed constitutional stature on state regulation of alcohol. U.S. CONST. amend XXI.

portion of the opinion that dealt with commercial speech doctrine.[17] Given the ambiguous nature of the Supreme Court's holding, its subsequent decision to remand the Baltimore case with instructions to reconsider in light of *Liquormart* is puzzling.

This Note argues, however, that the Fourth Circuit's original opinions in *Penn Advertising, Inc. v. Mayor of Baltimore*[18] and the companion case of *Anheuser-Busch, Inc. v. Schmoke*,[19] both of which involved governmental restrictions on commercial speech,[20] violated the commercial speech doctrine as it stood prior to the inconclusive *Liquormart* decision. After separately reviewing the issues unique to each case,[21] the Note examines the Fourth Circuit's application of the then existing commercial speech doctrine in both cases.[22] In particular, the Note focuses on the Fourth Circuit's application of the third and fourth prongs of the test articulated by the Supreme Court in *Central Hudson Gas & Electric Corp. v. Public Service Commission*.[23]

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17. *Liquormart*, 116 S. Ct. at 1501. Nonetheless, over the course of the opinion, four Justices supported strengthening the protection afforded commercial speech, *id.* at 1507 (Stevens, J., plurality opinion), 1520 (Thomas, J., concurring in judgment) (joined by Justices Stevens, Kennedy, Thomas, and Ginsburg), while other Justices supported the current level of protection. *Id.* at 1521 (O'Connor, J., concurring in the judgment) (joined by Chief Justice Rehnquist and Justices O'Connor, Souter and Breyer)

18. 63 F.3d 1318 (4th Cir. 1995), *vacated and remanded*, 64 U.S.L.W. 3868 (U.S. July 1, 1996).

19. 63 F.3d 1305 (4th Cir. 1995), *vacated and remanded*, 116 S. Ct. 1821 (1996). These two cases are inextricably intertwined. Prior to enacting the cigarette advertising ban, Baltimore enacted Ordinance 288, which placed restrictions on the outdoor advertising of alcoholic beverages. *Id.* at 1308. Anheuser-Busch filed a lawsuit challenging the ordinance, and Penn Advertising filed a similar suit a week later. *Id.* at 1309. Judge Hargrove of the District of Maryland consolidated these two actions. Anheuser-Busch, Inc. v. Mayor & City Council of Baltimore City, 855 F. Supp. 811, 812 (D. Md. 1994), *aff'd sub nom.*, Anheuser-Busch, Inc. v. Schmoke, 63 F.3d 1305 (4th Cir. 1995), *vacated and remanded*, 116 S. Ct. 1821 (1996). Although the alcohol advertising suit was conducted separately from the challenge to the cigarette advertising ordinance, Judge Murray's decision in the cigarette advertising case drew heavily on Judge Hargrove's earlier decision in the alcohol advertising case. Penn Advertising, Inc. v. Mayor & City Council of the City of Baltimore, 862 F. Supp. 1402, 1408-14 (D. Md. 1994), *aff'd*, 63 F.3d 1318 (4th Cir. 1995), *vacated and remanded*, 64 U.S.L.W. 3868 (U.S. July 1, 1996).

The appeals from both cases were heard on the same day by the same panel (March 6, 1995) and the appellate decisions were handed down at the same time (August 11, 1995). *Penn Advertising*, 63 F.3d at 1318; *Anheuser-Busch*, 63 F.3d at 1305. As in the lower court decision, the Fourth Circuit's opinion in the cigarette advertising case contained minimal explanation and frequently deferred to the decision in the alcohol advertising case on the commercial speech issues. *Penn Advertising*, 63 F.3d at 1325 ("These *same issues* were resolved in favor of Baltimore in the *related* case of [*Anheuser-Busch*]." (emphasis added)).

20. *Penn Advertising*, 63 F.3d at 1325; *Anheuser-Busch*, 63 F.3d at 1312.

21. *See infra* notes 28-48 and accompanying text.

22. *See infra* notes 49-62 and accompanying text.

23. 447 U.S. 557 (1980); *see Penn Advertising*, 63 F.3d at 1325; *Anheuser-Busch*, 63 F.3d at 1313-17.

After a brief discussion of the test as developed in *Central Hudson* itself,[24] the Note tracks the development of the third[25] and fourth[26] prongs, respectively, in subsequent cases in which the Supreme Court applied the *Central Hudson* test. In conclusion, the Note argues that in upholding Baltimore's ordinances in the *Penn Advertising* and *Anheuser-Busch* decisions, the Fourth Circuit allowed regulation of commercial speech that exceeds the limits set by even the most permissive of *Central Hudson's* progeny.[27]

Baltimore City Ordinances 288 and 307, enacted in 1994, contain general prohibitions on the outdoor advertising of alcoholic beverages and cigarettes, respectively, subject to a number of specified exceptions.[28] The key provision of each reads: "No person may place any sign, poster, placard, device, graphic display, or any other form of advertising that advertises [the respective product] in a publicly visible location. In this section, 'publicly visible location' includes outdoor billboards, sides of building[s], and free standing signboards."[29] The preamble of each ordinance cites numerous studies concluding that advertising plays a significant role in stimulating the illegal consumption of alcoholic beverages and cigarettes by minors.[30]

Before the ordinances took effect, the Anheuser-Busch Company filed suit in federal district court challenging the alcoholic beverage law (Ordinance 288)[31] and the Penn Advertising company similarly contested the cigarette law (Ordinance 307).[32] In response to both complaints, the City of Baltimore filed motions to dismiss.[33] In both cases, however, the district court judges converted the motions into

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24. *See infra* notes 63-86 and accompanying text.

25. *See infra* notes 87-128 and accompanying text.

26. *See infra* notes 129-45 and accompanying text.

27. *See infra* notes 146-65 and accompanying text.

28. *Penn Advertising*, 63 F.3d at 1321. "[T]he prohibition against cigarette advertising in Ordinance 307 mirrors Ordinance 288's exceptions permitting such advertising on buses, taxicabs, commercial vehicles used to transport cigarettes, and signs at businesses licensed to sell cigarettes, including professional sports stadiums." *Id.*; *see also Anheuser-Busch*, 63 F.3d at 1308-09 (discussing these same exceptions).

29. *Penn Advertising*, 63 F.3d at 1321 n.1; *Anheuser-Busch*, 63 F.3d at 1308 n.2. There are inconsequential differences in the plural forms of the word "location" in these two cites-the quotation used in the text is the one from *Penn Advertising*.

30. *Penn Advertising*, 63 F.3d at 1321; *Anheuser-Busch*, 63 F.3d at 1309.

31. Anheuser-Busch, Inc. v. Mayor & City Council of Baltimore City, 855 F. Supp. 811, 813 (D. Md. 1994), *aff'd sub nom.*, Anheuser-Busch, Inc. v. Schmoke, 63 F.3d 1305 (4th Cir. 1995), *vacated and remanded*, 116 S. Ct. 1821 (1996).

32. Penn Advertising, Inc. v. Mayor & City Council of the City of Baltimore, 862 F. Supp. 1402, 1404 (D. Md. 1994), *aff'd*, 63 F.3d 1318 (4th Cir. 1995), *vacated and remanded*, 64 U.S.L.W. 3868 (U.S. July 1, 1996).

33. *Id.*; *Anheuser-Busch*, 855 F. Supp. at 812.

motions for summary judgment and subsequently granted judgment in Baltimore's favor.[34]

On appeal, the Fourth Circuit affirmed both decisions[35] despite the appellants' assertions that the limited nature of the record in each case precluded summary judgment.[36] The appellants in *Penn Advertising* contended that the district court erred in not allowing a greater opportunity for discovery before reaching a decision.[37] The Fourth Circuit disagreed, insisting that the issues were questions of law and that "an understanding of the ordinance's factual impact on particular parties [was] not necessary to the inquiry."[38] In *Anheuser-Busch*, the court agreed with the appellants that summary judgment was inappropriate,[39] but upheld the lower court on the basis of Baltimore's motion to dismiss.[40] The court maintained that it was permissible to look beyond the pleadings to the legislative history and still meet the 12(b)(6) motion to dismiss criteria.[41] Thus, despite significant procedural differences, the limited record before the Fourth Circuit in each case was quite similar.[42]

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34. *Penn Advertising*, 862 F. Supp. at 1421. Both district court judges commented that they made a conversion to summary judgment because they had considered matters outside of the pleadings. *Penn Advertising*, 862 F. Supp. at 1404 n.1; *Anheuser-Busch*, 855 F. Supp. at 812; *see* FED. R. CIV. P. 12(b) ("If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment . . . .").

35. *Penn Advertising*, 63 F.3d at 1326; *Anheuser-Busch*, 63 F.3d at 1318.

36. *Penn Advertising*, 63 F.3d at 1322; *Anheuser-Busch*, 63 F.3d at 1310-11.

37. *Penn Advertising*, 63 F.3d at 1322.

38. *Id.* at 1323 (citing *Anheuser-Busch*, 63 F.3d at 1311-12). One reason that the court gave for its willingness to rule on a limited record was that it considered the lawsuit to be solely a "facial" challenge to the ordinance. *Id.* at 1322 ("[A] facial challenge to an ordinance restricting commercial speech may be resolved as a question of law . . . ."). *But see* P. Cameron DeVore, *Summary of Major 1995 Commercial Speech Developments*, *in* 3 COMMUNICATIONS LAW: 1995, at 7, 34 (PLI Patents, Copyrights, Trademarks and Literary Property Course Handbook Series No. G4-3945, 1995) ("[T]he court mischaracterized the appellant's challenge [in *Anheuser-Busch*] as solely 'facial.' ").

39. *Anheuser-Busch*, 63 F.3d at 1311. However, the reason the district court's conversion of the 12(b)(6) motion to dismiss into a motion for summary judgment was inappropriate was that it was made without notice to the parties and, therefore, deprived them of a chance to respond. *Id.; see* FED. R. CIV. P. 12(b) ("If . . . the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, . . . all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.").

40. *Anheuser-Busch*, 63 F.3d at 1312, 1318.

41. *Id.* at 1312. *But see* DeVore, *supra* note 38, at 37 (describing this procedural structure as "unique and unprecedented").

42. *Anheuser-Busch*, 63 F.3d at 1312. For instance, Baltimore filed and the district court considered "a transcript of the hearings before the City Council, and four studies that the City Council considered as support for the ordinance." *Id.* at 1311.

There was one major substantive difference between the cases.[43] Because the ordinance in *Penn Advertising* regulates cigarette advertising, the appellants advanced the argument that the ordinance was preempted by the Federal Cigarette Labeling and Advertising Act (FCLAA)[44] and portions of the Maryland state code.[45] The pertinent part of the FCLAA states that "[n]o requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter."[46] The Fourth Circuit decided that the Baltimore ordinance was not preempted by the FCLAA because the Baltimore law limited only the location of the cigarette advertisements and not their content.[47] Similarly, the Fourth Circuit concluded that Ordinance 307 was not preempted by Maryland state law.[48]

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43. One minor substantive distinction exists between the cases. In *Anheuser-Busch*, Baltimore submitted an alternative argument that the ordinance would be constitutional under the Twenty-first Amendment even if it failed to pass muster under the First Amendment. Anheuser-Busch, Inc. v. Mayor & City Council of Baltimore City, 855 F. Supp. 811, 814 n.3 (D. Md. 1994), *aff'd sub nom.*, Anheuser-Busch, Inc. v. Schmoke, 63 F.3d 1305 (4th Cir. 1995), *vacated and remanded*, 116 S. Ct. 1821 (1996). This argument was exactly the same as the one the Supreme Court subsequently found lacking in *Liquormart*. *See supra* note 16 and accompanying text. In the instant case, however, the district court did not reach this argument, *Anheuser-Busch*, 855 F. Supp at 814 n.3, and the Fourth Circuit's opinion was confined to commercial speech issues, *Anheuser-Busch*, 63 F.3d at 1308. This situation makes the Supreme Court's decision to remand *Anheuser-Busch* for reconsideration in light of *Liquormart* seem even more unusual. *See supra* text accompanying note 17.

44. 15 U.S.C. §§ 1331-1340 (1994).

45. *Penn Advertising*, 63 F.3d at 1323, 1324.

46. 15 U.S.C. § 1334(b) (1994).

47. *Penn Advertising*, 63 F.3d at 1323-24. Since the ordinance did not regulate the content of the message communicated, the Fourth Circuit found that the ordinance had only a general relationship to smoking and was not, therefore, specifically based on smoking and health. *Id.* at 1324. The district court, on the other hand, relied on the express purpose of Ordinance 307, as declared in the preamble, which was to effectuate the existing state law prohibiting cigarette sales to minors. Penn Advertising, Inc. v. Mayor & City Council of the City of Baltimore, 862 F. Supp. 1402, 1415-20 (D. Md. 1994), *aff'd*, 63 F.3d 1318 (4th Cir. 1995), *vacated and remanded*, 64 U.S.L.W. 6863 (U.S. July 1, 1996). In summarizing, the lower court stated that "Ordinance 307 is clearly focused on illegality." *Id.* at 1420.

Both courts relied heavily on the Supreme Court's analysis in Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992). There, the Supreme Court stated that "[t]he appropriate inquiry is not whether the claim challenges the 'propriety' of advertising and promotion, but whether the claim would require the imposition under state law of a requirement or prohibition based on smoking and health with respect to advertising or promotion." *Id.* at 525. For an expansive application of this test, see Vango Media, Inc. v. City of New York, 34 F.3d 68, 72-75 (2nd Cir. 1994).

48. *Penn Advertising*, 63 F.3d at 1324.

The dominant substantive issue in both cases was the ordinances' restriction on the right to advertise.[49] Governmental regulation of commercial speech is scrutinized using a four-part test.[50] As expressed in *Anheuser-Busch*, the test is as follows:

> [I]n order to be entitled to any First Amendment protection, the speech must (1) concern lawful activity and not be misleading. If the commercial speech meets that threshold prong, it may nevertheless be regulated if the government (2) asserts a substantial interest in support of its regulation; (3) demonstrates that the regulation "directly advances the governmental interest asserted"; and (4) demonstrates that the regulation is "narrowly drawn," i.e. "not more extensive than is necessary" to serve the governmental interest.[51]

In both *Penn Advertising* and *Anheuser-Busch*, the Fourth Circuit found that the principal disputes centered on the third and fourth prongs of the test.[52]

In applying the third prong of the test, the Fourth Circuit made it clear that it was not necessary for the government to develop an extensive factual record regarding the effectiveness of the advertising restrictions in reducing illegal consumption of alcoholic beverages and cigarettes by minors. The court stated that " 'it is not necessary, in satisfying [the] third prong, to prove conclusively that the correlation in fact exists, or that the steps undertaken will solve the problem.' "[53] Indeed, if the legislature reasonably believed that its goals would be furthered by the regulation, that was sufficient for the court.[54] In both cases, the court noted, the Baltimore City Council made specific findings before enacting the ordinances that advertising increased the demand by minors for the respective products.[55]

In *Anheuser-Busch*, the court seemed to indicate that it might have found the third prong satisfied even without the City Council's findings. It stated: "We simply do not believe that the liquor industry spends a billion dollars a year on advertising solely to acquire an ad-

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49. *Id.* at 1325; *Anheuser-Busch*, 63 F.3d at 1311.

50. *See* Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 566 (1980); *see also Anheuser-Busch*, 63 F.3d at 1313 (explaining that the *Central Hudson* test is still being utilized). For the pertinent text from the *Central Hudson* opinion, see *infra* note 71 and accompanying text.

51. *Anheuser-Busch*, 63 F.3d at 1313 (internal citations omitted). The test is articulated in almost identical fashion in *Penn Advertising*, 63 F.3d at 1325.

52. *Penn Advertising*, 63 F.3d at 1325; *Anheuser-Busch*, 63 F.3d at 1313.

53. *Penn Advertising*, 63 F.3d at 1325 (quoting *Anheuser-Busch*, 63 F.3d at 1314).

54. *Id.*; *Anheuser-Busch*, 63 F.3d at 1313, 1314-15.

55. *Penn Advertising*, 63 F.3d at 1321; *Anheuser-Busch*, 63 F.3d at 1309, 1314.

ded market share at the expense of competitors."[56] The Fourth Circuit noted that it could justifiably have taken judicial notice of the link between advertising and consumption.[57]

Elaborating on the fourth prong, the court explained that the fit between a legislative body's means and ends had to be reasonable, not perfect.[58] Furthermore, given the pervasive nature of the problem that Baltimore was attempting to confront, it was entitled to "some reasonable latitude."[59] Applying the test to the alcoholic beverage ordinance, the court conceded that the restrictions on outdoor advertisements prevented such ads from being seen by adults as well as minors.[60] However, it decided "that no less restrictive means may be available to advance the government's interest"[61] and upheld the prohibition.[62]

The four-part test utilized in *Penn Advertising* and *Anheuser-Busch* has been a mainstay of the Supreme Court's commercial speech jurisprudence for only the past fifteen years.[63] As explained in *Anheuser-Busch*, advertising and other forms of commercial speech do not enjoy the same level of First Amendment protection as does speech generally.[64] Commercial speech has been described as "expression related solely to the economic interests of the speaker and its audience."[65] Until the Supreme Court's 1976 decision in *Virginia State*

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56. *Anheuser-Busch*, 63 F.3d at 1315 (quoting Dunagin v. City of Oxford, 718 F.2d 738, 750 (5th Cir. 1983)).

57. *Id.*

58. *Id.* (citing Board of Trustees of the State Univ. of N.Y. v. Fox, 492 U.S. 469, 469 (1989)).

59. *Id.* at 1316; *see also Penn Advertising*, 63 F.3d at 1326 (quoting *Anheuser-Busch*, 63 F.3d at 1316). As to the pervasiveness of the problem, the court noted that

> Baltimore was faced with statistics showing that fully one-half of all deaths of minors were alcohol-related, and 40 to 50% of juveniles who drowned or had diving accidents had consumed alcohol immediately prior to the incident. The City Council . . . pointed to data which showed that over half of all twelfth graders, 40% of tenth graders, and over a quarter of eighth graders reported that they consumed alcohol within the past 30 days . . . [N]early 40% of all youths in adult correctional facilities reported drinking alcohol before committing their crime.

Anheuser-Busch, 63 F.3d at 1316.

60. *Anheuser-Busch*, 63 F.3d at 1316.

61. *Id.*; *see also id.* at 1317 ("[N]o ordinance of this kind could be so perfectly tailored as to all and only those areas to which children are daily exposed.").

62. *Id.* at 1316.

63. *Central Hudson* was decided in 1980. Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557 (1980).

64. *Anheuser-Busch*, 63 F.3d at 1313.

65. *See, e.g., Central Hudson*, 447 U.S. at 561. The Court had previously described commercial speech as "speech which does 'no more than propose a commercial transaction.' " Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 762 (1976) (quoting Pittsburgh Press Co. v. Human Relations Comm'n, 413 U.S.

Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.,[66] commercial speech was not considered a protected form of expression at all.[67] However, in that opinion, the Court elevated the status of commercial speech, stating that "the particular consumer's interest in the free flow of commercial information . . . may be as keen, if not keener by far, than his interest in the day's most urgent political debate."[68] Similar decisions soon followed[69] and the protected status of commercial speech quickly became entrenched.[70]

After several years of refining the new doctrine, the Supreme Court completely restated the commercial speech doctrine in terms of the four-part test in *Central Hudson Gas & Electric Corp. v. Public Service Commission.*[71] At issue in *Central Hudson* was a New York

376, 385 (1973)). For a discussion of the difficulty in defining commercial speech, see David F. McGowan, Comment, *A Critical Analysis of Commercial Speech*, 78 CAL. L. REV. 359, 382-90 (1990).

66. 425 U.S. 748 (1976).

67. *See, e.g.*, Valentine v. Chrestensen, 316 U.S. 52, 54 (1942). The *Valentine* Court stated that the Supreme Court

> has unequivocally held that the streets are proper places for the exercise of the freedom of communicating information and disseminating opinion and that, though the state and municipalities may appropriately regulate the privilege in the public interest, they may not unduly burden or prescribe its employment in these public thoroughfares. We are equally clear that the Constitution imposes no such restraint on government as respects *purely commercial advertising.*

Id. (emphasis added).

68. *Virginia State Bd. of Pharmacy*, 425 U.S. at 763. In *Virginia State Board of Pharmacy*, the Court struck down a Virginia law forbidding pharmacists from advertising the price of prescription medications. *Id.* at 749-50. Though the intent of the statute was to maintain the integrity of the profession, the Court emphasized that "society also may have a strong interest in the free flow of commercial information." *Id.* at 764. Indeed, the *Virginia State Board of Pharmacy* lawsuit was initiated by consumer groups. *Id.* at 753.

69. *See, e.g.*, Bates v. State Bar, 433 U.S. 350 (1977) (overturning a prohibition on attorney advertising); Linmark Assocs., Inc. v. Willingboro, 431 U.S. 85 (1977) (overturning a prohibition on residential "For Sale" signs).

70. For the history of the commercial speech doctrine before *Central Hudson*, see EDWIN P. ROME & WILLIAM H. ROBERTS, CORPORATE AND COMMERCIAL FREE SPEECH 3-80 (1985); Albert P. Mauro, Jr., Comment, *Commercial Speech After* Posadas *and* Fox*: A Rational Basis Wolf In Intermediate Sheep's Clothing*, 66 TUL. L. REV. 1931, 1933-40 (1992); McGowan, *supra* note 65, at 361-71. For the history of restrictions on attorney advertising in particular, see Todd Mitchell, Note, *Privacy and Popularity: The Supreme Court Attempts to Polish the Public Image of the Legal Profession in* Florida Bar v. Went For It, Inc., 74 N.C. L. REV. 1681, 1695-1700 (1996).

71. 447 U.S. 557 (1980); *see also* ROME & ROBERTS, *supra* note 70, at 82 (describing *Central Hudson* as "a full-scale restatement . . . of the rationale for the commercial speech doctrine"). The test, as first expressed in the case, is as follows:

> If the communication is neither misleading nor related to unlawful activity, the government's power is more circumscribed. The State must assert a substantial interest to be achieved by restrictions on commercial speech. Moreover, the regulatory technique must be in proportion to that interest. The limitation on expression must be designed carefully to achieve the State's goal. Compliance

State regulation enacted to facilitate energy conservation by banning the promotional advertising of electric utilities.[72] The Supreme Court readily acknowledged that the ban satisfied the first two prongs of its new test,[73] and found with respect to the third prong that the government's interest was directly advanced because of the "immediate connection between advertising and demand."[74] However, the Court also found that the advertising prohibition was not tailored narrowly enough because it affected "all promotional advertising, regardless of the impact of the touted service on overall energy use."[75] Since the restriction did not satisfy the fourth prong, the Court held it unconstitutional.[76]

The four-part test is actually summarized in two different places in the Court's opinion.[77] The threshold requirement (that the speech in question be about lawful activity and not be misleading) and the second requirement (that the asserted government interest be substantial) are expressed in the same fashion in both summaries.[78] However, the earlier summary contains language, especially with regard to the third prong, that the latter summary does not;[79] this additional

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> with this requirement may be measured by two criteria. First, the restriction must directly advance the state interest involved; the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose. Second, if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive.

Central Hudson, 447 U.S. at 564.

72. *Central Hudson*, 447 U.S. at 558, 569.

73. *Id.* at 566-69.

74. *Id.* at 569.

75. *Id.* at 570.

76. *Id.* at 571-72.

77. *Id.* at 564, 566. The earlier summary is quoted in note 71. The latter summary is the one utilized by the *Penn Advertising* and *Anheuser-Busch* courts. *See supra* note 51 and accompanying text.

78. *Central Hudson*, 447 U.S. at 564, 566.

79. With respect to the third prong, the earlier summary states that "the restriction must directly advance the state interest involved; *the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose.*" *Id.* at 564 (emphasis added). Interestingly, most of the subsequent Supreme Court cases cite the abbreviated latter summary (as do *Penn Advertising* and *Anheuser-Busch*; *see supra* note 49). *See, e.g.*, Rubin v. Coors Brewing Co., 115 S. Ct. 1585, 1589 (1995); United States v. Edge Broadcasting Co., 509 U.S. 418, 424 (1993); Board of Trustees v. Fox, 492 U.S. 469, 475 (1989); Posadas de Puerto Rico Assocs. v. Tourism Co., 478 U.S. 328, 340 (1986); Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 507 (1981). Notably, however, Edenfield v. Fane, 507 U.S. 761 (1993), generally regarded as one of the most pro-free speech decisions, cites the more expansive first summary, *id.* at 767; *see also* P. Cameron DeVore & Robert D. Sack, *Advertising and Commercial Speech*, *in* 3 COMMUNICATIONS LAW: 1995, at 51, 95 (PLI Patents, Copyrights, Trademarks and Literary Property Course Handbook Series No. G4-3945, 1995).

language arguably places a slightly higher burden on the government to justify commercial speech restrictions.

After the *Central Hudson* decision, judicial review of commercial speech restrictions was commonly characterized as intermediate scrutiny.[80] Though lacking a precise definition,[81] a law will generally survive intermediate scrutiny if it is " 'substantially related to an important governmental objective.' "[82] In order for a restriction on commercial speech to survive the third prong of the *Central Hudson* standard, "[t]he State must assert a substantial interest" and the "regulatory technique" must "directly advance the state interest involved."[83] While these two standards appear to be closely related, the outcomes of post-*Central Hudson* cases call into question whether commercial speech regulations are truly scrutinized at an intermediate level.[84] Ambiguity in the commercial speech doctrine has only become more exaggerated over the years.[85] But, by separately assembling and comparing the third prong and fourth prong analyses found

80. *See, e.g.*, Florida Bar v. Went For It, Inc., 115 S. Ct. 2371, 2375 (1995).

81. *See, e.g.*, ROME & ROBERTS, *supra* note 70, at 118-19. Rome and Roberts explain that "[i]n fashioning a standard of judicial review for commercial speech, the Supreme Court did not start afresh with an untried doctrinal system. Instead, the Court made use of the existing law concerning judicial review of legislation." *Id.* at 117. That existing system was comprised of three levels: rational relationship, under which legislation must be *arguably related* to a *legitimate* governmental purpose; strict scrutiny, under which the legislation must be *necessary* to promote a *compelling* governmental purpose; and intermediate scrutiny, which falls somewhere in between. *Id.* at 117-18.

82. *Id.* at 118 (quoting Califano v. Goldfarb, 430 U.S. 199, 210-11 (1977)).

83. Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 564 (1980). Rome and Roberts describe the *Central Hudson* standard as "a hybrid between the rational relationship standard and the strict scrutiny standard, with the least restrictive means requirement added on." ROME & ROBERTS, *supra* note 70, at 119.

84. *See* Mauro, *supra* note 70, at 1951-52 (positing that commercial speech had been relegated to rational basis protection under the standards set by some of the post *Central Hudson* cases). *But see* Robert T. Cahill, Jr., Note, City of Cincinnati v. Discovery Network, Inc.: *Towards Heightened Scrutiny For Truthful Commercial Speech?*, 28 U. RICH. L. REV. 225, 251 (1994) (suggesting that the Court was moving toward heightened scrutiny for commercial speech); Martin B. Marguiles, *Free Speech: The Status of the First Amendment*, 11 TOURO L. REV. 341, 355 (1995) (contending that the level of scrutiny applied in commercial speech cases has risen again because of cases decided in 1993).

85. *See* P. Cameron DeVore, *The Two Faces Of Commercial Speech Under The First Amendment*, 12 COMMUNICATIONS LAWYER, Spring 1994, at 1 ("In three 1993 decisions, the United States Supreme Court once again demonstrated its unpredictable approach to First Amendment protection of commercial speech."). Those three decisions were United States v. Edge Broadcasting Co., 509 U.S. 418 (1993), Edenfield v. Fane, 507 U.S. 761 (1993), and City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410 (1993). *See generally* Denise D. Trumler, Note, *Perpetuating Confusion In The Commercial Speech Area:* Adolph Coors Co. v. Brady, 26 CREIGHTON L. REV. 1193, 1213-14 (1993) ("The analysis in *Coors* reflects the confusion in the commercial speech area.").

in post-*Central Hudson* decisions, the Fourth Circuit's decisions in *Penn Advertising* and *Anheuser-Busch* can be clearly evaluated.[86]

The third prong of the *Central Hudson* test involves two closely related issues. The first concerns the degree to which the regulation must "directly advance" the state's interest (labeled herein the "effectiveness" issue). The second concerns the evidentiary standard that the government must meet to establish that its regulation advances its interest (labeled herein the "evidence" issue). The manifestations of both of these third prong issues in post-*Central Hudson* cases are discussed in turn.[87]

The starting point for the effectiveness issue is the Court's statement in *Central Hudson* that "the regulation may not be sustained if it provides only *ineffective or remote* support for the government's purpose."[88] Several subsequent cases, however, have made it clear that the regulation need not effectuate the government's purpose entirely. For instance, in *Metromedia, Inc. v. City of San Diego*,[89] a prohibition on off-site advertising and signs for the purpose of improving traffic safety and aesthetics did not fail the third prong of the test even though on-site advertising and signs were still permitted.[90] Similarly, in *Posadas de Puerto Rico Associates v. Tourism Co.*,[91] involving a Puerto Rican statute prohibiting casino advertising for the purpose of limiting local (as opposed to tourist) demand for gambling,[92] the Court stated that "[w]hether other kinds of gambling are advertised in Puerto Rico or not, the restrictions on advertising of casino gambling 'directly advance' the legislature's interest in reducing demand for games of chance."[93] Clearly, the support that advertising bans lent to the government's interest was not to be evaluated by the government's eventual success or failure in achieving its stated goal.

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86. *See infra* text accompanying notes 87-128 (concerning the third prong); *infra* text accompanying notes 129-45 (concerning the fourth prong).

87. *See infra* text accompanying notes 88-106 (concerning the effectiveness issue); *infra* text accompanying notes 107-28 (concerning the evidence issue).

88. *Central Hudson*, 447 U.S. at 564 (emphasis added); *see also id.* at 569 ("[C]onditional and remote eventualities simply cannot justify silencing appellant's promotional advertising.").

89. 453 U.S. 490 (1981).

90. *Id.* at 510-11. *But cf.* Bolger v. Young's Drug Prods. Corp., 463 U.S. 60, 73 (1983) (stating that "limited incremental support" was not sufficient to show direct advancement of the government's interest).

91. 478 U.S. 328 (1986).

92. *Id.* at 341.

93. *Id.* at 342 (citation omitted).

Likewise, in *United States v. Edge Broadcasting Co.*,[94] the Court upheld a statute prohibiting a North Carolina radio station from carrying advertisements for the Virginia lottery even though the station's audience was " 'inundated' by the Virginia media carrying lottery advertisements."[95] The Court remarked that it did not "require that the Government make progress on every front before it can make progress on any front. If there is an immediate connection between advertising and demand, and the federal regulation decreases advertising, it stands to reason that the policy of decreasing demand for gambling is correspondingly advanced."[96] Furthermore, the Court indicated that it would have upheld the regulation even if it resulted in an "only *marginal* advancement of the state's interest."[97]

By contrast, the Court set a far more rigorous standard in *Edenfield v. Fane*.[98] Explicitly addressing the effectiveness issue, the Court opined that "a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them *to a material degree*."[99] Although the language was undoubtedly intended to fortify the *Central Hudson* test,[100] "material degree" was neither defined nor illustrated anywhere in the decision.

The Court's most recent comment on the effectiveness issue came in *Rubin v. Coors Brewing Co.*[101] At issue was a portion of the Federal Alcohol Administration Act[102] prohibiting the disclosure of the alcohol content of beer on labels or in advertising.[103] The government's interest in the ban was preventing "strength wars" between brewers,[104] but in the same act the government also required the disclosure of alcohol content on wines and distilled spirits.[105] Consequently, the Court "conclude[d] that § 205(e)(2) cannot directly and

94. 509 U.S. 418 (1993).
95. *Id.* at 433.
96. *Id.* at 434.
97. *Id.* at 429 (emphasis added).
98. 507 U.S. 761 (1993).
99. *Id.* at 770-71 (emphasis added) (citations omitted).
100. The "material degree" language came just a few sentences after the Court quoted the "ineffective or remote support" section of *Central Hudson*. *Id.*
101. 115 S. Ct. 1585 (1995).
102. 27 U.S.C. §§ 201-219a (1994).
103. *Coors*, 115 S. Ct. at 1588; *see also* 27 U.S.C. § 205(e)(2) (1994) (statements of alcoholic content on malt beverage labels prohibited unless required by state law); 27 C.F.R. § 7.26(a) (1994) (statements of alcoholic content on beer labels prohibited).
104. *Coors*, 115 S. Ct. at 1588.
105. *Id.* at 1590; *see also* 27 U.S.C. § 205(e)(2) (1994) (statements of alcoholic content of wine required for wine containing more than 14% alcohol); 27 C.F.R. §§ 4.36, 5.37 (1994) (same).

materially advance its asserted interest *because of the overall irrationality of the Government's regulatory scheme.*"[106] Thus, the effectiveness of the regulation was not judged in isolation from other factors also affecting the government's interest.

Turning to the evidence issue, it is settled law that the government always bears the burden of establishing that the regulation in question advances its interest.[107] However, it is far less clear what the government must do to meet this burden.[108] The *Posadas* case, in particular, created confusion in this area.[109] There, the Court stated that "[t]he Puerto Rico Legislature obviously believed . . . that advertising of casino gambling . . . would serve to increase the demand for the product advertised. We think the legislature's belief is a reasonable one . . ."[110] The Court appeared to allow the regulation to stand based on nothing more than common assumptions about the effect of advertising.[111]

In *Edge*, the Court echoed the position it took in *Posadas* when it determined that a regulation prohibiting lottery advertising from airing on radio stations in non-lottery states was permissible.[112] It stated: "Congress plainly made the *commonsense* judgment that each North Carolina station would have an audience in that State . . . and that enforcing the statutory restriction would . . . advance the governmental purpose of supporting North Carolina's laws against gambling."[113]

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106. *Coors*, 115 S. Ct. at 1592 (emphasis added). Though the Court clearly classified this analysis as an application of the third prong, *id.* at 1591, its language quoted here seems to equally implicate a failure by the government to satisfy the second ("substantial interest") prong. *See* DeVore, *supra* note 38, at 10-11.

107. *See, e.g.*, Edenfield v. Fane, 507 U.S. 761, 770-71 (1993); Bolger v. Young's Drug Prods. Corp., 463 U.S. 60, 71 n.20 (1983).

108. *See* Lloyd B. Snyder, *Rhetoric, Evidence, and Bar Agency Restrictions on Speech by Attorneys*, 28 CREIGHTON L. REV. 357, 358-60 (1995) (arguing that commercial speech restrictions have been upheld despite a lack of evidentiary support).

109. *See* DeVore, *supra* note 38, at 10 ("The Court's 1986 *Posadas Puerto Rico* casino gambling decision had . . . lent support to regulators who argued for substantial deference to restrictions on commercial speech about possibly harmful products.").

110. Posadas de Puerto Rico Assocs. v. Tourism Co., 478 U.S. 328, 341-42 (1986). Note, however, that this portion of the *Posadas* opinion was severely undercut, though not technically overruled, in *Liquormart.* 44 Liquormart, Inc. v. Rhode Island, 116 S. Ct. 1495, 1511 (1996) (Stevens, J., plurality opinion); *id.* at 1522 (O'Connor J., concurring in the judgment) (1996).

111. *Cf.* Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 509 (1981) ("We likewise hesitate to disagree with the accumulated, common-sense judgments of local lawmakers . . . . There is nothing here to suggest that these judgments are unreasonable." (footnote omitted)).

112. United States v. Edge Broadcasting Co., 509 U.S. 418, 435-36 (1993).

113. *Id.* at 428 (emphasis added). *But cf. id.* at 430-32 (recognizing, in the as-applied challenge, that enforcing the regulation would result in 11% of total radio time in the area being free of such advertisements).

Here again, the evidentiary standard the government was required to meet consisted of little more than simple logic concerning the likely impact of commercials on the lottery.

In the second of the Court's two 1995 commercial speech decisions,[114] *Florida Bar v. Went For It, Inc.*,[115] the evidence issue received more extensive treatment. Refuting the claims of a blistering dissent,[116] the majority opinion stated that

> we do not read our case law to require that empirical data come to us accompanied by a surfeit of background information. Indeed, in other First Amendment contexts, we have permitted litigants to justify speech restrictions by reference to studies and anecdotes pertaining to different locales altogether, or even, in a case applying strict scrutiny, to justify restrictions based solely on history, consensus, and "simple common sense."[117]

Though the majority appeared willing to accept common sense conclusions, the results of several studies conducted by the Florida Bar Association were in the record.[118] Nevertheless, the evidentiary standard that the majority espoused as sufficient would have allowed them to affirm without relying on such evidence.[119]

As with the effectiveness issue, *Edenfield v. Fane*[120] is the primary example of a more stringent third prong evidence standard. In that case, the Court struck down a Florida Board of Accountancy rule prohibiting Certified Public Accountants from soliciting business in person.[121] Elaborating on the requirements of the third prong of the *Central Hudson* test, the Justices opined that the State's "burden is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will *in fact* alleviate them to a material degree."[122] The primary evidence presented by the Florida Board of Accountancy was an affidavit

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114. The first 1995 decision was Rubin v. Coors Brewing Co., 115 S. Ct. 1585 (1995). *See* DeVore, *supra* note 38, at 9.

115. 115 S. Ct. 2371 (1995).

116. *See id.* at 2384 (Kennedy, J., dissenting) ("Our cases require something more than a few pages of self-serving and unsupported statements by the State to demonstrate that a regulation directly and materially advances the elimination of a real harm.").

117. *Id.* at 2378 (citations omitted).

118. *Id.* at 2377.

119. In fact, the statistical support provided by the studies is subject to question. *See* Mitchell, *supra* note 70, at 1711-12.

120. 507 U.S. 761 (1993).

121. *Id.* at 767.

122. *Id.* at 770-71 (emphasis added).

consisting of "conclusory statements that add little if anything to the Board's original statement of its justifications."[123] Thus, *Edenfield* appeared to substantially heighten the evidentiary burden the government must meet.[124]

The *Coors* Court cited the *Edenfield* evidence standard verbatim and reinforced it by stating that the requirement that the government meet that standard was "vital."[125] Additionally, the *Coors* Court went out of its way to refute the notion that *Posadas* and *Edge*, in particular, had established a lower burden for the government to meet, not just with respect to the evidence standard, but with respect to the *Central Hudson* test as a whole. The Court stated: "[T]he government suggests that legislatures have broader latitude to regulate speech that promotes socially harmful activities, such as alcohol consumption. . . . Neither *Edge Broadcasting* nor *Posadas* compels us to craft an exception to the *Central Hudson* standard, for in both of those cases we applied the *Central Hudson* analysis."[126] Hence, *Coors*, one of the Court's two 1995 commercial speech cases,[127] supports greater protection for commercial speech on both third prong issues—evidence and effectiveness.[128]

In contrast to the implicit variations of the third prong, the fourth prong of the *Central Hudson* test was expressly revised in subsequent cases.[129] As described in *Central Hudson*, the test was first thought to be a "least restrictive means" requirement similar to that applied in strict scrutiny review.[130] Indeed, *Central Hudson* itself declares that "[i]f the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive."[131]

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123. *Id.* at 771.

124. *See* Board of Trustees of the State Univ. of N.Y. v. Fox, 492 U.S. 469, 480 (1989) ("Moreover, since the State bears the burden of justifying its restrictions, it must affirmatively establish the reasonable fit we require." (citation omitted)); DeVore & Sack, *supra* note 79, at 150.

125. Rubin v. Coors Brewing Co., 115 S. Ct. 1585, 1592 (1995).

126. *Id.* at 1589 n.2. Note, however, that both the plurality and a concurring opinion in 44 Liquormart v. Rhode Island, 116 S. Ct. 1495 (1996) (plurality opinion), representing eight of the Justices, disparaged the reasoning of *Posadas*. *See*, *44 Liquormart*, 116 S. Ct. at 1511-12; *id.* at 1522 (O'Connor, J., concurring in the judgment).

127. The other is Florida Bar v. Went For It, Inc., 115 S. Ct. 2371 (1995). *See* DeVore, *supra* note 38, at 9.

128. *See supra* notes 101-106 and accompanying text.

129. *See* Mauro, *supra* note 70, at 1953.

130. ROME & ROBERTS, *supra* note 70, at 119.

131. Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 564 (1980).

Though subsequent commercial speech decisions feigned compliance with this strict standard,[132] the Court recognized in *Board of Trustees of the State University of New York v. Fox*[133] that actual adherence to this standard simply had not taken place. The Court observed that its "decisions upholding the regulation of commercial speech cannot be reconciled with a requirement of least restrictive means."[134] Instead, the Court required a reasonable fit between the ends and the means chosen by the legislature.[135] Therefore, an ordinance will be struck down only when it is "substantially excessive, disregarding 'far less restrictive and more precise means.' "[136] Commercial speech cases decided since *Fox* have uniformly referred to this standard.[137]

To determine whether or not a statute is "substantially excessive," the Court has resorted to consideration of the availability of alternatives (or lack thereof). In *City of Cincinnati v. Discovery Network, Inc.*,[138] the Court concluded that "if there are numerous and obvious less burdensome alternatives to the restriction on commercial speech, that is certainly a relevant consideration in determining whether the 'fit' between ends and means is reasonable."[139] Using this approach, the *Coors* Court found that the government had not shown a reasonable fit between its labeling restriction and its interest

132. *See* Posadas de Puerto Rico Assocs. v. Tourism Co., 478 U.S. 328, 343 (1986) ("We also think it clear beyond peradventure that the challenged statute and regulations satisfy the fourth and last step of the *Central Hudson* analysis, namely, whether the restrictions on commercial speech are no more extensive than necessary to serve the government's interest."); Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 508 (1981) ("The city has gone no further than necessary in seeking to meet its ends.").

133. 492 U.S. 469 (1989).

134. *Id.* at 479; *see also id.* at 480 ("[W]e have not gone so far as to impose . . . that the manner of restriction [be] absolutely the least severe that will achieve the desired end.").

135. *Id.* at 480; *see also* Tara L. Lavery, Note, *Commercial Speech Suffers A First Amendment Blow In* United States v. Edge Broadcasting Co., 14 N. ILL. U. L. REV. 549, 550 (1994).

136. *Fox*, 492 U.S. at 479 (quoting Shapero v. Kentucky Bar Ass'n., 486 U.S. 468, 476 (1988)); *see* Mark A. Conrad, Board of Trustees of the State University of New York v. Fox—*The Dawn of a New Age of Commercial Speech Regulation of Tobacco and Alcohol*, 9 CARDOZO ARTS & ENT. L.J. 61 (1990); Todd J. Locher, Comment, Board of Trustees of the State University of New York v. Fox: *Cutting Back on Commercial Speech Standards*, 75 IOWA L. REV. 1335 (1990); David Rownd, Comment, *Muting the Commercial Speech Doctrine:* Board of Trustees of the State University of New York v. Fox, 38 WASH. U. J. URB. & CONTEMP. L. 275 (1990).

137. *See, e.g.*, Florida Bar v. Went For It, Inc., 115 S. Ct. 2371, 2380 (1995); United States v. Edge Broadcasting Co., 509 U.S. 418, 429-30 (1993); City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 416 n.11 (1993).

138. 507 U.S. 410 (1993).

139. *Id.* at 417 n.13. However, the unique facts of *Discovery Network* may limit the applicability of this holding. *See* DeVore, *supra* note 85, at 24.

in preventing strength wars.[140] The Court stated: "[T]he availability of these options, all of which could advance the Government's asserted interest in a manner less intrusive to respondent's First Amendment rights, indicates that [the statute] is more extensive than necessary."[141]

However, because evaluating alternatives necessarily requires dealing with the hypothetical, this approach provides ample basis for disagreement among the Justices.[142] For example, the Court split five to four in its *Florida Bar* decision,[143] and the contrast between the majority and the dissenting opinions is quite clear with regard to the fourth prong. The majority stated that it did "not see 'numerous and obvious less-burdensome alternatives' to Florida's short temporal ban."[144] The dissent, however, concluded that "it should not be hard to imagine the contours of a regulation that satisfies the reasonable fit requirement,"[145] although it did not propose one. Nonetheless, the availability of alternatives standard is the only approach articulated by the Court to date.

Thus, given the variability in the Court's approach to both the third and fourth prongs, the range of restrictions on commercial speech that might or might not pass constitutional muster is rather broad. The Supreme Court's decisions in *Posadas* (1986) and *Fox* (1989) opened the door for ordinances such as Baltimore's to enter the domain of permissible speech restriction.[146] The 1993 decisions (*Discovery Network*, *Edenfield*, and *Edge*) sent mixed messages,[147] while the 1995 cases (*Coors*, *Florida Bar*) "reaffirmed" those precedents that had "stiffened" the level of scrutiny compelled by *Central*

140. Rubin v. Coors Brewing Co., 115 S. Ct. 1585, 1593 (1995) ("In response, respondent suggests several alternatives, such as directly limiting the alcohol content of beers, prohibiting marketing efforts emphasizing high alcohol strength . . . or limiting the labeling ban only to malt liquors.").

141. *Id.* at 1593-94.

142. Chief Justice Rehnquist observed: "The final part of the Court's test thus leaves room for so many hypothetical 'better' ways that any ingenious lawyer will surely seize on one of them." Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 599-600 (Rehnquist, J., dissenting).

143. Florida Bar v. Went For It, Inc., 115 S. Ct. 2371, 2373 (1995). Note that the *Florida Bar* Court renumbered the four-part *Central Hudson* test by considering the first prong (speech concerning lawful activity that was not misleading) a threshold issue to what it labeled the remaining three-part test. *Id.* at 2376; *see also supra* text accompanying note 51 (quoting the four-part *Central Hudson* test).

144. *Florida Bar*, 115 S. Ct. at 2380 (quoting City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 417 (1993)).

145. *Id.* at 2385 (Rehnquist, J., dissenting) (internal quotations omitted).

146. *See* Conrad, *supra* note 136, at 94; Mauro, *supra* note 70, at 1933-40.

147. *See* DeVore & Sack, *supra* note 79, at 148.

Hudson.[148] Nevertheless, the boundaries of the permissible range of restrictions are still best exemplified by the 1993 *Edenfield* and *Edge* decisions, *Edenfield* representing the most protection afforded commercial speech and *Edge* representing the least.[149] If Baltimore's ordinances were judged to meet the higher standard articulated by *Edenfield* and similar cases, they would clearly be within the realm of permissible commercial speech infringement. However, the Fourth Circuit's decisions in *Anheuser-Busch* and *Penn Advertising* are so lacking in support that they fail to boost the ordinances over even the lower threshold of *Edge*.[150]

In considering what this Note has labeled the effectiveness issue under the third prong, the *Anheuser-Busch* court noted that children would be exposed to alcoholic beverage advertising simply by going outdoors and that the City Council had pointed to studies correlating underage drinking to such advertising.[151] Then, however, the court stated that "it is not necessary . . . to prove conclusively that the correlation in fact exists, or that the steps undertaken will solve the problem."[152] Clearly, such a standard differs dramatically from *Edenfield's* "alleviate . . . to a material degree" test.[153] It also arguably fails to meet the "marginal advancement" standard of *Edge*[154]—it is possible a legislature could have a reasonable belief even when no correlation existed in fact. Nonetheless, given the number of cases that accept without controversy the proposition that advertising bans reduce de-

148. DeVore, *supra* note 38, at 10.

149. The continued precedential value of *Edge* was affirmed in *Coors*: "Neither *Edge Broadcasting* nor *Posadas* compels us to craft an exception to the *Central Hudson* standard, for in both of those cases we applied the *Central Hudson* analysis." Rubin v. Coors Brewing Co., 115 S. Ct. 1585, 1589 (1995). Interestingly, despite their differing standards, *Edge* and *Edenfield* were decided within two months of each other: United States v. Edge Broadcasting Co., 509 U.S. 416 (June 25, 1993); Edenfield v. Fane, 507 U.S. 761 (April 26, 1993).

150. *See* DeVore, *supra* note 38, at 37-38 ("[T]he *Anheuser-Busch* opinion . . . exceeds the pre-*Rubin* deference to state regulation of allegedly harmful substances under *Posadas* and *Edge*."); Jeffrey S. Edelstein, *New Limitations On Commercial Speech*, N.Y. L.J., Oct. 20, 1995, at 3 ("It is difficult to reconcile these Fourth Circuit decisions with precedent."); *infra* notes 151-65 and accompanying text.

151. *Anheuser-Busch*, 63 F.3d at 1314.

152. *Id.*; *see Penn Advertising*, 63 F.3d at 1325.

153. *Edenfield*, 507 U.S. at 770-71; *see supra* text accompanying note 99.

154. United States v. Edge Broadcasting Co., 509 U.S. at 429 (1993); *see supra* text accompanying note 97.

mand,[155] Baltimore might well have prevailed *as a matter of law* even if the Fourth Circuit used a formulation more like the one in *Edge*.[156]

It is with regard to the evidence issue that the Fourth Circuit's decisions seem particularly suspect. In this area, the Fourth Circuit abdicated virtually all power of review: "If it appears that the legislative body could reasonably have believed . . . that the legislation would directly advance a substantial governmental interest, the government's burden of justifying it is met."[157] By contrast, even though the *Posadas* Court accepted the legislature's assumption that advertising would increase demand for gambling, it still made an independent evaluation of the legislature's conclusion.[158] The Fourth Circuit's disposal of the *Anheuser-Busch* case on a 12(b)(6) motion seems very questionable; none of the major precedents upholding commercial speech restrictions were decided at such an early phase in the litigation.[159] Furthermore, the Fourth Circuit's action contradicts the Supreme Court's edict that courts are to use intermediate scrutiny when reviewing commercial speech restrictions.[160] One commentator

155. *See Edge*, 509 U.S. at 434; Posadas de Puerto Rico Assocs. v. Tourism Co., 478 U.S. 328, 342 (1986); Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 569 (1980).

156. Indeed, the "as a matter of law" standard is precisely what the court used. *Anheuser-Busch*, 63 F.3d at 1315 (quoting Oklahoma Telecasters Ass'n v. Crisp, 699 F.2d 490 (10th Cir. 1983), *rev'd on other grounds sub nom.*, Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984)). The *Anheuser-Busch* court stated: "[W]e hold, *as a matter of law*, that prohibitions against the advertising of alcoholic beverages are reasonably related to reducing the sale and consumption of those beverages and their attendant problems." *Id.* (emphasis added). Note, however, that the Tenth Circuit found "reasonable relation," not "direct and material advancement." *Id.*

For an argument that cigarette advertising restrictions should not be readily found to advance a governmental interest in reducing teenage smoking, see Ludwikowski, *supra* note 11, at 113 ("Whether or not tobacco advertising intends or actually causes increased consumption, a problem remains in establishing the nexus between advertising and consumption of tobacco products by minors, particularly because minors are prohibited by law from purchasing tobacco products.").

157. *Anheuser-Busch*, 63 F.3d at 1311; *see Penn Advertising*, 63 F.3d at 1323. Moreover, litigants "cannot subject legislative findings themselves to judicial review under a clearly erroneous standard or otherwise." *Penn Advertising*, 63 F.3d at 1323; *Anheuser-Busch*, 63 F.3d at 1312.

158. Posadas de Puerto Rico Assocs. v. Tourism Co. 478 U.S. 328, 342 (1986) ("We think the legislature's belief is a reasonable one.").

159. Florida Bar v. Went For It, Inc., 115 S. Ct. 2371, 2374 (1995) (summary judgment for plaintiff at district court level); *Edge*, 509 U.S. at 424-25 (judgment for defendant at district court level); Board of Trustees of the University of New York v. Fox, 492 U.S. 469, 472 (1989) (judgment for defendant after a trial at district court level); *Posadas*, 478 U.S. at 336-37 (judgment for defendant at trial court level); Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 497 (1981) (summary judgment for plaintiff at trial level after extensive discovery).

160. *See, e.g., Florida Bar*, 115 S. Ct. at 2375.

warned that if courts upheld such speech constraints "without scrutinizing the basis and extent of the restrictions, the *Central Hudson* test may well become illusory."[161]

Finally, a strong argument can be made that the Fourth Circuit's decision also fails to square with prior interpretations of *Central Hudson's* fourth prong. The court admits that other "approaches might indeed prove beneficial in reducing underage drinking," but they do not regard these approaches as "numerous and obvious less burdensome alternatives" because they do not address "curbing the *enticement* to consume alcoholic beverages."[162] This narrow analysis is directly contradicted by *Coors*, a precedent that the Fourth Circuit virtually ignored.[163] In *Coors*, the availability of other options that met the government's goal without intruding on First Amendment rights was fundamental to the Court's decision to overturn the restriction.[164] Other options that Baltimore could pursue include waging an aggressive anti-smoking/anti-drinking campaign in schools, imposing a higher tax on cigarettes and alcoholic beverages, and increased enforcement of existing laws prohibiting sales of such items to minors.[165]

The approach taken in the *Penn Advertising* and *Anheuser-Busch* decisions does not find adequate support anywhere in the existing commercial speech doctrine. Even by the lax standards of *Edge*, satisfaction of the third prong of the *Central Hudson* test requires that a court actively find that the restriction directly advances a substantial government interest, not that the court simply defer to the legislature's judgment. Similarly, satisfaction of the fourth prong requires that the court make an honest assessment of other, non-speech impinging alternatives. By failing to perform either of these obligations, the Fourth Circuit added insult to injury and arrived at a decision that overstepped the limits of the commercial speech doctrine. Indeed, it

161. Edelstein, *supra* note 150, at A12; *see also* DeVore, *supra* note 38, at 36-37 (labeling the Fourth Circuit's approach an "evasion of application of a First Amendment evidentiary burden of proof" and a negation of courts' constitutional duty to audit legislative regulation of speech).

162. *Anheuser-Busch*, 63 F.3d at 1316 (emphasis added).

163. The *Coors* case, handed down after oral arguments in *Penn Advertising* and *Anheuser-Busch*, but before publication of those decisions, is mentioned by the Fourth Circuit only once in passing. *Anheuser-Busch*, 63 F.3d at 1315 n.5. A similar oversight occurred with respect to President Clinton's proposed regulations. *See supra* notes 1-4 and accompanying text. "A First Amendment analysis apparently prepared by FDA staff in support of the proposal relied heavily on *Posadas* and *Edge Broadcasting*, . . . cited [*Coors*] only with regard to *Central Hudson* part four, and made no reference to [*Coors'*] specific limitations on *Posadas* and *Edge*." DeVore & Sack, *supra* note 79, at 548.

164. Rubin v. Coors Brewing Co., 115 S. Ct. 1585, 1593-94 (1995).

165. *See* Ludwikowski, *supra* note 11, at 116.

is likely that it was for these reasons and not for any advancement of the doctrine in *Liquormart* that the Supreme Court instructed the Fourth Circuit to reconsider.

THOMAS D. BLUE, JR.

State v. Rush: Admissibility of Out-of-Court Spousal Statements in the Post-*Freeman* Context of North Carolina Marital Privilege Law

> *Be courteous to all, but intimate with few, and let those few be well tried before you give them your confidence. True friendship is a plant of slow growth, and must undergo and withstand the shocks of adversity before it is entitled to the appellation.*[1]

Consider the following: One day Susan comes home from work to find a bloody knife on her kitchen counter. Because her husband, John, sometimes hunts and skins animals for food (and because he rarely cleans up after himself), she thinks nothing of it and washes the knife. Before long a police officer knocks on the door, asking Susan if she has seen a knife, possibly one recently used by her husband. She gets the knife for the officer and tells him that when she found it covered in blood, she assumed it had recently been used by John. John is subsequently arrested for the murder of Pat, who was stabbed to death earlier that day. Susan asserts the marital privilege to avoid testifying against her husband. The prosecution wishes to examine the officer regarding Susan's statements about the knife, but John claims that this is the equivalent of forcing his spouse to testify against him in violation of the marital privilege. Without the officer's testimony relating to the recovery of the murder weapon in the home of the defendant, the state's case is fatally weak. Should the prosecution be allowed to present this evidence against John? The North Carolina Supreme Court's recent decision in *State v. Rush*[2] held that the marital privilege does not exclude non-confidential out-of-court statements such as the comments Susan made to the police officer.[3]

This Note examines the impact of the court's holding in *Rush* on North Carolina's marital privilege doctrine. It first explains the facts and procedural history of *Rush* to the extent that they are relevant to the case[4] and summarizes the court's resolution of the issue of the marital privilege doctrine in North Carolina.[5] The Note then introduces and explains the various marital privileges and characterizes

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1. Letter from George Washington (Jan. 15, 1783), *in* THE HOME BOOK OF AMERICAN QUOTATIONS, at 171 (Bruce Bohle ed. 1967).

2. 340 N.C. 174, 456 S.E.2d 819 (1995).

3. *Id.* at 182, 456 S.E.2d at 824.

4. See *infra* notes 10-33 and accompanying text.

5. *See infra* notes 34-47 and accompanying text.

each as an individual doctrine.[6] It traces a line of case law that leads up to the court's decision, as well as the statutory precedent that helps define the scope of the holding.[7] The Note then examines the court's reasoning and evaluates whether *Rush* clarifies the law in this area.[8] Finally, this Note analyzes the North Carolina law of marital privilege as it emerges from *Rush*, encompassing both the rule against adverse spousal testimony and the confidential communications privilege.[9]

At the murder trial of Johnny Karl Rush,[10] the prosecution presented evidence that tended to show that the defendant and a friend, Bryan Bobbitt, left a cookout around midnight and sat in the road drinking beer.[11] Shortly thereafter, the victim, Strickland, joined them, and Strickland and Rush began to argue.[12] Strickland accused Rush of always "hiding behind his gun or knife,"[13] and Rush responded to the comment by handing his gun and pocketknife to Bobbitt.[14] Rush then turned and walked home.[15] Ten minutes later, the prosecution claimed that Rush returned to the road where Strickland and Bobbitt were still sitting with his wife yelling after him: "Do not do this. Think about your son."[16] Rush then pointed a nine-millimeter semiautomatic pistol at Strickland and shot and killed him.[17]

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6. *See infra* notes 52-84 and accompanying text.

7. *See infra* notes 85-118 and accompanying text.

8. *See infra* notes 119-30 and accompanying text.

9. *See infra* notes 131-37 and accompanying text.

10. A detailed recitation of the facts is submitted here because the information is relevant to the court's standard of review. The defendant did not object to the admission of his wife's statements to the 911 operator, and thus the error was not preserved for appellate review. *Rush*, 340 N.C. at 179, 456 S.E.2d at 822. Assignments of error to evidentiary matters not preserved for appeal are reviewable only under the plain error rule. *See* State v. Black, 308 N.C. 736, 740-41, 303 S.E.2d 804, 806-07 (1983). According to this standard of review, the defendant can prevail only if he proves that the trial court committed error, *and* that the error most likely caused the jury to reach its decision. *See* State v. Jordan, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993). Therefore, the facts are crucial to the ultimate disposition of the defendant's case, because even assuming error, the court must inquire into the jury's consideration of all the other evidence. *Rush*, 340 N.C. at 182-83, 456 S.E.2d at 824; *see infra* notes 43-47 and accompanying text (explaining the court's application of the plain error standard of review to the facts of the case).

11. *Rush*, 340 N.C. at 176, 456 S.E.2d at 820-21.

12. *Id.* Bobbitt testified that Strickland and the defendant had a history of tension toward one another. *Id.* Rush testified that the source of the antagonism was Strickland's habit of ridiculing his limp, which was the result of an accident he had suffered some time ago. *Id.* at 178, 456 S.E.2d at 822. Strickland had been violent toward him in the past, and because of his enhanced vulnerability, Rush always carried weapons for protection. *Id.*

13. *Id.* at 176, 456 S.E.2d at 821.

14. *Id.*

15. *Id.*

16. *Id.* at 183, 456 S.E.2d at 825.

17. *Id.* at 176-77, 456 S.E.2d at 821.

The defense claimed that about twenty minutes after arguing with Strickland and returning home, Rush looked out his window and saw Bobbitt and Strickland still sitting by the road.[18] Worried that someone might pass out in the street, Rush went back outside.[19] Although he already had one gun in his belt, he picked up another on his way out, as a matter of habit.[20] Rush testified that when he told his friend to go inside, Strickland again became angry, grabbing Rush's lame leg, and yelling, "I'm going to kill you, mother f——."[21] Rush claimed he was afraid for his life when he pulled out his gun and shot Strickland.[22] Rush reported the shooting to a 911 operator, who instructed him to wait for the police to arrive.[23] The operator then spoke to the defendant's wife who said, among other things, to the operator: "How can he do this?"[24]

The jury found Rush guilty of first degree murder and sentenced him to life imprisonment.[25] Rush appealed to the Supreme Court of North Carolina.[26] He assigned as error the admission into evidence of a tape of the 911 operator's conversation with Ms. Rush,[27] as well as the admission of his wife's statements made shortly before the murder.[28] Though he made no objection at trial to the admission of Ms.

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18. *Id.* at 178-79, 456 S.E.2d at 822.

19. *Id.* According to both the state and the defense, Bobbitt, who was the primary witness for the prosecution, was highly intoxicated. *Id.* at 176, 456 S.E.2d at 821. The parties also agreed that while the defendant had been drinking, he was lucid. *Id.* at 178, 456 S.E.2d at 821.

20. *Id.* at 179, 456 S.E.2d at 822.

21. *Id.*

22. *Id.*

23. *Id.* at 177, 456 S.E.2d at 821.

24. *Id.* at 179, 456 S.E.2d at 821. Ms. Rush also asked the dispatcher if she would be required to accompany her husband to the police station. *Id.*

25. *Id.* at 176, 456 S.E.2d. at 822.

26. *Id.* Rush's case was not heard by the North Carolina Court of Appeals, because he appealed directly to the Supreme Court as a matter of right pursuant to N.C. GEN. STAT. § 7A-27(a) (1995). *Id.*

27. *Rush*, 340 N.C. at 179, 456 S.E.2d at 822.

28. *Id.* at 183, 456 S.E.2d at 825. The court applied different standards of review to the two sets of statements; the defendant did not object to the admission of his wife's statements to the 911 operator but did object to the prosecution's use of the statements his wife made before the murder. *Id.* The court did not apply the "plain error" rule to the admission of the statements Ms. Rush made before the murder in which she allegedly pleaded with her husband not to "do this" and to "think about [his] son." *Id.* During the cross-examination of the defendant, the prosecutor asked the defendant about these statements. *Id.* The defendant objected to the question which was sustained. *Id.* However, after a *voir dire*, the trial court ruled that the prosecutor could pursue the line of questioning. *Id.* The defendant excepted "on the grounds that the spouse's statement could not be compelled as evidence against the defendant." *Id.*

On appeal, the court, assuming the prosecutor's question had been improper, concluded that "the error was not prejudicial . . . the test is whether there is a reasonable

Rush's statements to the 911 operator, Rush maintained that under section 8-57 of the North Carolina General Statutes[29] a spouse cannot be compelled to testify against a defendant spouse,[30] and therefore the trial court had committed reversible error by admitting the statements to the 911 operator.[31] In North Carolina, if evidence is admitted in violation of a state statute, the error is automatically preserved for appellate review;[32] otherwise, the defendant's failure to object renders the error reviewable only under a plain error standard.[33]

In determining that Ms. Rush's statements were admissible, the court emphasized its holding in *State v. Freeman*,[34] which modified the common-law rule that prevented adverse spousal testimony in crimi-

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possibility that had the error not occurred, the jury would have reached a different result . . . . Defendant has failed to carry that burden." *Id.*

29. N.C. GEN. STAT. § 8-57 (1986) provides:

(a) The spouse of the defendant shall be a competent witness for the defendant in all criminal actions, but the failure of the defendant to call such spouse as a witness shall not be used against him. Such spouse is subject to cross-examination as are other witnesses.

(b) The spouse of the defendant shall be competent but not compellable to testify for the State against the defendant in any criminal action or grand jury proceedings, except that the spouse of the defendant shall be both competent and compellable to so testify:

(1) In a prosecution for bigamy or criminal cohabitation, to prove the fact of marriage and facts tending to show the absence of divorce or annulment;

(2) In a prosecution for assaulting or communicating a threat to the other spouse;

(3) In a prosecution for trespass in or upon the separate lands or residence of the other spouse when living separate and apart from each other by mutual consent or court order;

(4) In a prosecution for abandonment of or failure to provide support for the other spouse or their child;

(5) In a prosecution of one spouse for any other criminal offense against the minor child of either spouse, including any illegitimate or adopted or foster child of either spouse.

(c) No husband or wife shall be compellable in any event to disclose any confidential communication made by one to the other during their marriage.

30. *Rush*, 340 N.C. at 179, 456 S.E.2d at 822-23. Rush relied specifically on N.C. GEN. STAT. § 8-57(b), which provides: "The spouse of the defendant shall be competent but not compellable to testify for the State against the defendant in any criminal action." *Id.* at 181, 456 S.E.2d at 823; *see also supra* note 29 (citing the full text of N.C. GEN. STAT. § 8-57).

31. *Rush*, 340 N.C. at 179-80, 456 S.E.2d at 822-23.

32. *See* State v. Ashe, 314 N.C. 28, 39, 331 S.E.2d 652, 659 (1985) (stating that when a trial court errs in contravention of a state statute, the error is preserved for appellate review regardless of whether the defendant entered objection at trial); *see also* State v. Warren, 236 N.C. 358, 360, 72 S.E.2d 763, 764 (1952) (holding that defendant is entitled to a new trial where statutorily forbidden evidence was admitted and no objection was noted; it is the duty of the trial judge to prevent the introduction of such evidence and failure to do so must be held for reversible error).

33. *See Rush*, 340 N.C. at 179-80, 456 S.E.2d at 822-23.

34. 302 N.C. 591, 276 S.E.2d 450 (1981).

nal cases.[35] The *Freeman* court found that the policy of protecting communications within the marital relationship could be promoted by a rule of spousal incompetency only in the case of "confidential communications" between marriage partners.[36] In response to this change in the common law, the North Carolina legislature amended section 8-57(b) to provide that a spouse shall be competent to testify against a defendant spouse, but may not be compelled to do so.[37]

The *Rush* court also analyzed whether the admission of the 911 tape had compelled Ms. Rush to "testify" against the defendant.[38] The court reasoned that the testimony of a third person as to the out-of-court statements of another does not cause the declarant to "testify" within the meaning of the statute; therefore, the court found no violation of section 8-57(b).[39]

Having determined that the statute did not compel exclusion of Ms. Rush's statements, the court then looked to the common-law rule of spousal privilege.[40] The court reasoned that barring the admission of such statements would defeat the administration of justice without advancing in any way the purposes for which the privilege had been

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35. *See infra* notes 106-16 and accompanying text (analyzing more completely the court's decision in *Freeman*, particularly as it relates to the reasoning in the *Rush* case).

36. *Freeman*, 302 N.C. at 595-96, 276 S.E.2d at 453; *see supra* notes 69-84 and accompanying text (explaining "confidential communications").

37. N.C. GEN. STAT. § 8-57(b) (1986); *see supra* note 29 (quoting the full text of the statute). Prior to the amendment, § 8-57 provided: "Nothing herein shall render any spouse competent or compellable to give evidence against the other spouse in any criminal action or proceeding . . . ." Act of Mar. 30, 1967, ch. 116, § 1, 1967 N.C. Sess. Laws 177 (codified as amended at N.C. GEN. STAT. § 8-57 (1986)).

38. *Rush*, 340 N.C. at 181, 456 S.E.2d at 823.

39. *Id.* The court defined "testify" as "to make a solemn declaration, under oath or affirmation, in a judicial inquiry, for the purpose of establishing or proving some fact." *Id.* (quoting BLACK'S LAW DICTIONARY 1476 (6th ed. 1990)). Ms. Rush, therefore, did not "testify" when she made the statements to the operator over the telephone, and the only solemn declaration made under oath was that of the witness who authenticated the tape at trial. *Id.* The court also noted that § 8-57(c), which declares the incompetency of testimony concerning confidential communications between spouses was not implicated because the defendant had conceded that the comments of Ms. Rush to the 911 dispatcher were not "confidential communications." *Id.*; *see infra* note 127 and accompanying text (explaining why Rush did not argue that his wife's comments were protected by the confidential communications privilege). N.C. GEN. STAT. § 8-57(c) provides: "No husband or wife shall be compellable in any event to disclose any confidential communication made by one to the other during their marriage."

40. *Rush*, 340 N.C. at 181-82, 456 S.E.2d at 824; *see* State v. Josey, 328 N.C. 697, 704, 403 S.E.2d 479, 483 (1991) (asserting that N.C. GEN. STAT. § 8-57 "is a declaration that, with some exceptions, the common law rule of spousal privilege applies"); State v. Freeman, 302 N.C. 591, 594, 276 S.E.2d 450, 452-53 (1981) (holding that the common law rules of spousal competency remain in effect, except as they are modified by N.C. GEN. STAT. § 8-57).

retained under *Freeman*.[41] Finding no compulsion in introducing the out-of-court statements through a third party, the court held that the admission of the statements was consistent with the policy underlying the common-law privilege against adverse spousal testimony.[42]

Finally, the *Rush* court considered "whether [the statements] were relevant and offered for either a nonhearsay purpose or under an exception to the hearsay rule."[43] Because the court interpreted section 8-57 as not proscribing the admission of Ms. Rush's statements,[44] the error was not preserved, and was thus subject only to plain error review.[45] Applying this standard, the court assumed *arguendo* that the comments were inadmissible but nonetheless concluded that the record contained ample additional evidence upon which the jury could have found premeditation and deliberation.[46] Therefore, the court held that the admission of the out-of-court statements of Ms. Rush to the 911 operator was not reversible error.[47]

Because *Freeman* transformed the marital privilege rule, the admissibility of non-confidential, extra-judicial statements of a spouse against a defendant spouse introduced through a third party was an issue of first impression in North Carolina.[48] The *Rush* court resolved

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41. *Rush*, 340 N.C. at 181-82, 456 S.E.2d at 824.

42. *Id.*

43. *Id.* at 182, 456 S.E.2d at 824; *see also supra* note 10 and accompanying text (explaining the operation of and the reasoning for the court's employment of the plain error standard of review).

44. *Rush*, 340 N.C. at 179-82, 456 S.E.2d at 822-24.

45. *Id.* at 180, 456 S.E.2d at 823. Under this standard, a court considers first whether the introduction of the evidence was error and secondly whether, despite the error, the jury could have been expected to reach the same verdict. *Id.*

46. *Id.* at 182-83, 456 S.E.2d at 824. The court considered, for example, a statement Rush gave to the police on the night of the murder in which he admitted that he retrieved his gun from his house and shot Strickland because he sought an end to Strickland's constant harassment of him. *Id.* at 183, 456 S.E.2d at 824. The court also noted that the physical evidence corroborated this initial version of events, and the court found that the contrary claim of self-defense offered by the defendant at trial was therefore easily discredited. *Id.* Also, although the court did not consider this factor, Ms. Rush's plea to her husband "not [to] do this" and to "think about [their] son" seems to be fairly convincing evidence of premeditation and deliberation, as well as strong evidence in defeat of the defendant's self-defense claim. *Id.* at 183, 456 S.E.2d at 825.

47. *Id.* at 183, 456 S.E.2d at 824.

48. *Id.* at 181, 456 S.E.2d at 824. Pre-*Freeman* decisions addressed the admissibility of out-of-court statements made by a spouse, but were premised on the now-discarded common-law rule of the incompetency of adverse spousal testimony. *See, e.g.*, State v. Suits, 296 N.C. 553, 557-58, 251 S.E.2d 607, 609-10 (1979) (holding that the testimony of a police officer relating spouse's assertive action was inadmissible because incompetent); State v. Cousin, 291 N.C. 413, 417-18, 230 S.E.2d 518, 521 (1976) (holding that, despite the incompetency of adverse spousal testimony, evidence procured as a result of spouse's voluntary statements to police was admissible against defendant-spouse); State v. Dillahunt, 244 N.C. 524, 525, 94 S.E.2d 479, 479-80 (1956) (finding evidence of spouse's statement through

the issue by applying the same reasoning used to limit the bounds of the spousal privilege in *Freeman*.[49] Like the *Freeman* court, the court in *Rush* considered the policy behind the spousal privilege of allowing "marriage partners to speak freely to each other in confidence without fear of being thereafter confronted with the confession in litigation."[50] The court concluded that "[a]llowing the admission of non-confidential, out-of-court statements made by a spouse and introduced against the defendant spouse for the state through a third party promotes the administration of justice without infringing on the confidence of the marital relationship."[51]

The court's analysis in *Rush* reflects a judicial tendency to intermingle three separate doctrines that historically comprised the common law of marital privilege. The first of the three forms was the spousal incompetency rule, which forbade the testimony of one spouse *either for or against* the other spouse.[52] This doctrine was premised on the evidentiary rule that prohibited the testimony of interested parties,[53] as well as on the belief that a husband and wife shared a single legal existence.[54] Because a defendant was unable to testify on his

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third party witness inadmissible because of incompetency); State v. Warren, 236 N.C. 358, 359-60, 72 S.E.2d 763, 764 (1952) (finding testimony of police officer as to spouse's incriminating statement to be inadmissible due to incompetence).

49. *Rush*, 340 N.C. at 182, 456 S.E.2d at 824; *see infra* notes 131-33 and accompanying text (comparing the *Rush* and *Freeman* decisions).

50. *Rush*, 340 N.C. at 182, 456 S.E.2d at 824.

51. *Id.*

52. *See, e.g.*, Wright v. Wright, 281 N.C. 159, 162, 188 S.E.2d 317, 321 (1972) (noting that "[a]t common law husband and wife were absolutely incompetent to testify in an action to which either was a party"); 1 E. COKE, A COMMENTARIE UPON LITTLETON § 6b (1628) ("It hath been resolved by the Justices that a wife cannot be produced either against or for her husband.").

53. Trammel v. United States, 445 U.S. 40, 44 (1980); *see* Michael W. Mullane, Trammel v. United States*: Bad History, Bad Policy, and Bad Law*, 47 ME. L. REV. 105, 125 (1995) (noting that early English common law presumed that the testimony of parties having an interest in the case would lack reliability). The testimony of those interested in protecting people with whom they share intimate bonds was viewed with particular suspicion. *Id.* at 126.

54. *Trammel*, 445 U.S. at 44; *see, e.g.*, Scholtens v. Scholtens, 230 N.C. 149, 150, 52 S.E.2d 350, 351 (1949) (noting that "[a]t common law the husband and wife were considered one,— the legal existence of the wife during coverture being merged in that of the husband"). Medieval law generally reflected the notion that a husband and wife were one, and that the "one" was the husband. *See Trammel*, 445 U.S. at 44. Modern courts recognize this concept as a relic of the past. *Id.* at 52 ("Nowhere in the common-law world—indeed in any modern society—is a woman regarded as chattel or demeaned by denial of a separate legal identity and the dignity associated with recognition as a whole human being."). *But see* Mullane, *supra* note 53, at 122 nn.73-74 (claiming that a society can be "modern" without adhering to a "presumption of sexual equality," and suggesting that "the medieval courts [may have] accorded wives somewhat more recognition than is suggested by the Court in *Trammel*").

own behalf, his wife, deemed to be an extension of him, was likewise a forbidden witness.[55] The spousal incompetency rule addressed itself not to the preservation of harmony between spouses, but to the risk that the evidence would be unreliable or unduly prejudicial.[56]

The common-law rule of spousal incompetency is now defunct in all states, including North Carolina.[57] When courts abandoned the rule that a defendant was an incompetent witness, the common law still recognized the incompatible rule of spousal incompetency.[58] However, because the defendant was no longer considered untrustworthy and was allowed to testify for himself, the justification for disqualifying his spouse ceased to exist. North Carolina's response to this inconsistency was the pre-*Freeman* version of section 8-57, which provided that a spouse was a competent witness for, but not against, the defendant-spouse.[59] Thereafter, the North Carolina courts applied the second doctrine of marital privilege, the rule against adverse spousal testimony, as opposed to complete spousal incompetency.[60]

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55. *See Trammel*, 445 U.S. at 44.

56. *See* Mullane, *supra* note 53, at 124.

57. *See* State v. Freeman, 302 N.C. 591, 596-97 & n.1, 276 S.E.2d 450, 452-54 & n.1 (1981). However, most states did not reject the spousal incompetency rule until well into the nineteenth century. *See* 8 JOHN HENRY WIGMORE, EVIDENCE §§ 2227, 2228, 2245 (McNaughton rev. 1961) (describing the historical phases of the spousal incompentency rule and its abolition). In fact, it was not abolished in federal courts until 1933. *See* Funk v. United States, 290 U.S. 371, 380-87 (1933).

58. *See American Bar Association Committee on the Improvements in the Law of Evidence*, Report, *in* 63 REPORTS OF THE AMERICAN BAR ASSOCIATION 570, 594-95 (1938) (reporting that at common law, spouses were forbidden to testify either for or against one another but that by 1938, this rule of disqualification had long been abolished in almost all states).

59. Act of Mar. 30, 1967, ch. 116, § 1, 1967 N.C. Sess. Laws 177 (codified as amended at N.C. GEN. STAT. § 8-57(1986)). *See* State v. Alford, 274 N.C. 125, 127-33, 161 S.E.2d 575, 577-81 (1968) (stating the common-law rule against adverse spousal testimony, but holding that the statutory exception for divorced spouses applies); State v. Rice, 222 N.C. 634, 635-36, 24 S.E.2d 483, 484 (1943) (holding that refusal to allow spouse to testify is error).

60. A rule against adverse spousal testimony, however, has its own specific policy and most likely existed before the rule of spousal incompetency. *See* Mullane, *supra* note 53, at 127-28; 8 WIGMORE, *supra* note 57, § 2234. Courts in general have a history of blurring the lines between these two forms of marital privilege. *See* E.C. Sanderson, Note, *Evidence—Privileged Communications Between Husband and Wife*, 15 N.C. L. REV. 282, 283 n.2 (1937). Commentators have suggested that the doctrinal confusion may stem from Lord Coke's 1628 pronouncement of a rule of disqualification of favorable spousal testimony, in which he simultaneously referred to the already recognized privilege of the defendant spouse to refuse such testimony. *See, e.g.*, James P. Nehf, Note, State v. Freeman: *Adverse Marital Testimony in North Carolina Criminal Actions—Can Spousal Testimony Be Compelled?* 60 N.C. L. REV. 874, 877 n.29 (1982) (citing 1 COKE, *supra* note 52, § 6b)).

The common-law rule against adverse spousal testimony[61] prohibits either spouse from testifying *against* the other in a criminal proceeding,[62] promoting an interest in preserving peace within the marriage.[63] In most jurisdictions today, it functions more like an evidentiary privilege than a rule.[64] Rather than operating as a per se prohibition, the rule against adverse spousal testimony usually allows such testimony if the witness spouse raises no objection.[65] Because adverse spousal testimony is presumably reliable, allowing its admission strikes a balance between the judicial search for the truth and the protection through the law of the marriage relationship.[66] In this respect, the privilege against adverse spousal testimony is distinguishable from the old rule of spousal incompetency. While the incompetency rule served to eliminate a perceived risk of allowing un-

61. The rule against adverse spousal testimony is also known as the "privilege for antimarital facts." *See* 8 WIGMORE, *supra* note 57, § 2227.

62. *See, e.g.*, Wyatt v. United States, 362 U.S. 525, 528 (1960) (defining the rule against adverse spousal testimony as a bar to admission of even voluntary testimony of a witness spouse if such testimony tends to incriminate defendant spouse); Hawkins v. United States, 358 U.S. 74, 77-79 (1958) (allowing defendant's spouse to testify against him was reversible error). At this writing, only four states continue to employ a rule of incompetency for adverse spousal testimony. *See* HAWAII REV. STAT. §§ 621-18 (1976); OHIO REV. CODE ANN. § 2945.42 (Anderson Supp. 1995); PA. STAT. ANN. tit. 42, § 5913 (1978); WYO. STAT. § 1-12-104 (1977).

63. *See* Nehf, *supra* note 60, at 881-82; *see generally* Mullane, *supra* note 53, at 135-61 (discussing a vast array of moralistic policies behind the marital privileges). However, many authors have argued that the commonly proffered reasons for the privilege are insufficient to justify its negative effects on the administration of justice. *See, e.g.*, 5 JEREMY BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 340 (1827) (arguing that the privilege surpasses the boundaries of making "every man's house his castle," and allows a person to convert her home into a "den of thieves," assuring to every married individual "one safe and unquestionable and ever ready accomplice for every imaginable crime"); CHARLES MCCORMICK, MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 61, at 139 (E. Cleary ed. 1972); WIGMORE, *supra* note 57, § 2228; Joseph A. Fawal, Note, *Questioning the Marital Privilege: A Medieval Philosophy in a Modern World*, 7 CUMB. L. REV. 307, 318-21 (1976). *But see* Note, *Federal Courts: Adverse Testimony by Spouse of Accused in a Criminal Prosecution*, 24 CAL. L. REV. 472, 474 (1936) (criticizing these arguments for their assumptions that the accused is guilty, and that her spouse's incriminating statements will therefore lead the court to the truth, when the presumption of the law should be that the accused is innocent).

64. A rule generally seeks to exclude evidence of which the court is suspicious and thus forbids the factfinder's consideration of the evidence, whether or not the parties object to its admission. *See, e.g.*, State v. Porter, 272 N.C. 463, 468, 158 S.E.2d 626, 629-30 (1968) (finding reversible error in simply calling the spouse of the defendant to the stand). A privilege, on the other hand, confers upon its holder the ability, but not the obligation, to prevent the introduction of otherwise competent evidence. *See, e.g.*, State v. Waters, 308 N.C. 348, 355-56, 302 S.E.2d 188, 193-94 (1983) (holding that adverse spousal testimony is admissible if witness-spouse waives her privilege not to testify).

65. *See, e.g.*, Hawkins v. United States, 358 U.S. 74, 78 (1958) (indicating that adverse spousal testimony is admissible if both spouses consent).

66. *See* Mullane, *supra* note 53, at 130.

reliable testimony to fall into the hands of the factfinder, the privilege against adverse testimony protects the sanctity of marriage at the cost of concealing what is likely to be truthful information from the factfinder.[67] However, both the incompetency rule and the rule against adverse testimony are conditioned upon a presumption of loyalty between spouses. In either case, if the adverse testimony is *volunteered*, it may be that the presumption has been rebutted.[68]

The confidential communications privilege is the third form of the marital privilege. By excluding evidence of communications between spouses which are "induced by the marital relationship and prompted by the affection, confidence, and loyalty engendered by such relationship,"[69] the confidential communications privilege encourages unfettered communication between marriage partners.[70] The privilege is rooted in four basic assumptions: (1) the communications originate in confidence; (2) confidence is essential to the marital relationship; (3) the marital relationship is a proper object of encouragement by the law; and (4) the general injury that would accrue to marriage relationships by disclosure is probably greater than the benefit that would result from judicial investigation of the truth.[71]

The confidential communications privilege is often confused with the rule against adverse spousal testimony, though each is based on a different policy interest. The rule against adverse testimony excludes the spouse's testimony in order to avoid hostility that may result within a marriage from the compulsion of adverse testimony itself.[72] However, the confidential communications privilege addresses the chilling effect on communication within a marriage that may result from the threat of such compulsion in the future.[73] Furthermore, the confidential communications privilege is narrower than the rule

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67. *Id.* at 131-35

68. Many jurisdictions, including North Carolina, have taken this view and have tailored the rule against adverse spousal testimony to apply where the prosecution seeks to *compel* the defendant's spouse to take the stand, but not where the defendant unilaterally seeks to prevent his spouse from testifying against him. *See* State v. Britt, 320 N.C. 705, 709 n.1, 360 S.E.2d 660, 662 n.1 (1987); State v. Waters, 308 N.C. 348, 356, 302 S.E.2d 188, 193-94 (1983).

69. State v. Freeman, 302 N.C. 591, 598, 276 S.E.2d 450, 454 (1981).

70. Sanderson, *supra* note 60, at 283 ("The social gain to be fostered is complete confidence between spouses.").

71. *See* Alicia Brown, Comment, State v. Hurley: *Erosion of the Marital Privilege for Confidential Communications in Tennessee*, 25 U. MEM. L. REV. 835, 837 (1994); *see also* 8 WIGMORE, *supra* note 57, § 2228 (describing policies behind spousal incompetency rule).

72. *See, e.g.*, State v. Thorne, 260 P.2d 331, 336 (Wash. 1953) (distinguishing policy underlying the confidential communications privilege from that of the rule against adverse spousal testimony).

73. *See id.*

against adverse testimony in that it applies only to those facts which are the subjects of confidential communications between marriage partners.[74] It is also broader in the sense that it can apply to spousal testimony that is not necessarily damaging to the defendant's case,[75] or to cases in which neither spouse is an interested party.[76]

The lack of judicial familiarity with the confidential communications privilege that has caused it to be confused with the adverse spousal testimony doctrine is partly attributable to prolonged enforcement of both the rule against adverse spousal testimony and the spousal incompetency rule.[77] Though the privilege was recognized as early as 1838 in North Carolina,[78] in most instances in which a spouse was called upon to disclose a confidential communication the other spouse was an adverse party (such as a criminal defendant), and the testimony was therefore prohibited by the rule against adverse spousal testimony.[79] Most other cases in which a spouse would have been asked to reveal a confidential communication involved a defendant's attempt to call his spouse to testify on his behalf, which was forbidden by spousal incompetency.[80]

The only time the confidential communications privilege would have been exclusively implicated in the common-law regime of marital privilege was a case in which neither spouse was an interested party.[81] It is the rare case that a litigant seeks to present evidence of a confidential communication made between two spouses, neither of whom has an interest in the case.[82] Therefore, despite frequent acknowledgement and widespread approval of the policy it advanced,[83] the confidential communications privilege remained functionally dormant until the spousal incompetency rule was rejected and the rule against adverse spousal testimony was revised.[84]

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74. *See, e.g.*, Commonwealth v. Darush, 420 A.2d 1071, 1075-76 (Pa. 1980).

75. *See, e.g.*, Dalton v. People, 189 P. 37, 38 (Colo. 1920).

76. *See, e.g.*, United States v. Lustig, 555 F.2d 737, 747-48 (9th Cir. 1977), *cert. denied*, 434 U.S. 1045 (1978); Westchester Fire Ins. Co. v. Foster, 90 Ill. 121, 125 (1878); Willis v. Gammill, 67 Mo. 730, 731 (1878).

77. *See* 8 WIGMORE, *supra* note 57, § 2332.

78. Hicks v. Hicks, 271 N.C. 204, 205, 155 S.E.2d 799, 800 (1967); State v. Jolly, 20 N.C. (3 Dev. & Bat.) 108, 108-09 (1838).

79. *See* 8 WIGMORE, *supra* note 57, § 2334.

80. *Id.*

81. *Id.* § 2235.

82. *Id.*

83. *See id.*; Charles W. Quick, *Privileges Under the Uniform Rules of Evidence*, 26 U. CIN. L. REV. 537, 550-51 (1957).

84. *See* 8 WIGMORE, *supra* note 57, § 2245.

The North Carolina legislature added to the confusion by making a provision for the confidential communications privilege in the pre-*Freeman* version of section 8-57 as well as referring to the rule against adverse spousal testimony.[85] The General Assembly revised the statute to add: "Nothing herein shall render any spouse competent or compellable to give evidence against the other spouse in any criminal action . . . ."[86] This revision entangled the doctrines of adverse incompetency and confidential communications. The vague language of the revision also made it difficult for the courts to determine whether the statute explicitly prohibited the introduction of adverse spousal testimony.[87]

Prior to *Freeman*, the North Carolina Supreme Court addressed the admissibility of an out-of-court spousal statement in *State v. Warren*.[88] A defendant's wife had remarked to the police officer who arrested her husband that "if he had not been going so slow, he wouldn't have been caught."[89] The defendant appealed the trial court's decision to admit the statement through the testimony of the police officer.[90] The *Warren* court held that introduction of the incriminating statement of the defendant's spouse was reversible error.[91] In reaching this conclusion, the court made no reference to a common-law doctrine regarding the incompetency of adverse spousal testimony, but instead relied solely on the words of the statute.[92] The court implied that section 8-57 codified the marital privilege, and that it was therefore unnecessary to consider the common law as a separate doctrine.[93] Furthermore, the court read the statutory language "to give evidence" to include out-of-court statements as well as in-court testimony, and interpreted section 8-57 as a prophylactic rule against adverse spousal testimony.[94]

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85. *See* Act of Mar. 30, 1967, ch. 116, § 1, 1967 N.C. Sess. Laws 177 (codified as amended at N.C. GEN. STAT. § 8-57 (1986)).

86. *Id.*

87. *See infra* notes 88-121 and accompanying text.

88. 236 N.C. 358, 359-60, 72 S.E.2d 763, 764 (1952).

89. *Id.* at 359, 72 S.E.2d at 764.

90. *Id.*

91. *Id.* at 360, 72 S.E.2d at 764.

92. *Id.* at 359, 72 S.E.2d at 764. This was a necessary element of the *Warren* court's holding, because absent a finding of statutory violation, the defendant's failure to object to the admission of the statement at trial would have rendered the issue reviewable only under the plain error standard. *See supra* notes 43-47 (explaining this policy in the context of *Rush*).

93. *Warren*, 236 N.C. at 359-60, 72 S.E.2d at 764. *But see supra* note 40 and accompanying text (explaining how the court interpreted the statute in exactly the opposite manner in *Rush*).

94. *Warren*, 236 N.C. at 359-60, 72 S.E.2d at 764.

In *State v. Dillahunt*,[95] the court again invoked section 8-57 to exclude evidence of an out-of-court statement made by a spouse.[96] The court emphasized that the prohibitory language of the statute extended to the defendant's wife's out-of-court statement because the statement was a "declaration[ ] made by one spouse not in the presence of the other."[97] The court offered no explanation for this part of its holding,[98] but the reasoning may indicate confusion with the confidential communications privilege, which requires that the information a defendant seeks to exclude be the subject of a communication from one spouse to the other.[99] Also, the opinion seemed to suggest a wife's lack of authority to make a potentially damaging statement without the consent of her husband. This reflects an attitude reminiscent of the policies advanced in support of the spousal incompetency rule, such as the lack of individual identity for married women.[100]

State v. Suits[101] examined whether the out-of-court actions of a spouse were admissible against a defendant when introduced through a third party.[102] In this case, the court held that section 8-57 was merely an enabling provision to the admission of favorable spousal testimony, and that the common law-rule prohibiting adverse spousal testimony generally remained in effect.[103] This interpretation was inconsistent with the holdings in both *Warren* and *Dillahunt*, but was an equally reasonable construction of the statute. The court reasoned that the list in section 8-57 of the situations in which adverse spousal testimony was to be competent evidence, considered along with the statutory language stating that "[n]othing herein shall be construed to render any spouse competent or compellable to give evidence against the other in a criminal action," was merely the legislature's statement of exceptions to the common law rule against adverse spousal testimony.[104] The court maintained that adverse spousal testimony was

95. 244 N.C 524, 94 S.E.2d 479 (1956) (per curiam).

96. *Id.* at 525, 94 S.E.2d at 479-80.

97. *Id.*

98. *Id.*

99. *See, e.g.*, State v. Holmes, 330 N.C. 826, 833-34, 412 S.E.2d 660, 664-65 (1992); Hicks v. Hicks, 271 N.C. 204, 205-07, 155 S.E.2d 799, 800-01 (1967); *see also supra* notes 69-84 and accompanying text (discussing the confidential communications privilege).

100. *See supra* notes 54-55 and accompanying text.

101. 296 N.C. 553, 251 S.E.2d 607 (1979).

102. *Id.* at 557, 251 S.E.2d at 609.

103. *Id.* As explained above, *see supra* note 60 and accompanying text, the pre-*Freeman* version of the statute displaced the common-law rule of spousal incompetency. The rule against adverse spousal testimony did not necessarily grow out of this rejection, as it advances a different policy and has independent common-law roots.

104. *Suits*, 296 N.C. at 557, 251 S.E.2d at 609.

per se incompetent under common law,[105] but by ruling that the statute did not codify the rule against adverse testimony, the *Suits* court laid the foundation for the judicial transformation of the marital privilege doctrine in *Freeman.*

In 1981, in *State v. Freeman*[106] the court held that "[h]enceforth, spouses shall be incompetent to testify against one another in a criminal proceeding only if the substance of the testimony concerns a 'confidential communication' between the marriage partners made during the duration of their marriage."[107] The court asserted its power to reshape the rules of marital privilege by relying on the notion in *Suits* that the rule of incompetency of adverse spousal testimony existed only at common law.[108] Weighing the interest in promoting the marriage relationship versus the interest in learning the truth,[109] the *Freeman* court invalidated the common-law rule, finding that it ultimately frustrated the administration of justice more than it advanced marital harmony.[110] Thus, the court declared the old common law rule null and void.[111] Rather than merely eliminating the rule of incompetency for adverse spousal testimony, *Freeman* created a new rule of incompetency conditioned upon the existence of "confidential communications,"[112] which assured the interconnection of the doctrines of marital privilege.

In rejecting the incompetency rule for adverse spousal testimony, the *Freeman* court failed to articulate whether it sought to leave a privilege against compulsion in its place.[113] Because adverse spousal

105. *Id.*

106. 302 N.C. 591, 276 S.E.2d 450 (1981).

107. *Id.* at 596, 276 S.E.2d at 453. The *Freeman* case caused a major upheaval in North Carolina common law, which previously had adhered almost unquestioningly to the old principle of the incompetency of adverse spousal testimony. *See, e.g.*, State v. Suits, 296 N.C. 553, 557, 251 S.E.2d 607, 609 (1979); State v. Dillahunt, 244 N.C. 524, 525, 94 S.E.2d 479, 479-80 (1956); State v. Warren, 236 N.C. 358, 360, 72 S.E.2d 763, 764 (1952); State v. Aaron, 29 N.C. App. 582, 584-85, 225 S.E.2d 117, 119 (1976). For comprehensive analyses of *Freeman*'s abrogation of the common-law rule forbidding adverse spousal testimony, see Nehf, *supra* note 60, at 874-76; Douglas P. Arthurs, Note, *Spousal Testimony in Criminal Proceedings*—State v. Freeman, 17 WAKE FOREST L. REV. 990, 1001-07 (1981).

108. *Freeman*, 302 N.C. at 594-95, 276 S.E.2d at 452-53. Common law may always be revised by the courts in which it was created if the judges become aware of a need for change. *Id.* (citing Trammel v. United States, 445 U.S. 40 (1980)); Francis v. Southern Pacific Co., 333 U.S. 445 (1948) (Black, J., dissenting); Funk v. United States, 290 U.S. 371 (1933); State v. Alford, 274 N.C. 125, 161 S.E.2d 575 (1968)).

109. *Freeman*, 302 N.C. at 594-96, 276 S.E.2d at 452-54.

110. *Id.* at 596, 276 S.E.2d at 453-54.

111. *Id.*

112. *Id.; see also supra* notes 69-84 and accompanying text (discussing the confidential communications privilege).

113. *Freeman*, 302 N.C. at 596, 276 S.E.2d at 453-54 (1981).

testimony was traditionally incompetent, it had been a moot question whether such testimony was compellable. The abolition of the incompetency rule raised new concerns over the propriety of compulsion as a means of obtaining adverse spousal testimony.[114] The *Freeman* court suggested that the only justification for retaining any type of marital privilege was the enhancement of free and unfettered communication between spouses,[115] and therefore conditioned common-law incompetency of adverse spousal testimony upon the "confidentiality" of the desired evidence.[116]

This reasoning suggested that adverse spousal testimony *would* be compellable, provided that the subject matter of the testimony was not a confidential communication, because open communication within the marriage would not be affected by the fear of one day being compelled to disclose information not gained through the marital relationship.[117] The legislature, however, soon preempted that possibility by revising section 8-57 into its present form, which provides: "The spouse of the defendant shall be competent but not compellable to testify for the State against the defendant in any criminal action . . . ."[118]

As amended, section 8-57 changed not only the rule regarding adverse spousal testimony itself, but also the language in which it was expressed. While the old statute referred to "*giv[ing] evidence*" against one's spouse,[119] new language in section 8-57 referred to "*tes-*

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114. *See* Nehf, *supra* note 60, at 882.

115. *Freeman*, 302 N.C. at 596, 276 S.E.2d at 453-54; *see also* Trammel v. United States, 445 U.S. 40, 53 (1980) (suggesting that the sole remaining justification for a rule against adverse spousal testimony is the enhancement of harmonious marital communication and vesting the privilege to refuse adverse spousal testimony in the witness-spouse, to the exclusion of the defendant-spouse). For a critical treatment of this view of marital privilege, see generally Mullane, *supra* note 53, at 109-10 (accusing the Court of thoughtlessly discarding the law of traditional social values); Steven N. Gofman, Note, *"Honey, the Judge Says We're History": Abrogating the Marital Privileges Via Modern Doctrines of Marital Worthiness*, 77 CORNELL L. REV. 843, 855-71 (1992) (examining the legislative and judicial erosion of legal doctrines of marital worthiness).

116. *Freeman*, 302 N.C. at 596, 276 S.E.2d at 453.

117. *See* Nehf, *supra* note 60, at 876; *see also* Arthurs, *supra* note 107, at 1007 (claiming that "[i]f the spouse may be compelled to testify, the rule against adverse spousal testimony has been completely abolished in North Carolina, and the only evidentiary rule remaining to protect the marital relationship is the privilege protecting confidential communications").

118. N.C. GEN. STAT. § 8-57(b) (1995); *see* State v. Josey, 328 N.C. 697, 705, 403 S.E.2d 479, 483 (1991) (holding that *Freeman* and N.C. GEN. STAT. § 8-75(b) do not allow for the compulsion of adverse spousal testimony regardless of whether the testimony concerns a confidential communication).

119. Act of Mar. 30, 1967, ch. 116, § 1, 1967 N.C. Sess. Laws 177 (codified as amended at N.C. GEN. STAT. § 8-57 (1986)).

tify[ing]" against a defendant spouse.[120] On the eve of *Rush*, no cases had addressed the issue of non-confidential out-of-court statements in the context of this statutory amendment.[121]

The *Rush* court reasoned that amended section 8-57 was the embodiment of the *Freeman* decision, and meant to mirror the court's abolition of the incompetency rule for adverse spousal testimony, as well as its unstated preservation of a privilege against compulsion to testify, by removing the contradictory language the old statute contained.[122] The court concluded that the legislature intended to impose no additional requirements with the statutory amendment.[123]

Because the sole prohibition in section 8-57 is the admission of "compelled" spousal "testi[mony]," the court considered whether the admission of third party testimony regarding Ms. Rush's out-of-court statements had "compelled" her to "testify" against her husband.[124] It might seem that the out-of-court statements of a spouse could be excluded if that spouse invoked her privilege not to give adverse testi-

120. N.C. GEN. STAT. § 8-57 (1995) (emphasis added); *see also supra* note 29 (quoting the current version of the statute in full).

121. *Rush*, 340 N.C. at 181, 456 S.E.2d at 824. At least pre-*Freeman* cases that addressed the issue yielded a confusing array of determinative standards. *See* State v. Suits, 296 N.C. 553, 557-58, 251 S.E.2d 607, 609 (1979) (stating that when the State presented testimony of police officer as to spouse's conduct of producing evidence that was used against defendant-spouse, officer's testimony was inadmissible *because "a husband or wife [is] incompetent to testify . . . against his or her defendant-spouse in a criminal action"*) (emphasis added); State v. Cousin, 291 N.C. 413, 417-18, 230 S.E.2d 518, 521 (1976) (stating that when spouse directed police to the whereabouts of the murder weapon, evidence was admissible *because spouse herself "never testified nor was any statement [made] by her admitted into evidence"*) (emphasis added); State v. Dillahunt, 244 N.C. 524, 525, 94 S.E.2d 479, 479-80 (1956) (stating that when spouse gave statement to the police which tended to incriminate defendant-spouse, police officer's testimony to that effect was inadmissible *because spouses are incompetent to testify against one another and "[t]he prohibition extends to declarations made by one spouse not in the presence of the other"*) (emphasis added); State v. Warren, 236 N.C. 358, 359, 72 S.E.2d 763, 764 (1952) (stating that when police officer's testimony included incriminating comment of spouse, such testimony was inadmissible against defendant-spouse *because under § 8-57, "the wife [is] neither competent nor compellable to testify to her husband's hurt . . . and . . . her declarations against him should not be received when not made in his presence nor by his authority"*) (emphasis added); State v. Aaron, 29 N.C. App. 582, 584-85, 225 S.E.2d 117, 119 (1976) (stating that when police officer testified that information given by spouse led to recovery of stolen goods introduced as evidence against defendant-spouse, testimony was admissible *because § 8-57 "was not intended, and it does not, prohibit a husband or wife from making voluntary statements to police officers during the investigatory stage of a criminal proceeding"*) (emphasis added).

122. *Rush*, 340 N.C. at 181, 456 S.E.2d at 823.

123. *Id.*

124. *Id.*

mony, as did Ms. Rush, because spousal testimony is now competent but not compellable.[125]

The court relied instead on a strict interpretation of section 8-57, referring to the definition of "testify" as it appears in *Black's Law Dictionary*, and determined that spousal declarations made outside the courtroom and introduced through a third party witness do not qualify as spousal "testimony" within the meaning of the statute.[126] By defining these statements as out of the statutory purview,[127] the court was able to use the malleable common law of marital privilege, unhampered by legislative restrictions, as a tool for carving out a policy-oriented response to the question presented in *Rush*.[128] The court

125. *Id.* at 179, 456 S.E.2d at 822 (noting that Ms. Rush asserted her privilege not to take the stand and give evidence against the defendant at trial).

126. *Id.* at 181, 456 S.E.2d at 822; *see supra* notes 38-39 and accompanying text (describing the court's analysis of the term "testify").

127. Section 8-57(c) also prevents the compelled disclosure of confidential communications. *See supra* notes 29, 39. However, because Rush stipulated that his wife's statements were not the subjects of confidential marital communications, the court did not utilize this portion of the statute in its analysis. *Rush*, 340 N.C. at 181, 456 S.E.2d at 823. In order to be a "confidential communication" within the meaning of the statutory and common law rule, the substance of the testimony at issue must have been induced by the marital relationship and prompted by the affection, confidence, and loyalty engendered by the marriage. State v. Freeman, 302 N.C. 591, 598, 276 S.E.2d 450, 454 (citing Wright v. Wright, 281 N.C. 159, 188 S.E.2d 317 (1972); Hicks v. Hicks, 271 N.C. 204, 155 S.E.2d 799 (1967); Hagedorn v. Hagedorn, 211 N.C. 175, 189 S.E. 507 (1937); McCoy v. Justice, 199 N.C. 602, 155 S.E. 452 (1930); State v. Freeman, 197 N.C. 376, 148 S.E. 450 (1929); Whitford v. North State Life Ins. Co., 163 N.C. 223, 79 S.E. 501 (1913)). Communications between spouses made in the presence of third parties cannot reasonably be expected to be confidential and thus are not protected by the privilege. *See, e.g.*, State v. Holmes, 330 N.C. 826, 832-34, 412 S.E.2d 660, 663-65 (1992); Hicks v. Hicks, 271 N.C. 204, 205-08, 155 S.E.2d 799, 800-01 (1967). Accordingly, Rush did not attempt to argue to the court that his wife's statements were privileged confidential communications. *Rush*, 340 N.C. at 181, 456 S.E.2d at 823. Note that "confidential communication" has been interpreted most often in civil cases rather than in criminal cases. This is due to the fairly recent nature of the judicial abolition of the rule against adverse spousal testimony for criminal cases. *See* State v. Freeman, 302 N.C. 591, 596-98, 276 S.E.2d 450, 453-55 (1981). Because the common-law rule made all adverse spousal testimony inadmissible, there was no need for separate debate over the "confidential" nature of the testimony in criminal cases. *See* CHARLES T. MCCORMICK, MCCORMICK ON EVIDENCE § 79 (John W. Strong ed. 1992) (explaining that it was not until states began to allow spouses to testify in criminal cases that problems regarding confidential communications arose). On the other hand, spouses are both competent and compellable witnesses in civil cases, but a privilege against disclosing "confidential communications" is nonetheless reserved. *See* N.C. GEN. STAT. § 8-57(c) (1986). The court in *Freeman* directed that the interpretations given in civil cases should be imputed to criminal cases. *Freeman*, 302 N.C. at 597-98, 276 S.E.2d at 453-54.

128. In support of the principle that courts are authorized to revise rules of common-law marital privilege, though not those of legislative declaration, see Trammel v. United States, 445 U.S. 40, 52 (1980); Francis v. Southern Pacific Co., 333 U.S. 445, 471 (1948) (Black, J., dissenting); Funk v. United States, 290 U.S. 371, 382 (1933); State v. Alford, 274 N.C. 125, 128-33, 161 S.E.2d 575, 577-80 (1968).

detailed the reasons advanced in *Freeman* for the modification of the common-law rule against adverse spousal testimony, agreeing with *Freeman*'s proposition that the modern justification for retention of marital privilege is to "[allow] marriage partners to speak freely to each other in confidence without fear of being thereafter confronted with the confession in litigation."[129] The *Rush* court therefore found that "the spousal privilege does not bar non-confidential, out-of-court statements made by a spouse and introduced against a defendant spouse for the State through a third party."[130]

The problem with fixing the bounds of the post-*Freeman* spousal privilege according to the strict definition of the word "testify" is that the privilege itself depends on a less literal interpretation of that word. According to *Rush*, out-of-court spousal statements are not excluded by the statutory privilege against compulsion to testify, and if non-confidential, neither are such statements excluded by virtue of common-law spousal privilege. Common-law spousal privilege as defined in *Freeman* provides that "spouses shall be incompetent to testify against one another . . . if the substance of the testimony concerns a 'confidential communication.' "[131] A strict definition of "testify" indicates that if a confidential communication were submitted in the form of an out-of-court spousal statement, the defendant could exclude it neither (1) by statutory marital privilege, under *Rush*; nor (2) by common law marital privilege, because the common law privilege, too, is expressed in terms of a spouse's incompetency to "testify" to a confidential communication.[132] Therefore, considered together with *Freeman*, *Rush* creates a loophole through which the defendant's confidential communications may be used against him. Even if the communication may be revealed only through a third party witness to whom the spouse has voluntarily revealed the defendant's confidence, marital communication will be less intimate if marriage partners are not fully protected against ensuing confrontation with their confessions in litigation.

For example, refer to the introductory hypothetical and assume that, before Pat's murder, Susan and John discussed the fact that John harbored negative feelings toward Pat. Under *Rush*, if Susan reveals the substance of this conversation to the police officer, John cannot

129. *Rush*, 340 N.C. at 182, 456 S.E.2d at 824 (citing *Freeman*, 302 N.C. at 596, 276 S.E.2d at 453-54).

130. *Id.*

131. *Freeman*, 302 N.C. at 596, 276 S.E.2d at 453.

132. *See supra* note 131. The court might distinguish these situations by adopting a more lenient meaning of "testify" as it is used in the interpretation of common law marital privilege.

invoke the marital privilege to exclude evidence of the officer's testimony regarding this confidential communication. This defeats the policy of the spousal privilege as expressed in both *Rush* and *Freeman* in the sense that John is penalized at trial because he openly confided in his spouse.[133]

Freeman impliedly announced the North Carolina Supreme Courts' intention to treat the marital privilege as a single legal doctrine, rather than decode the old complex, multi-faceted doctrine.[134] The recent holding in *Rush* is meant as another step toward the perceived simplicity of a trimmed, but oddly assembled, rule of marital privilege. The court has effectively replaced the rule against adverse spousal testimony with the statutory rules prohibiting the compulsion of spousal testimony.[135] Marital peace was the original policy aim of the rule, and by denying the defendant the right to exclude a spouse's incriminating testimony, the current formulation probably aggravates this objective. The statutory rules serve to protect the free will of the witness, regardless of the condition of her marital relationship.[136]

Furthermore, the confidential communications privilege has become a rule of incompetency.[137] In truth, the privilege to exclude should belong only to the *communicator* of the information, because the policy of promoting open communication seeks to prevent only the trepidation of the marital partner who desires to disclose his confidences to his spouse. When a defendant's spouse is called to testify against him in a criminal proceeding, however, the confidential information generally sought by the prosecution is that which has been communicated by the defendant to his spouse. Thus, the rule of incompetency has the same functional effect as would a privilege vested in the communicating spouse. Yet the rule adopted by the court in *Rush* may afford defendants neither a rule of incompetency nor a privilege when confidential, out-of-court statements are introduced

133. However, out-of-court statements are, of course, subject to the hearsay rule. *See* State v. Perry, 54 N.C. App. 479, 480-81, 283 S.E.2d 569, 571 (1981). Therefore, the statements may be excluded as inadmissible hearsay without regard to the marital privilege. *See id.* Only because Rush failed to enter an objection at trial did the court ignore hearsay as a ground for reversal, subject to the plain error standard of review. *See supra* notes 43-47 and accompanying text.

134. *See Freeman,* 302 N.C. at 596, 276 S.E.2d at 453.

135. *See supra* notes 119-25 and accompanying text.

136. *See* Gofman, *supra* note 115, at 844 (arguing that courts are not in a position to determine whether or not there is harmony remaining in a marriage, and that therefore the marital privileges should be retained in expansive form).

137. *See Rush,* 340 N.C. at 182, 456 S.E.2d at 824; *see also* State v. Holmes, 330 N.C. 826, 835-36, 412 S.E.2d 660, 665 (1992) (holding that a spouse may not voluntarily testify to confidential communications when the defendant spouse asserts the privilege).

through third party testimony. If a subsequent communication of a confidence from a spouse to a third party is all that is required to defeat the privilege, then the most private and confidant marital exchanges may quickly become fodder for courtroom cross-examination or convictions. In the event that *Rush* is taken to this logical conclusion, the marital privilege as it has existed in North Carolina for many years will unceremoniously vanish.

KIMBERLEY R. CHAPMAN

Giving Credit Where Credit Is Due: North Carolina Recognizes Custodial Obligations as a Factor in Determining Alimony Entitlements

The ubiquitous single mother in American society has not garnered concern commensurate with her financial dilemma. Her plights are far too often underestimated or wholly overlooked. The obstacles she encounters daily as she struggles to balance the demands of full-time employment, motherhood, and a host of other obligations, including the need to secure quality child-care, are difficult for many to imagine. With the virtual plethora of challenges facing divorced single mothers, a question presents itself: Do alimony and child support payments by absentee fathers truly ameliorate such difficulties? This is a question with which legislatures and tribunals across the nation are currently struggling. It is likely that such issues will continue to attract attention in the future, as long as the incidence of divorce among American couples remains high.[1]

Unfortunately, as a result of the modern frequency of divorce, the corresponding economic burdens borne by divorced mothers and their children after marital dissolution are also on the rise. Indeed, many recent studies attribute the devastating economic impact of divorce as a primary cause of the difficulties facing divorced single mothers.[2] Of

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1. Professor Jana Singer writes:

> Close to fifty percent of American marriages now end in divorce. Each year more married couples across the country end their unions in dissolution than in death. Experts predict that if current divorce rates hold steady, almost half of all children born in the 1980s will spend at least part of their childhood in a household headed by a divorced parent.

Jana B. Singer, *Divorce Reform and Gender Justice*, 67 N.C. L. REV. 1103, 1103 (1989); *see also* THE WORLD ALMANAC AND BOOK OF FACTS 691 (Robert Famighetti et al. eds., 1995) (reporting that one out of two marriages now end in divorce); Nancy E. Dowd, *Stigmatizing Single Parents*, 18 HARV. WOMEN'S L.J. 19, 21-22 (1995) ("Single-parent families now constitute twenty-six percent of all families with minor children and are the most rapidly growing family form in America . . . . Divorced or separated single parents remain the largest group of single parents (nearly sixty percent), almost double the number of never-married single parents (just over thirty percent) . . . ."); Grahm B. Spanier & Paul C. Glick, *Marital Instability in the United States: Some Correlates and Recent Changes*, 30 FAM. REL. 329, 332 (1981) (discussing the prevalence of divorce).

2. *See generally*, LENORE J. WEITZMAN, THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA (1985) (discussing the fiscal consequences of divorce on single mothers); James B. McLindon, *Separate But Unequal: The Economic Disaster of Divorce for Women and Children*, 21 FAM. L.Q. 351 (1987) (same); Heather R. Wishik, *Economics of Divorce: An Exploratory Study*, 20 FAM. L.Q. 79 (1986) (same).

female-headed families in the United States,[3] the poverty rate in 1991 was fifty-five percent[4]—five times higher than the poverty rate among families headed by married couples.[5] Even if not declining to the poverty level, the post-divorce standards of living for women and children almost always decrease substantially.[6]

One important but widely overlooked factor[7] contributing to this precipitous decline in the economic well-being of divorced women has been the legal assumption of economic equality among divorcing spouses.[8] This assumption largely ignores the reality that women continue to assume primary responsibility for housework and child care,

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3. This category accounts for 90% of all American children living in households headed by a divorced parent. Singer, *supra* note 1, at 1103; *see* Dowd, *supra* note 1, at 23 ("Most single-parent families with children are [headed by] women.").

4. Dowd, *supra* note 1, at 23.

5. CHILDREN'S DEFENSE FUND, THE STATE OF AMERICA'S CHILDREN 28 (1992); *see also* Dowd, *supra* note 1, at 23 ("[A] majority of female-headed families . . . are poor. The 1990 poverty line for a family of one adult and two children was $10,419; the approximate average income of poor female-headed families was $4,500. . . . Although female-headed households constitute only about ten percent of all households, they account for nearly one-third of the poverty population.").

6. *See* WEITZMAN, *supra* note 2, at 323. As Weitzman notes:

> For most women and children, divorce means precipitous downward mobility—both economically and socially. The reduction in income brings residential moves and inferior housing, drastically diminished or nonexistent funds for recreation and leisure, and intense pressures due to inadequate time and money. . . . On a societal level, divorce increases female and child poverty and creates an ever widening gap between the economic well-being of divorced men, on the one hand, and their children and former wives on the other.

Id.

7. Many factors contribute to this "feminization" of poverty. For example, some commentators have attributed the devastating economic effects of divorce on women and children to the rise of no-fault divorce laws throughout American jurisdictions. *See, e.g.*, *id.* at 20-50. It is suggested that the no-fault laws now in place in most states eliminate the precious bargaining power that women once enjoyed under a fault-based regime. Now, because divorce is unilaterally attainable by even the most blameworthy husbands, women are deprived of any leverage in negotiating a favorable divorce settlement for themselves. *Id.* at 20.

For more sources on no-fault divorce and its effects on women, see Marsha Garrison, *How Do Judges Decide Divorce Cases?: An Empirical Analysis of Discretionary Decision Making*, 74 N.C. L. REV. 401, 419-420 (1996) (noting the shift of modern divorce law away from its traditional goal of remedial, fault basis); Deborah L. Rhode & Martha Minow, *Reforming the Questions, Questioning the Reforms: Feminist Perspectives on Divorce Law*, *in* DIVORCE REFORM AT THE CROSSROADS 191, 194-98 (Stephen D. Sugarman & Herma Hill Kay eds., 1990).

The phrase "feminization of poverty" was coined by sociologist Diana Pearce in 1978 after her research revealed a strong correlation between gender and poverty. *See The Feminization of Poverty: An Issue for the 90s*, 4 YALE J.L. & FEMINISM 73, 73 (1991); *see generally* Diana M. Pearce, *The Feminization of Poverty: Women, Work and Welfare*, 11 URB & SOC. CHANGE REV. 28 (1978).

8. *See* Dowd, *supra* note 1, at 60-61. Professor Dowd states that the current post-divorce model:

even when employed outside the home, and ignores the effect of this reality on their earning potential.[9] Indeed, women typically choose employment that minimizes interference with their family obligations and allows interruption for custodial caretaking.[10] Because such employment is usually marked by low wages,[11] divorced women find themselves with an income well below half of their pre-divorce income.[12] This means that when the marital dissolution of a couple with children results in an award of custody to the mother, she must then bear the burden of supporting the children on less than half the family income, further contributing to her dramatic decrease in standard of living.[13]

This decrease in standard of living, coupled with caretaking responsibility, would seem to create a compelling argument for alimony entitlement. In practice, however, such an award is atypical. For example, in the middle to late 1980s, only around fifteen percent of all divorced women, whether or not they were custodians, were awarded

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> presumes that each [marital] partner resumes the position he or she had before the marriage, as modified by his or her responsibility for parenting children. It presumes that any interruption of wage work or modification of work behavior in response to family responsibilities during the marriage can be overcome by making different choices in labor market work after divorce. The divorce system, therefore, presumes that the burden of parenting will be equally distributed between two independent self-supporting adults. The realities of divorced single-parent families are starkly at odds with these presumptions. Men and women continue to emerge from divorce at opposite economic poles: men's financial position improves, while women's sharply declines.

Id. at 61.

9. *See* SYLVIA ANN HEWLETT, A LESSER LIFE: THE MYTH OF WOMEN'S LIBERATION IN AMERICA 81 (1986).

10. *Id.*

11. *Id.* at 83. Hewlett states that:

> [w]age-earning profiles for men and women demonstrate the severely depressing effect of child rearing on female earnings. . . . [W]omen miss out on the rapid upward mobility men typically experience in their late twenties and thirties. At this critical stage of most career paths, women have children (or at least 90 percent of them do), and given inadequate (or no) maternity leave and the paucity and expense of child-care facilities, the majority of working women are forced to make drastic compromises in their work lives.

Id.; *see also* Diane Dodson, *The Relationship Between Child Support and Alimony*, 4 J. AM. ACAD. MATRIMONIAL LAW. 25, 32-33 (1988) ("Although most divorced mothers work, they can be expected to earn far less than their ex-husbands. . . . Women are also concentrated in a small number of occupations that offer low pay and limited opportunity for advancement.").

12. WEITZMAN, *supra* note 2, at 327-29.

13. *Id.* at 323 ("[W]hen income is compared to needs, divorced men experience an average 42 percent rise in their standard of living in the first year after divorce, while divorced women (and their children) experience a 73 percent decline.").

alimony, and only six percent actually received alimony payments.[14] This is in sharp contrast with spousal support awards in the early twentieth century, when the importance of providing spousal support to custodial parents—typically mothers—was widely accepted.[15] Indeed, the importance of custodial obligations is expressly mentioned in the Uniform Marriage and Divorce Act[16] and the divorce statutes of many states.[17] Many other states' statutes include a spouse's custodial obligations among the factors to be considered when determining the need for and amount of spousal support awards.[18] There are two primary justifications advanced for recognizing a divorced spouse's custodial status in determining alimony entitlements. First, the standards of living of the custodian and the child are too closely related to

14. U.S. DEPT. OF COMMERCE, BUREAU OF THE CENSUS, CURRENT POPULATIONS REPORTS, CHILD SUPPORT AND ALIMONY tbls. K & L (1991). Often courts are reluctant to award alimony because they believe that it is better to encourage care-giving spouses to seek work outside the home and thereby "rehabilitate" themselves following a divorce. *See generally* David H. Relsey & Patrick P. Fry, *The Relationship Between Permanent and Rehabilitative Alimony*, 4 J. AM. ACAD. MATRIMONIAL LAW. 1 (1988) (summarizing the state of permanent and rehabilitative alimony). "Rehabilitative alimony" awards are designed to terminate after one or two years in order to allow one spouse time to acquire skills needed to enter the labor force. IRA MARK ELLMAN ET. AL., FAMILY LAW 286 n.2 (2d ed. 1991). Often a rehabilitative award is based on unrealistic assumptions about the ability to a long-term homemaker to re-enter the work force successfully. *Id.*

15. *See* Ann L. Estin, *Maintenance, Alimony, and the Rehabilitation of Family Care*, 71 N.C. L. REV. 721, 727 (1993) (" 'The first and most important of all the functions of alimony relates to the care of children.' ") (quoting HOMER CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 441 (1968)).

16. The Uniform Marriage and Divorce Act (U.M.D.A.) § 308(a) provides that a spouse is eligible for alimony only if he [or she]: "(1) lacks sufficient property to provide for his reasonable needs; and (2) is unable to support himself through appropriate employment or *is the custodian of a minor child whose condition or circumstances make it appropriate that the custodian may not be required to seek employment outside the home.*" UNIFORM MARRIAGE AND DIVORCE ACT § 308(a), 9A U.L.A. 347-48 (1987) (emphasis added). If the spouse meets these preconditions, the statute lists six factors to be considered in arriving at the appropriate amount of alimony. *Id.* § 308(a), 9A U.L.A. 348.

17. Professor Estin, *supra* note 15, at 727 & n.16, notes that at least ten states use the U.M.D.A. formula in their alimony or spousal maintenance statutes. *See, e.g.*, ARIZ. REV. STAT. ANN. § 25-319.A.2 (1991); COLO. REV. STAT. ANN. § 14-10-114(1)(b) (West 1987); ILL. REV. STAT. ch. 40, para. 504(a)(2) (1985); KY. REV. STAT. ANN. § 403.200(1)(b) (Michie/Bobbs-Merrill 1984); MINN. STAT. § 518.552.1(b) (1990); MO. REV. STAT. § 452.335.1(2) (Supp. 1991); MONT. CODE ANN. § 40-4-203(1)(b) (1991). In some states, however, the U.M.D.A. § 308(a) formula has been adopted without the custodial language. *See* IDAHO CODE § 32-705.1 (Supp. 1991); WASH. REV. CODE ANN. § 26.09.090 (West Supp. 1992).

18. *See* Estin, *supra* note 15, at 727 n.18. Examples of these statutes include CAL. CIV. CODE § 4801(a)(5) (West 1986); IOWA CODE ANN. § 598.21(3)(e) (West Supp. 1992); LA. CIV. CODE ANN. art. 112(A)(2)(d) (West Supp. 1992); NEB. REV. STAT. § 42-365 (1988); N.Y. DOM. REL. LAW § 236[B][6][a][6] (McKinney 1986); OHIO REV. CODE ANN. § 3105.18(c)(1)(f) (Anderson Supp. 1991); 23 PA. CONS. STAT. § 3701(b)(7) (1991); W. VA. CODE § 48-2-16(b)(4), (13) (1992).

consider one in isolation of the other.[19] Secondly, the enormous non-monetary contributions of the custodian dramatically affect her earning capacity, and thus her ability to manage without support from the non-custodian.[20]

North Carolina has recently expressed its willingness to recognize the economic burdens borne by custodial spouses in determining alimony awards by virtue of two separate but related events: one judicial, and the other legislative. Specifically, in the recent case of *Fink v. Fink*,[21] the North Carolina Court of Appeals interpreted the language of North Carolina General Statute section 50-16.5[22] as allowing judicial discretion to consider a divorcing spouse's custodial status in setting a proper alimony award.[23] In a related development the same month that *Fink* was decided, the North Carolina General Assembly enacted new alimony legislation.[24] This legislation repealed or significantly altered much of the existing statutory law regarding alimony, and embraced a principle similar to that established by the court of appeals in *Fink*. The effect of the *Fink* decision and the new alimony legislation is that North Carolina courts may be more attentive to the special needs of caregivers in setting alimony awards than have the courts of many other states—even in those states with similar "custodian-oriented" legislation already in place.[25] Furthermore, the new alimony legislation serves to bolster the conclusions reached by the

19. *See* Dodson, *supra* note 11, at 35-36.

20. *Id.*

21. 120 N.C. App. 412, 462 S.E.2d 844 (1995), *disc. rev. denied*, 342 N.C. 654, 467 S.E.2d 710 (1995). See *infra* notes 31-79 and accompanying text for a discussion of *Fink*.

22. This statute was repealed and replaced by new alimony legislation which became effective on October 1, 1995. Act of June 21, 1995, ch. 319, §12, 1995 N.C. Adv. Legis. Serv. 518, 525. The Court of Appeals rendered its decision in *Fink* on October 17, 1995. *Fink*, 120 N.C. App. at 412, 462 S.E. 2d at 844. However, the new alimony legislation was inapplicable to the case because the relevant statute provides that the new Act applies neither to "pending litigation, nor to future motions in the cause seeking to modify orders or judgments in effect on October 1, 1995." Act of June 21, 1995, ch. 319, §12, 1995 N.C. Adv. Legis. Serv. 518, 525.

23. *Fink*, 120 N.C. App. at 418, 462 S.E.2d at 849-50.

24. *See* N.C. GEN. STAT. § 50-16.1A, 16.2A, 16.3A (1995); *see also infra* notes 99-111 (discussing the new legislation and its effects on the prior law regarding alimony awards in North Carolina).

25. See *supra* note 18 for a non-exhaustive list of states that have enacted alimony statutes explicitly authorizing the consideration of a spouse's custodial duties in setting alimony awards. Professor Estin has noted the dismal reality that even under these progressive alimony statutes, "maintenance awarded to facilitate the care of children is unusual." Estin, *supra* note 15, at 728. In contrast, because North Carolina's new alimony legislation has now been supported by judicial action, it is hopeful that "custodian-oriented" spousal support will be awarded more frequently in North Carolina than in the other states.

Fink court by ensuring that custody will be a factor in determining alimony entitlements.

This Note first discusses the *Fink* decision and the court of appeals' analysis that led it to recognize the care-giving responsibilities of custodial spouses.[26] The Note then turns to the sparse precedent regarding the relationship of custodial status to alimony and spousal maintenance in North Carolina.[27] Subsequently, the Note addresses the new alimony legislation, as well as the likely effects of the statute on the current state of North Carolina alimony law in general.[28] Next, the Note analyzes the close nexus between custodian-oriented alimony awards and child support, in recognition that the line between these two areas of domestic law is often difficult to discern.[29] Finally, the Note concludes by considering the significance that North Carolina and other states will place on the relationship between custodial obligations and alimony entitlements in their efforts to remedy the economic imbalance between divorcing couples.[30]

Calvin and Robbie Fink were married on July 22, 1973.[31] On July 23, 1989, exactly one day after their sixteenth anniversary, the Finks separated.[32] Two years later, in October 1991, Robbie Fink filed a complaint seeking a divorce, temporary and permanent alimony, attorneys' fees, custody, child support, and equitable distribution.[33] Six weeks later, a consent order was entered granting Ms. Fink custody of the couple's child, and directing Mr. Fink to pay child support in the amount of $425 per month in accordance with the North Carolina Child Support Guidelines.[34] Because Calvin Fink stipulated that he had committed acts of marital misconduct constituting grounds for ali-

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26. *See infra* notes 31-79 and accompanying text.

27. *See infra* notes 80-84 and accompanying text.

28. *See infra* notes 97-111 and accompanying text.

29. *See infra* notes 112-43 and accompanying text. The confusion over the precise boundaries of this nexus is embodied in the *Fink* decision itself. One of the defendant's primary arguments on appeal was that the trial court improperly crossed the line between his child support obligation and his alimony duties in predicating the plaintiff's alimony award in part on her custodial status. 120 N.C. App. at 420, 462 S.E.2d at 851.

30. *See infra* notes 135-39 and accompanying text.

31. *Fink*, 120 N.C. App. at 413, 462 S.E.2d at 847.

32. *Id.*

33. *Id.* at 414, 462 S.E.2d at 847.

34. *Id.* Mr. Fink was also ordered to maintain medical insurance for the child and to defray certain orthodontic expenses of the child. *Id.* Under the applicable Child Support Guidelines, Mr. and Ms. Fink's monthly gross incomes were specified as $3,179 and $1,426, respectively. *Id.*; *see infra* notes 115-26 and accompanying text (discussing the statutory Child Support Guidelines). In June 1993, the parties entered into a consent judgment regarding the equitable distribution of their marital property. *Fink*, 120 N.C. App. at 414, 462 S.E.2d at 847.

mony under section 50-16.2 of the North Carolina General Statutes,[35] the focus of the subsequent alimony hearing was the issue of Ms. Fink's dependency.[36]

After determining both the plaintiff's and the defendant's monthly net incomes and expenses,[37] the trial court concluded that Ms. Fink had "a shortfall of $562.00 per month in meeting her own needs,"[38] and that Mr. Fink could contribute $409 per month to Ms. Fink to reduce this shortfall.[39] On appeal, the defendant argued that the trial court erred by including a sum for child support in the amount of the plaintiff's needs.[40] Mr. Fink's argument focused on the fact that a child support order had already been entered under the applicable Child Support Guidelines.[41] Because the trial court calculated the plaintiff's own monthly child-care expenditures to be $767—

35. This statute was repealed by the enactment of the new alimony legislation in June, 1995. However, the new alimony legislation provides that in awarding alimony, a court should consider whether such an award would be equitable "after considering all relevant factors, including . . . [t]he marital misconduct of either of the spouses." N.C. GEN. STAT. § 50-16.3A (a), (b)(1) (1995). The term "marital misconduct" is defined in § 50-16.1A to include the same factors that were listed as grounds for an alimony award to a dependent spouse in former § 50-16.2 (repealed 1995).

36. *Fink,* 120 N.C. App. at 414, 462 S.E. 2d at 847. At the alimony hearing, the court also considered whether Ms. Fink had committed acts that should disallow or reduce any alimony otherwise payable. *Id.* Because the trial court's ruling on this issue was not appealed by Mr. Fink, it will not be further considered.

37. The trial court first determined that the defendant had a net monthly income of $2,099, and then established that he had "reasonable needs for his own support and maintenance" of $1,088 per month. *Id.* at 415, 462 S.E.2d at 848. The court also found that, after subtracting from his monthly net income the amount in child support and other expenses he provided directly for the child, the defendant had $1,497 per month with which to meet his needs. *Id.* at 416, 462 S.E.2d at 848. This left the defendant with a surplus of $409 per month ($1,497 less $1,088). *Id.* at 417, 462 S.E.2d at 849.

Turning to the needs of the parties' child, the trial court determined that "[i]n addition to medical insurance coverage and other needs which the defendant directly provides for [her], the Child has other reasonable needs for her support and maintenance of $1,192.00 per month." *Id.* at 415, 462 S.E 2d at 848. The court subtracted the amount paid by Mr. Fink under the Child Support Guidelines ($425 per month) from the amount of the child's needs ($1,192 per month) and found that Ms. Fink "provides the remaining $767.00 per month." *Id.* at 416, 462 S.E.2d at 848.

38. The trial court calculated Ms. Fink's reasonable needs to be $1,055 per month. *Id.* at 416, 462 S.E.2d at 848. It then determined her shortfall by subtracting that amount and the $767 that it found she provided to the parties' child each month from her net monthly income ($1,260). *Id.* The court thus concluded that Ms. Fink had "a shortfall of $562 per month in meeting her own needs." *Id.*

39. *Id.* at 417, 462 S.E.2d at 849. In reaching this figure, the trial court simply applied the amount it had earlier determined as Mr. Fink's surplus per month. *See supra* note 37.

40. Although the opinion does not specify the amount complained of by Mr. Fink, it appears to have been the $767 per month that the trial court found to have been expended by Ms. Fink for the care of the child. *See supra* note 37.

41. *Fink,* 120 N.C. App. at 417, 462 S.E.2d at 849. For a discussion of the Guidelines and an analysis of their application, see *infra* notes 115-26 and accompanying text.

an amount exceeding her presumed child support obligations under the Guidelines—the defendant argued that she was getting the benefit of this higher allocation of child support expenditures because the higher allocation affected her entitlement to alimony under the trial court's calculations.[42]

In considering the defendant's argument, the court of appeals first interpreted the meaning of "dependency" as one of the statutory prerequisites for alimony.[43] The applicable North Carolina statute defined a "dependent" spouse as one " 'who is actually substantially dependent upon the other spouse for his or her maintenance and support or is substantially in need of maintenance and support from the other spouse.' "[44] The court of appeals then alluded to the hazy distinction between the "actually substantially dependent" and the "substantially in need" standards.[45] Quoting the North Carolina Supreme Court decision *Williams v. Williams*,[46] the court explained,

> "Actually substantially dependent" means "the spouse seeking alimony must have actual dependence on the other in order to maintain the standard of living in the manner to which that spouse became accustomed during the last several years prior to separation." . . . "Substantially in need of" [support] means that the dependent spouse "would be unable to maintain his or her accustomed standard of living (established prior to separation) without financial contribution from the other." . . . [I]t appears that the trial court based its determination of dependency upon plaintiff's being substantially in need of defendant's support.[47]

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42. *Fink*, 120 N.C. App. at 417, 462 S.E.2d at 849. Compared to the rigid mathematical formula of the Guidelines, the trial court's method of calculation was undoubtedly more uncertain and open to discretionary subjectivity. *See infra* notes 122-26 and accompanying text (discussing the Guidelines' income-sharing model).

43. *Fink*, 120 N.C. App. at 417, 462 S.E.2d at 849. N.C. GEN. STAT. § 50-16.2 (repealed 1995) provided that only a dependent spouse was entitled to alimony in North Carolina. The new alimony legislation effective October 1, 1995 retains this requirement. *See* N.C. GEN. STAT. § 50-16.3A(a) (1995) (providing in part that "[t]he court shall award alimony to the dependent spouse upon a finding that one spouse is a dependent spouse and the other is a supporting spouse, and that an award of alimony is equitable after considering all relevant factors."); *see also infra* notes 98-111 and accompanying text (discussing the new alimony legislation).

44. *Fink*, 120 N.C. App. at 417, 462 S.E.2d at 849 (quoting N.C. GEN. STAT. § 50-16.3 (repealed 1995)). The new alimony statute retains this language. *See* N.C. GEN. STAT. § 50-16.1A (1995).

45. *Fink*, 120 N.C. App. at 417, 462 S.E.2d at 849.

46. 299 N.C. 174, 261 S.E.2d 849 (1980). For a discussion of *Williams*, see *infra* notes 80-95 and accompanying text.

47. *Fink*, 120 N.C. App. at 417, 462 S.E.2d at 849 (quoting *Williams*, 299 N.C. at 180-82, 261 S.E.2d at 854-55 (citations omitted)).

The court of appeals then turned to a closer analysis of the "substantially in need" standard. Again relying on the *Williams* case, the court explained that whether a spouse meets this dependency standard must be determined by construing North Carolina General Statute section 50-16.3 *in pari materia* with the terms of former General Statute section 50-16.5 which listed factors for the trial court to consider in determining the amount of alimony.[48] Using these factors as its guide, the court of appeals then followed the three-part test set forth in *Williams*. Under the first part of the *Williams* test, the trial court must determine the pre-divorce social and economic standard of living of the parties.[49] Second, the court must "determine the present and prospective earning capacity [of each spouse] and any other '*condition*' (such as health and *child custody*)."[50] Finally, the trial court must determine whether the spouse seeking alimony "has a demonstrated need for financial contribution from the other spouse in order to maintain the [pre-divorce] standard of living."[51]

Under this three-part test, the court noted its obligation to determine "whether child care expenses incurred by a custodial spouse should be taken into account in a finding of dependency, i.e., whether the expenses incurred as a caregiver is one of the factors contemplated in *Williams* and by our alimony statutes."[52] In reaching an affirmative answer to this question, the court relied on two family law authorities, Homer Clark[53] and Lenore Weitzman,[54] and found explicit authority for the recognition of child-care responsibilities in setting alimony awards.

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48. *Id.* at 418, 462 S.E.2d at 849-50. N.C. GEN. STAT. § 50-16.5 (repealed 1995) provided, "[a]limony shall be in such amount as the circumstances render necessary, having due regard to the estates, earning, earning capacity, *condition*, accustomed standard of living of the parties, and other facts of the particular case." *Id.* (emphasis added). See *infra* notes 55-57 and accompanying text for a discussion of the court's interpretation of the term "condition."

49. *Fink*, 120 N.C. App. at 418, 462 S.E.2d at 850.

50. *Id.* (quoting *Williams*, 299 N.C. at 182-83, 261 S.E.2d at 855-56) (emphasis added).

51. *Id.* (quoting *Williams*, 299 N.C. at 182-83, 261 S.E.2d at 855-56).

52. *Id.* at 419, 462 S.E.2d at 850.

53. *Id.* (" 'The first and most important of all the functions of alimony relates to the care of children.' ") (quoting HOMER CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES § 17.5, at 253 (2d ed. 1987)).

54. The court noted Clark's analysis of Weitzman's suggestion that even if a divorced custodian works outside the home and receives child support, it remains likely that the custodian's income will be insufficient to support himself or herself and the children. *Id.* (citing CLARK, *supra* note 53, at 253-54 (citing Lenore Weitzman, *The Economics of Divorce: Social and Economic Consequences of Property, Alimony, and Child Support Awards,* 28 UCLA L. REV. 1181 (1981))). "In this situation [he or] she should be entitled to alimony as a way of providing for the care of the children in a family setting." *Id.* (citing CLARK, *supra* note 53, at 254).

With this in mind, the court found further authority to consider child care obligations within the three-part *Williams* test itself.[55] Specifically, the court noted that in the second part of its test, the *Williams* court parenthetically noted "child custody" as an example of a "condition" affecting the determination of dependency.[56] From this analysis, the court of appeals found judicial authority to consider the *financial* responsibilities borne by custodial parents in determining the standard of living to which they were accustomed during their marriage.[57]

The court found further statutory authority in the language of former General Statute section 50-16.5(b), which allowed the court to consider "other facts of the particular case" in determining dependency.[58] The court cited previous North Carolina decisions interpreting the "other facts" language to include: the "length of the marriage and contributions 'to the financial status of the family over the years,' "[59] "marital fault,"[60] "income tax consequences,"[61] "and the effects of inflation."[62] The court concluded that a custodial parent's "care-giving and monetary" obligations were consistent with such examples.[63]

The court found a final type of authority by comparing its holding with the case law of other jurisdictions "which allow consideration of such obligations in the dependency decision as well as in determining the amount of support awarded."[64] It also considered statutes of other states that expressly include custodial obligations among the fac-

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55. *Id.* at 419, 462 S.E.2d at 850.

56. *Id.*; *see supra* note 50 and accompanying text.

57. *Fink*, 120 N.C. App. at 419, 462 S.E.2d at 850. In contrast, the dissent argued that the custodial responsibilities considered in an alimony determination should be those "spiritual, intellectual, and emotional" in nature, but not "financial." *Id.* at 428, 462 S.E.2d at 855 (Wynn, J., dissenting); *see infra* notes 72-75 and accompanying text.

58. *Fink*, 120 N.C. App. at 420, 462 S.E.2d at 851; *see also supra* note 48 (setting forth the language of former N.C. GEN. STAT. § 50-16.5 (repealed 1995)).

59. *Fink*, 120 N.C. App. at 420, 462 S.E.2d at 851 (citing Williams v. Williams, 299 N.C. 174, 185, 261 S.E.2d 849, 857 (1980)).

60. *Id.* (citing *Williams*, 299 N.C. at 187-88, 261 S.E.2d at 858).

61. *Id.* (citing Perkins v. Perkins, 85 N.C. App. 660, 667, 355 S.E.2d 848, 852, *disc. rev. denied*, 320 N.C. 633, 360 S.E.2d 92 (1987)).

62. *Id.* (citing Roberts v. Roberts, 38 N.C. App. 295, 302-03, 248 S.E.2d 85, 89 (1978)).

63. *Id.*

64. *Id.* at 421, 462 S.E.2d at 851-52. For examples of some of these comparative jurisdictions, see, *e.g.*, Wolfburg v. Wolfburg, 606 A.2d 48, 51-52 (Conn. App. Ct. 1992); Hammonds v. Hammonds, 597 So.2d 653, 655 (Miss. 1992); Barber v. Barber, 360 S.E.2d 574, 576 (Ga. 1987); McNally v. McNally, 516 So.2d 499, 501 (Miss. 1987); Fields v. Fields, 343 S.W.2d 168, 170 (Mo. Ct. App. 1960).

tors pertinent to a determination of alimony awards.[65] The court concluded that "[w]hile North Carolina's alimony statute, unlike the foregoing, does not contain express language which specifically allows consideration of the custodial spouse's care-giving obligations to the minor children,[66] our holding is nonetheless consistent with the 'overriding principle' of 'fairness' which guides the determination of alimony."[67]

Disagreeing with the majority's conclusion that "child care expenses incurred by a custodial spouse should be taken into account in a finding of dependency in the determination of alimony," Judge Wynn dissented.[68] He first attacked the majority's willingness to adopt from the "parenthetical[ ] indicat[ion]" in *Williams* the notion that child custody could be an "other condition" that trial courts may

65. *Fink*, 120 N.C. App. at 421-22, 462 S.E.2d at 852. For examples of these state statutes, see, *e.g.*, IOWA CODE ANN. § 598.21(3)(e) (West 1995); LA. CIV. CODE ANN. art. 112 (A)(2)(f) (West 1993); N.Y. DOM. REL. LAW. § 236[b][6][a][6] (McKinney 1986); OR. REV. STAT. § 107.105(1)(d)(g) (1993); 23 PA. CONS. STAT. ANN. § 3701(b)(7) (1991); W. VA. CODE § 48-2-16(b)(15) (1995); WIS. STAT. ANN. § 767.26(5) (West 1993); *see also supra* note 18 for a list of such states.

66. *Fink*, 120 N.C. App. at 422, 462 S.E.2d at 852. The court's language is especially significant because, as discussed later, the new alimony statute, effective October 1, 1995, *explicitly* lists custodial obligations as a factor to consider in determining the amount of alimony awards, thus joining the ranks of those states listed *supra* notes 17 and 18. Although this case was decided over two weeks after the effective date of the new statute, the court was unable to point to the new statute as authority as it was inapplicable to this case. *See supra* note 22. Clearly, the court wished to justify its holding on public policy grounds, perhaps lending judicial support to the new statute, to be relied upon when the court does in fact face a *Fink*-type issue under the new legislation. See *infra* notes 98-111 and accompanying text for a discussion of the new alimony statute.

67. *Fink*, 120 N.C. App. at 422, 462 S.E.2d at 852 (citing Marks v. Marks, 316 N.C. 447, 460, 342 S.E.2d 859, 867 (1986)). At this point in the opinion, the court turned to the defendant's second assignment of error—that regardless of the definition of "dependency," the trial court erred by establishing its own calculation of the amount that the plaintiff contributed to the parties' child per month, because when determining the amount the defendant contributed, it simply adopted the amount that had been statutorily calculated under the Child Support Guidelines. *Id.* Because this argument raises questions concerning the often hazy distinction between custodial-premised alimony and child support, it will be discussed *infra* when the Guidelines are discussed. *See infra* notes 115-26 and accompanying text.

The defendant raised several other grounds for reversal. For example, he argued that the trial court erred by not including certain "third party payments" as part of plaintiff's income and by "excluding certain nonbinding debts as 'expenses' for the purposes of determining dependency and alimony." *See Fink*, 120 N.C. App. at 425-27, 462 S.E.2d at 854-55. Because the court of appeals cursorily disposed of these arguments upon a finding of directly-applicable precedent, these independent arguments will not be addressed. *Id.*

68. *Fink*, 120 N.C. App. at 427, 462 S.E.2d at 855 (Wynn, J., dissenting).

consider in hearing an alimony claim.[69] He found it revealing that in the fifteen years since *Williams* was decided, no North Carolina court had interpreted that language to mean that a trial court could consider child support expenses as an "other condition."[70] Judge Wynn expressed concern that by so holding in *Fink*, "the majority [today] takes that novel step and in doing so inextricably intertwines the determination of alimony dependency with the determination of child support."[71]

In Judge Wynn's view, the parenthetical reference to "child custody" in *Williams* did not compel a consideration of "child support expenses."[72] Rather, he found statutory support for a reading of "child support" to include "providing for the *financial* well-being of the child . . . , [for which] the court must calculate the expenses incurred for rearing the child,"[73] whereas "child custody" involves the responsibility of providing for the "*spiritual*, *intellectual*, and *emotional* development of the child."[74] Thus, he would have read the term "child custody" to compel a determination of several factors independent from those financial in nature.[75]

Judge Wynn then noted the potential long-range effects he felt the majority's decision may have on the law of alimony and child support, as well as on the circumstances of this particular case.[76] For example, he noted that in this case, the Finks' child would turn eighteen years old in 1996, at which time any child support expenses the de-

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69. *Id.* (Wynn, J., dissenting); *see supra* notes 48-51 and accompanying text (discussing the *Williams* three-part test and its parenthetical reference to child custody as an "other condition").

70. *Fink*, 120 N.C. App. at 427, 462 S.E.2d at 855 (Wynn, J., dissenting).

71. *Id.* (Wynn, J., dissenting). This is somewhat related to one of the defendant's arguments raised on appeal, in which he assigned error to the trial court's failure to adhere to the Guidelines in determining the amount of child care expenses attributed to the plaintiff. For a discussion of this argument and of the statutory Guidelines, see *infra* notes 115-26 and accompanying text.

72. *Fink*, 120 N.C. App. at 427-28, 462 S.E.2d at 855-56 (Wynn, J., dissenting).

73. *Id.* at 427, 462 S.E.2d at 855 (Wynn, J., dissenting) (emphasis added). Judge Wynn found support for this interpretation of the term "child support expenses" from the language of N.C. GEN. STAT. § 50-13.4, -13.1 (repealed 1995). *Fink*, 120 N.C. App. at 427, 462 S.E.2d at 855 (Wynn, J., dissenting).

74. *Fink*, 120 N.C. App. at 428, 462 S.E.2d at 855 (Wynn, J., dissenting) (emphasis added).

75. *Id.* (Wynn, J., dissenting). Judge Wynn found further support for the distinction he drew between "child support" and "child custody" through an analysis of the inherent nature of each. Specifically, he viewed custody as something that may be more of a benefit than a detriment to the custodial parent, thus constituting a "qualitative benefit" to the custodian, whereas child support is a "quantitative financial detriment" to its obligors. *Id.* at 428, 462 S.E.2d at 856 (Wynn, J., dissenting).

76. *Id.* at 428-29, 462 S.E.2d at 856 (Wynn, J., dissenting).

fendant was legally obliged to pay would typically end.[77] Alimony obligations, on the other hand, would continue until the dependent spouse remarries or dies;

> thus, Mr. Fink could potentially pay alimony under this order based on an improper deviation from the Child Support Guidelines for a time period long after his child support obligation has terminated. Accordingly, if child expenses are considered for purposes of determining permanent alimony, then such a consideration necessitates a redetermination of alimony when each child reaches the age of majority. No such result was ever contemplated by our legislature.[78]

Based upon his finding that inclusion of the child's needs in the plaintiff's alimony determination constituted reversible error, Judge Wynn dissented from that part of the majority's opinion.[79]

Although the majority in *Fink* premised its holding solely on a reading of the North Carolina Supreme Court case of *Williams v. Williams*,[80] North Carolina lower courts had grappled with the meaning of "dependency" long before *Williams* was ever decided.[81] However, the *Williams* case was the first time the North Carolina Supreme Court addressed the issue of custody in relation to alimony awards. The parties in *Williams* had been married for thirty years and had

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77. *Id.* at 428, 462 S.E.2d at 856 (Wynn, J., dissenting).

78. *Id.* (Wynn, J., dissenting). Interestingly, perhaps following the lead of the majority, Judge Wynn also neglected to mention the new alimony legislation, which *does* contemplate the consideration of child-care expenses incurred by custodial parents in a determination of that parent's entitlement to alimony. *See* N.C. GEN. STAT. § 50-16.3A(b)(7) (1995). For a discussion of the new alimony statute, see *infra* notes 99-109 and accompanying text.

79. *Fink*, 120 N.C. App. at 429, 462 S.E.2d at 857 (Wynn, J., dissenting). Judge Wynn also raised the argument addressed by the majority that the trial court erred by deviating from the Guidelines in determining the amount of child support the plaintiff expended per month. *Id.* at 429, 462 S.E.2d at 856 (Wynn, J., dissenting). For a discussion of this argument and the applicable Child Support Guidelines, see *infra* notes 115-26 and accompanying text.

80. 299 N.C. 174, 261 S.E.2d 849 (1980).

81. *See, e.g.*, Peeler v. Peeler, 7 N.C. App. 456, 172 S.E.2d 915 (1970) (addressing the issue of the dependency of a wife owning substantial property upon divorce in an action for alimony *pendente lite*). For a definition of alimony *pendente lite*, see *infra* note 104. In *Peeler*, the defendant argued that the plaintiff did not qualify for a finding of dependency under the applicable alimony statute, and that the court should hold that "to be a dependent spouse, one should not be able to exist without the aid of the other spouse." *Id.* at 461, 172 S.E.2d at 917. The court of appeals rejected this assertion, relying on the "substantially in need" language of N.C. GEN. STAT. § 50-16.1(3) to find that "[t]he mere fact that the wife has property or means of her own does not prohibit an award of alimony *pendente lite*." *Id.* at 462, 172 S.E.2d at 919 (citing Sayland v. Sayland, 267 N.C. 378, 148 S.E.2d 218 (1966)). The court concluded by emphasizing that it did "not think that the law requires that a dependent spouse should be impoverished before the court can make such an award." *Id.* (citing Mercer v. Mercer, 23 N.C. 164, 116 S.E.2d 443 (1960)).

three adult children and one minor child.[82] After finding that the defendant was the president and primary shareholder of Alfred Williams and Company in Raleigh, with a worth of $870,000 and an annual gross income of $116,660 in 1976-77, the trial court had awarded the plaintiff permanent alimony of $1,000 per month, along with possession of the parties' home, mortgage, tax and utility payments, payment of home insurance, certain medical expenses, and $4,500 per year for private school tuition for the minor child.[83] The defendant appealed, disputing the trial court's finding that his wife was either "actually substantially dependent" upon him or "substantially in need of support" from him.[84]

The supreme court began with an analysis of the meaning of the terms "dependent" and "supporting" spouse under General Statutes sections 50-16.1(3) and 50-16.1(4).[85] The court then noted that although the legislature had "not spelled out what is precisely meant by the terms 'actually substantially dependent,' 'substantially in need of,' and 'maintenance and support,' "[86] "the intent of the legislature controls."[87] Applying the plain meaning rule of statutory construction, the court found that the meaning of the term "actually substantially dependent" was "clear." The term "obviously implie[d] that the spouse seeking alimony must have actual dependence on the other in order to maintain the standard of living to which that spouse became accustomed during the last several years prior to separation."[88] After finding that the plaintiff in the *Williams* case obviously would not qualify under that standard, the court then addressed the alternative definition of dependency, the "substantially in need" standard. Conceding that this standard was not so easily construed as the "actually substantially dependent" standard, the court noted that the term "obviously refers to something less than being 'actually substantially dependent.' "[89]

To determine the meaning of this term, the court used an alternate rule of statutory construction, which provides that a legislative act should be construed as a whole, such that none of its provisions

82. *Williams*, 299 N.C. at 176, 261 S.E.2d at 852. The parties agreed prior to trial that the plaintiff should have custody of the minor child. *Id.* at 176, 261 S.E.2d at 852.

83. *Id.* at 177-78, 261 S.E.2d at 852-53.

84. *Id.* at 178, 261 S.E.2d at 853.

85. *Id.* at 179-80, 261 S.E.2d at 853-54; *see supra* notes 43-54 and accompanying text (discussing the *Fink* court's treatment of the analysis in *Williams*).

86. *Williams*, 299 N.C. at 179, 261 S.E.2d at 854.

87. *Id.* at 179-80, 261 S.E.2d at 854.

88. *Id.* at 180, 261 S.E.2d at 854.

89. *Id.*

will be deemed redundant if they can reasonably be construed otherwise.[90] Thus, interpreting the language of this provision *in pari materia* with the rest of the alimony statute, the court concluded that it was necessary to turn for guidance to General Statute section 50-16.5 providing the criteria for determining the *amount* of an alimony award.[91] This statute provided that the amount of an alimony award should be as much "as the circumstances render necessary," considering factors such as the "estates, earnings, earning capacity, condition, accustomed standard of living of the parties, and other facts of the particular case."[92]

Construing the term "substantially in need of maintenance and support" in light of the above statutory provision, the court concluded that this standard required only that the "spouse seeking alimony establish that he or she would be unable to maintain his or her accustomed standard of living (established prior to separation) without financial contribution from the other."[93] The court then set forth its test, as later adopted in *Fink*, for determining whether a spouse has met the "substantial need" standard for dependency.[94] As noted earlier, it was in this test that the supreme court parenthetically listed "child custody" as a "condition" that could be considered in the dependency analysis.[95]

Although until *Fink* no North Carolina case since *Williams* addressed the consideration of child custody in awarding alimony to a dependent spouse, many cases have applied the *Williams* test for determining whether a spouse is "substantially in need of maintenance and support" from the other spouse.[96] Now, with the enactment of the new alimony legislation effective October 1, 1995 which explicitly lists child custody as a relevant factor, it is clear that North Carolina

90. *Id.* at 180-81, 261 S.E.2d at 854.

91. *Id.* at 181, 261 S.E.2d at 854-55.

92. N.C. GEN. STAT. § 50-16.5(a) (repealed 1995).

93. *Williams*, 299 N.C. at 181-82, 261 S.E.2d at 855.

94. *See supra* notes 48-51 and accompanying text (setting forth the *Williams* test). The test as set forth in *Williams* actually included a fourth part, which consisted of a consideration of the "financial worth or 'estate' of both spouses." *See Williams*, 299 N.C. at 182-84, 261 S.E.2d at 855-56. Because this factor has only been invoked by the courts in cases like *Peeler v. Peeler*, 7 N.C. App. 456, 461-62, 172 S.E.2d 915, 917-19 (1970), and *Williams*, in which the dependent spouse herself has had independent wealth, it need not be addressed for it was not applicable to the situation of Ms. Fink.

95. *Williams*, 299 N.C. at 182-83, 261 S.E.2d at 855-56; *see also supra* notes 55-57 and accompanying text (discussing the court's parenthetical reference to "child custody").

96. *See, e.g.*, Lamb v. Lamb, 103 N.C. App. 541, 548, 406 S.E.2d 622, 626 (1991); Perkins v. Perkins, 85 N.C. App. 660, 665-66, 355 S.E.2d 848, 852, *disc. rev. denied*, 320 N.C. 633, 360 S.E.2d 92 (1987); Talent v. Talent, 76 N.C. App. 545, 548, 334 S.E.2d 256, 258 (1985); Capps v. Capps, 69 N.C. App. 755, 758, 318 S.E.2d 346, 348 (1984).

courts will consider custodial obligations in determining alimony awards more frequently.[97] With this expected rise in consideration of the issues addressed by *Fink*, it is necessary to examine the new alimony legislation in greater detail to determine what effect, if any, it will have on future alimony awards.[98]

In addition to making several alterations of the existing alimony statute, the new legislation repealed certain provisions of the former statute[99] and replaced them with three new sections.[100] The first, North Carolina General Statute section 50-16.1A, is the new definitional section of the alimony statute, which retains most of the old definitions with some alterations and additions.[101] The second new provision is section 50-16.2A, which creates an entirely new category, "postseparation support."[102] Under section 50-16.1A(4), "postseparation support" is defined as "spousal support to be paid until the earlier of either the date specified in the order of postseparation support, or an order awarding or denying alimony."[103] This new type of support effectively replaces the old "alimony *pendente lite*"[104] that was used

97. *See* N.C. GEN. STAT. § 50-16.3A(7) (1995).

98. *See generally* Wiley P. Wooten, *Alimony Legislative Changes*, *in* NORTH CAROLINA ACADEMY OF TRIAL LAWYERS, FAMILY LAW: LEGISLATIVE UPDATE SEMINAR AND SECTION MEETING 1 (1995) (discussing the history and enactment of the new statute). The history behind the enactment of the new legislation dates back to the late 1980s, when the Family Law Section of the North Carolina Bar Association (NCBA) charged an Alimony Committee with the task of revising and rewriting portions of North Carolina's alimony statute. *Id.* The committee developed an "alimony bill" which was met with approval by both the Family Law Section and the Board of Governors of the NCBA in 1993. *Id.* Later that year, the bill was introduced in the North Carolina House of Representatives. *Id.* Before passing the House, the bill was substantially revised, and was then introduced in the Senate. *Id.* The Family Law Section of the NCBA, however, decided that the revisions proposed by the House of Representatives were unacceptable, and decided to withdraw the bill from Senate consideration. *Id.* In redrafting the alimony bill, the Alimony Committee attempted to incorporate both its original objectives and those expressed by the House. *Id.* In making its revisions, the Alimony Committee worked closely with the legislature's Family Issues Committee and developed a slightly revised bill. *Id.* at 1-2. This bill eventually received approval from both the House and the Senate, becoming effective on October 1, 1995. *Id.* at 2.

99. N.C. GEN. STAT. § 50-16.1 (repealed 1995) ("Definitions"); *id.* § 50-16.2 (repealed 1995) ("Grounds for Alimony"); *id.* § 50-16.3 (repealed 1995) ("Grounds for Alimony Pendente Lite").

100. N.C. GEN. STAT. § 50-16.1A (1995) ("Definitions"); *id.* § 50-16.2A (1995) ("Postseparation Support"); *id.* § 50-16.3A (1995) ("Alimony").

101. *See, e.g.*, N.C. GEN. STAT. § 50-16.1A(1) (1995) (allowing a judge to make an alimony award for a specified or indefinite time).

102. N.C. GEN. STAT. § 50-16.2A (1995).

103. § 50-16.1A(4).

104. "Alimony *pendente lite*" is alimony ordered to be paid pending the final judgment of divorce in an action for divorce. N.C. GEN. STAT. § 50-16.1(2) (repealed 1995). According to the North Carolina Court of Appeals:

prior to the new legislation to achieve essentially the same result.[105] The third and final new provision, section 50-16.3A of the North Carolina General Statutes, is the most relevant to this discussion.[106] This section significantly rewrites and revises the rules for the entitlement, amount, and duration of alimony awards.[107] Specifically, joining the ranks of a host of other states that have enacted similar provisions,[108] this statute provides a list of factors to be considered in determining the amount, duration, and manner of alimony payments. The factors include "[t]he extent to which the earning power, expenses, or financial obligations of a spouse will be affected by reason of serving as the *custodian of a minor child.*"[109]

Thus, North Carolina statutory law now expressly directs[110] its state courts to consider the caretaking obligations of a custodial parent in determining the amount and duration of alimony awards. Additionally, the language of the statute clearly embodies a financial or monetary-based definition of "child custody," as opposed to the "emotional, spiritual, and intellectual"-based definition asserted by Judge Wynn.[111] Upon first impression, it appears that the issues raised in *Fink* regarding the applicability of custodial expenses to alimony determinations will be easily resolved in future litigation under

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> The purpose of the speedy proceedings for alimony *pendente lite* [wa]s to give the dependent spouse subsistence and counsel fees pending trial of the action on its merits. This result place[d] the dependent spouse on a more nearly equal footing with the supporting spouse for purposes of preparing for and prosecuting the dependent spouse's claim.

Black v. Black, 30 N.C. App. 403, 404, 226 S.E.2d 858, 859, *appeal dismissed*, 290 N.C. 775, 229 S.E.2d 31 (1976).

105. One significant distinction between "alimony *pendente lite*" and "postseparation support" lies in the potential creation of a "postseparation support" window. Under the definition of postseparation support, if an effective date of termination for postseparation support payments is specified in neither the postseparation support order, nor in the order awarding or denying alimony, the postseparation support payments may continue indefinitely if the dependent spouse never sues for alimony (or at least until an effective alimony award would have terminated, that is, when the dependent spouse remarried, cohabitated, or died). *See* N.C. GEN. STAT. § 50-16.1A(4) (1995). Alimony *pendente lite*, on the other hand, was expressly limited to an amount paid "pending the final judgment of divorce . . . ." *See* N.C. GEN. STAT. § 50-16.1(2) (repealed 1995).

106. N.C. GEN. STAT. § 50-16.3A (1995).

107. § 50-16.3A.

108. *See, e.g.*, *supra* notes 17 and 18 (listing the statutes of other such states).

109. N.C. GEN. STAT. § 50-16.3A(b)(7) (1995) (emphasis added).

110. The preamble of § 50-16.3A(b) reads, "In determining the amount, duration, and manner of payment of alimony, the court *shall* consider all relevant factors, including [the factors listed above]." *Id.* § 50-16.3A(b) (emphasis added).

111. *Fink*, 120 N.C. App. at 428, 462 S.E.2d at 855; *see also supra* notes 72-75 and accompanying text (discussing Judge Wynn's disapproval of the majority's financially-based interpretation of child custody).

the new alimony statute. Moreover, the legislation supports the result reached in *Fink*, buttressing the concerns expressed in that decision with a precise statutory backbone.

However, this new statutory language and the approach adopted by the *Fink* court arguably blurs the fine line between child support and alimony. Therefore, it is necessary to analyze the distinction between these two remedies, and to consider whether custody-based alimony has obliterated any part of that distinction. On appeal, Calvin Fink argued that the trial court erred by not referring " 'to the presumptive guideline child support schedule to determine the amount of Robbie Fink's income from her own employment attributable to her *pro rata* share of the child support.' "[112] In response, the court of appeals noted that because a previous order had already been entered establishing the defendant's child support obligation under the Guidelines, the parties were collaterally estopped from asserting amounts different than those determined under the Guidelines.[113] The court thus agreed with the defendant's argument, finding that "[a]s child support under the Guidelines is conceived as a 'shared parental obligation' and defendant's contribution was established by application of those Guidelines, the trial court erred by not utilizing the same methodology in its calculation of plaintiff's contribution."[114]

To understand and better appreciate the court of appeals' holding on this point, a brief explanation of the basis of and history behind the Child Support Guidelines is necessary. Prior to the enactment of the Guidelines, child support awards varied across the country signifi-

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112. *Fink*, 120 N.C. App. at 423, 462 S.E.2d at 853. As discussed *supra* note 37, the trial court calculated the child's reasonable monthly needs to be $1,192. *Id.* at 415, 462 S.E.2d at 848. The trial court then subtracted from that amount the $425 per month paid by the defendant under the Child Support Guidelines and concluded that the remaining $767 of the child's needs was provided for by the plaintiff. *Id.* at 416, 462 S.E.2d at 848.

113. *Id.* at 423, 462 S.E.2d at 852-53 (citing Burton v. City of Durham, 118 N.C. App. 676, 680, 457 S.E.2d 329, 331-32, *disc. rev. denied and cert. denied*, 341 N.C. 419, 461 S.E.2d 756 (1995)).

114. *Id.* at 424, 462 S.E.2d at 853. Judge Wynn agreed with this finding by the majority in his dissent:

> [W]hen the trial court included the minor child's "needs" of $767.00 in its alimony order, this determination had the effect of rendering two child support orders. A child support consent order had already been entered in accordance with the child support guidelines. That order contained a finding that no deviation from the . . . guidelines was justified. Increasing Mrs. Fink's claimed personal needs and expenses by including non-guideline expenses of the minor child resulted in an increase in the amount of child support that Mr. Fink was ordered to pay, although it was denominated "alimony." As such, it is tantamount to modifying the child support order without a motion to modify having been filed and without any evidence or the required findings to justify a deviation from the guidelines.

Id. at 429, 462 S.E.2d at 856 (Wynn, J., dissenting).

cantly. This discrepancy was attributable to the variety of factors that jurisdictions considered, and to the inherent discretion that judges exercise in making case-by-case child support awards.[115] In an effort to achieve greater uniformity of child support awards and their enforcement, Congress enacted the Child Support Enforcement Amendments in 1984, which required all states to develop guidelines for determining child support by October 1, 1987.[116] States retained discretion, however, to decide whether the Guidelines would be binding.[117] As a result, child support awards continued to be inconsistent.[118]

Congress responded to this continuing discrepancy by enacting the Family Support Act of 1988, which required states to establish and enforce guidelines for child support awards.[119] Several different guideline formulas emerged and were adopted by various states.[120] These formulas included the flat percentage method, the income shares model, and the Delaware Melson method.[121]

Of these three, the income shares model has become the most widely used formula, and is the approach that North Carolina has adopted.[122] This formula accounts for the income of both parents in an attempt to approximate the standard of living the child would have enjoyed had the parents remained together.[123] First, a preliminary

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115. *See* JOHN DE WITT GREGORY ET AL., UNDERSTANDING FAMILY LAW 265 (1993).

116. North Carolina complied with this federal law by enacting N.C. GEN. STAT. § 50-13.4(c1) (1995). *See* LLOYD T. KELSO, NORTH CAROLINA DIVORCE, ALIMONY, AND CHILD CUSTODY § 10-3, at 133-36 (3d ed. 1995).

117. *See* Victoria Vazquez, Note, *Evaluation of the New York Child Support Standards Act: Have the Guidelines Really Made a Difference?*, 4 J. L. & POL'Y 279, 284 (1995).

118. GREGORY, *supra* note 115, at 265.

119. *See* Vazquez, *supra* note 117, at 284-85. This law requires the Guidelines to be applied as a rebuttable presumption of the amount of child support awarded. 42 U.S.C. § 667(b)(1), (2) (1994). Under the direction of the statutory mandate in § 50-13.4(c1), the North Carolina Conference of District Court Judges adopted Guidelines effective August 1, 1991; some subsequent amendments took effect on October 1, 1994. *See* KELSO, *supra* note 116, § 10-3, at 135.

120. *See* GREGORY, *supra* note 113, at 265.

121. *Id.* The flat percentage and Delaware Melson methods are less frequently adopted than the income shares method. *Id.* Under flat percentage guidelines, the amount of child support is based on the income of the obligor and the number of children, without consideration of the custodial parent's income or any extraordinary expenses of the child. *Id.* The Delaware Melson guidelines formula, on the other hand,

> is based on the principle that the basic needs of a person's children must be met before the parent should be allowed to retain any income beyond that necessary to satisfy the parent's minimum needs. . . , presum[ing] that excess income should be shared to allow children to benefit from an absent parent's higher standard of living.

Id. at 266.

122. *See, e.g.*, Cohen v. Cohen, 100 N.C. App. 334, 342, 396 S.E.2d 344, 348 (1990).

123. GREGORY, *supra* note 115, at 266.

child support amount is calculated based on the parent's combined income and child-care expenses.[124] This estimate is then adjusted and modified with items such as work-related child-care costs, health insurance premium costs for the minor child, and extraordinary expenses for children with special needs.[125] Finally, the parents are expected to contribute to the aggregate child support obligation in a *pro rata* amount of their respective gross incomes.[126]

Because of the presumptive nature of child support calculations rendered under the statutory guidelines, it is clear that in *Fink* the trial court overstepped its boundaries by failing to adopt those calculations in determining the amount contributed by Ms. Fink to the support of the parties' child. Thus, it remains to be determined whether the court of appeals was justified in holding that the custodial status of a spouse may *ever* be considered in finding that spouse dependent and thus deserving of an award of alimony.

Although the type of alimony contemplated in *Fink* closely resembles traditional child support,[127] several justifications have been offered for such awards of custodial-based alimony. First, the court of appeals in *Fink* itself noted that

> where family dissolution occurs, one of the policies of domestic relations law is "to make as easy and as equitable an adjustment as possible with due regard to the interests of the parties, society, and the state." Children, as part of "the family unit," are no less affected by divorce than separating spouses, society, or the state. We therefore hold that custodial responsibilities constitute a "condition" to be considered by the trial court in its determination of dependency so as to effect as equitable an adjustment as possible, with due regard to all affected interests.[128]

Likewise, it has been suggested that the fundamental premise behind the federal government's emphasis on uniform and presumptive statutory child support was the belief that such measures would help ease

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124. *Id.*

125. *Id.*

126. *Id.*; Vazquez, *supra* note 117, at 288-89.

127. The majority in *Fink* expressed its own concern on this matter when it stated: "[A]limony is payment for support of a former spouse and child support is payment for support of a minor child[,] ... [and] the two must be kept separate when the court determines the appropriate awards as to each[;] the distinction between the two kinds of payments is easily blurred, particularly when the child for whom the support is needed resides primarily with the recipient of the alimony." *Fink*, 299 N.C. App. at 420, 462 S.E.2d at 851 (quoting Wolfburg v. Wolfburg, 606 A.2d 48, 52 (Conn. App. Ct. 1992)).

128. *Fink*, 120 N.C. App. at 420-21, 462 S.E.2d at 851 (citations omitted).

the devastating economic effects of divorce on dependent spouses and their children.[129] This was coupled with the recognition that the economic burdens on custodial spouses had not theretofore been remedied by alimony awards, the latter being awarded too infrequently or in an amount inadequate to meet the spouse's needs.[130] However, the Child Support Guidelines have not by themselves ended the disparity in the standard of living between the non-custodian and the custodian.[131]

Furthermore, traditional (non-custodial based) alimony payments do not resolve the inadequacies attributed to child support awards under the Guidelines. For this reason, it seems justified that custodial obligations and care-giving expenses should be directly considered in setting alimony awards, even though alimony awards under such a modified standard would tend to blur the distinction between alimony and child support. Two arguments have been offered for such a consideration:

1. The standard of living of the custodian and children are inextricably intertwined, and to address increasing the children's standard of living without considering the custodian's financial circumstances at the same time is not possible.
2. The custodian makes an enormous non-monetary contribution to the upbringing of the children and suffers a reduction in his or her own earning capacity as a result.[132]

In an effort to respond to such concerns about the post-divorce financial burden faced by child custodians, North Carolina has decided to consider custodial obligations in the determination of a dependent spouse's alimony entitlement. And if there is doubt as to the

129. *See* Dodson, *supra* note 11, at 27-37.

130. *See supra* notes 9-14 and accompanying text (discussing the fact that custodial spouses sacrifice higher wage-earning opportunities in order to allow time for child rearing, but few receive alimony).

131. Dodson, *supra* note 11, at 30. The author cites three reasons for this phenomenon. First, the estimates of child-care expenses made during the marriage under the Guidelines are understated, and such expenses increase post-divorce. Second, these estimates do not take into account the non-monetary care-giving responsibilities of the custodian. Third, the Guidelines do not address the reality that the child's standard of living is directly determined by that of the custodian and his or her household. Because the Guidelines thus do not consider the financial situation of the custodian, the results achieved thereunder are skewed. *Id.*

132. *Id.* at 35-36.

strength of the new legislative provision so providing,[133] the judiciary has indicated its willingness to back it.[134]

While one can conclude that future issues of the type raised in *Fink* will be easily resolved by judicial resort to statutory requirements and case law precedent, the two independent measures have not yet been tested together. Thus, it remains to be seen whether discrepancies between the language of *Fink* and that of the statutory test will allow some flexibility for a lower court that is determined to deny an alimony award to a particular claimant. For example, the *Fink* court held that a spouse's status as a custodian could constitute a *factor* in finding that spouse dependent,[135] which is in turn a prerequisite to an award of alimony.[136] The new alimony statute, however, allows consideration of custodial status as a factor in determining the *amount* and *duration* of alimony, presumably only after the spouse has already met the independent burden of dependency.[137] In addition, the statute lists custodial responsibilities as a relevant factor in finding an award of alimony equitable, also a prerequisite to an award under the statute.[138] Again, however, the court will only arrive at a determination of the "equity" of an alimony award after already having found the claimant a dependent spouse.[139] Thus, it is arguable that the hold-

133. *See* N.C. GEN. STAT. § 50-16.3A(b)(7) (1995); *see also supra* notes 98-111 and accompanying text (discussing the new alimony legislation).

134. *See Fink*,120 N.C. App. at 422, 462 S.E.2d at 852 ("[E]xpress language which specifically allows consideration of the custodial spouse's care-giving obligations to the minor child . . . is . . . consistent with the 'overriding principle' of 'fairness' which guides the determination of alimony."); *see also supra* text of note 66 (suggesting that the *Fink* holding lends judicial support to the new alimony statute).

135. *Id.* at 421, 462 S.E.2d at 851 ("We . . . hold that custodial responsibilities constitute a 'condition' to be considered by the trial court in its determination of dependency.").

136. *See* N.C. GEN. STAT. § 50-16.3A(a) (1995) ("[T]he court shall award alimony to the dependent spouse upon a finding that one spouse is a dependent spouse, [and] that the other spouse is a supporting spouse."); *see also supra* notes 43-51 and accompanying text.

137. *See* N.C. GEN. STAT. § 50-16.3A(b), (b)(7) (1995) ("In determining the amount, duration, and manner of payment of alimony, the court shall consider all relevant factors, including . . . [t]he extent to which the earning power, expenses, or financial obligations of a spouse will be affected by reason of serving as the custodian of a minor child.").

138. N.C. GEN. STAT. § 50-16.3A(a) (1995) provides in part: "The court shall award alimony to the dependent spouse upon a finding that one spouse is a dependent spouse . . . *and* that an award of alimony is equitable after considering all relevant factors, *including those set out in subsection (b) of this section.*" *Id.* § 50-16.3A(a) (emphasis added). Subsection (a) thus incorporates by reference subsection (b)'s list of "relevant factors," one of which is custodial expenses and obligations. *See supra* note 137 (listing custodial obligations as one such relevant factor in determining the amount, duration and manner of payment of alimony).

139. *See supra* note 138 (providing the language of § 50-16.3A(a)). The use of the conjunction "and" in the language of subsection (a) clearly indicates that a court must find *both* that the claimant spouse is a dependent *as well as* that an award of alimony to her would be equitable.

ing in *Fink* went a step beyond the approach embodied in the new alimony legislation by allowing custodial obligations to factor into the preliminary finding of dependency.

Even more likely, however, the two independent measures will complement each other, allowing a court the flexibility to rely on one or the other, or both. For example, if a claimant spouse has independent income or employment and thereby has difficulty meeting the statutory dependency requirement,[140] a court may point to the *Fink* decision as authority to consider her custodial status in meeting that requirement. Further, whether a custodial spouse establishes dependency based on *Fink* or by other evidence, a court may consider the burdens of the custodian in determining the proper amount and duration of alimony under the new legislation.[141] Although it may be impossible to predict precisely how *Fink v. Fink*[142] and the new alimony legislation[143] will be received and construed by lower courts, what is certain is that the combination of the two has brightened the future for the advancement of gender equality in North Carolina alimony law, and will hopefully continue to illuminate the path toward the defeminization of poverty among North Carolina's custodial parents.

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140. *See supra* note 136 (setting forth the language of the statutory dependency requirement).

141. N.C. GEN. STAT. § 50-16.3A (1995).

142. 120 N.C. App. 412, 462 S.E.2d 844 (1995), *disc. rev. denied*, 342 N.C. 654, 467 S.E.2d 710 (1996).

143. N.C. GEN. STAT. § 50-16.1A to -16.3A (1995).

Bromhal v. Stott: Revisiting the Court's Role in Separation Agreements in the Context of Attorneys' Fees

> *There are three parties to a marriage contract—the husband, the wife and the State.*[1]

Traditionally, courts commonly accepted the above view of the institution of marriage.[2] Indeed, even though "marriage has often been described as a civil contract, until recently it was the state, and not the parties, that set the terms of this contract."[3] Marriage was not only thought to involve the relationship between husband and wife, but also perceived as implicating larger issues of social concern and policy, issues within the prerogative of courts to control.[4] A divorce or separation provided the most difficult context in which to reconcile these competing interests. On one hand, courts were sympathetic to the separate individuals' interests in contracting the terms of their new, separate lives. On the other hand, courts felt particularly compelled to intervene in the dealings between husbands and wives at the dissolution of a marriage.[5]

However, over roughly the past twenty-five years developments in the law in most states have dramatically changed the dynamics of

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1. Ritchie v. White, 225 N.C. 450, 453, 35 S.E.2d 414, 415 (1945). The court continued, "For this reason marriage is denominated a status, and certain incidents are attached thereto by law which may not be abrogated without the consent of the third party, the State." *Id.*

2. In fact, other courts have independently stated this precise sentiment. *See, e.g.*, Fricke v. Fricke, 42 N.W.2d 500, 501 (Wis. 1950).

3. Jana B. Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1443, 1456 n.46.

4. Thomas E. Carbonneau, *A Consideration of Alternatives to Divorce Litigation*, 1986 U. ILL. L. REV. 1119, 1127-28 ("The fabric of marriage . . . consists of more than just disparate strands of contract law interwoven by the thread of party autonomy. Marriage implicates larger social interests, and transcends purely individual concerns.").

5. *Id.* at 1128. Professor Carbonneau emphasizes that "[t]he dynamics of this curious triangular association are particularly evident when the parties are terminating the personal relationship. In the name of public policy, a court of law usually intervenes at this stage to deal with disputes that ensue from the dismantling of the matrimonial association." *Id.* Professor Sally Sharp has stated that

> [r]econciling the principles of individualism and equality with the institution of marriage has never been an easy task. . . . Nowhere are the tensions between these principles more obvious than in the continuing attempts of the law to accommodate freedom to contract, the sine qua non of a laissez-faire system, with restrictions on the ability of spouses to contract with regard to dissolution of marriage.

Sally B. Sharp, *Fairness Standards and Separation Agreements: A Word of Caution on Contractual Freedom*, 132 U. PA. L. REV. 1399, 1399 (1984).

this "marriage triangle" between spouses and the state.[6] Spouses are now free to contract with respect to "virtually all issues incident to divorce," as long as the agreement adheres to basic contract principles of fairness.[7] The primary impetus for this change was the no-fault divorce movement of the 1960s,[8] which gave couples the freedom not only to choose whether and when to end their marriage, but also to determine the consequences of their divorce, financial or otherwise, through private separation agreements.[9]

North Carolina has followed the trend of other jurisdictions in transforming its divorce laws in recent decades. In addition to the no-fault divorce revolution,[10] even greater changes in North Carolina law

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6. *See* Singer, *supra* note 3, at 1444. Professor Singer notes that "[o]ver the past twenty-five years, family law has become increasingly privatized. In virtually all doctrinal areas, private norm creation and private decision making have supplanted state-imposed rules and structures for governing family-related behavior." *Id.* Professor Singer continues: "This preference for private over public ordering has encompassed both the substantive legal doctrines governing family relations and the preferred procedures for resolving family law disputes." *Id.*

7. Sally B. Sharp, *Semantics as Jurisprudence: The Elevation of Form over Substance in the Treatment of Separation Agreements in North Carolina*, 69 N.C. L. REV. 319, 321-22 (1991) [hereinafter Sharp, *Semantics*] (noting that the separation contract must only be "basically just and reasonable," and be free from fraud, duress, and undue influence). In the past, although the couple could contract as to the terms of their own divorce, spouses were prohibited from contracting to alter "the fundamental duties and responsibilities which the law attaches to the marital status." ROBERT E. LEE, 2 NORTH CAROLINA FAMILY LAW § 183 (4th ed. 1980) (citing HOMER CLARK, LAW OF DOMESTIC RELATIONS § 1.9 (1968)). Husbands and wives were prohibited from making any agreements which contemplated or induced divorce, and the husband could not be relieved of his duty of support. The latter was a duty imposed on a husband by law to support and maintain his wife and children to the best of his ability. *Id.* § 128. However, the traditional duties of marriage have been much eroded. *Id.* § 183 (1995 Supp.). For example, a husband and wife now may enter a valid premarital contract concerning the disposition of their property upon separation or marital dissolution, N.C. GEN. STAT. § 52B-4(a)(3) (1987), and may even modify or eliminate the duty of marital spousal support, § 52B-4(a)(4). The only specific prohibition remaining is that the couple may not limit or adversely affect the husband's duty of support owed to his children. § 52B-4(b).

8. No-fault divorce laws made it suddenly possible for a spouse to unilaterally decide to end her marriage, where previously she had to prove fault on the part of her spouse, and prove that she herself was without fault. Victoria M. Mather, *Commentaries: Evolution and Revolution in Family Law*, 25 ST. MARY'S L.J. 405, 409 (1993). The advent of no-fault divorce made it "easier" to get a divorce. *Id.* For a summary of the development and principles of no-fault divorce from a national perspective, see MARY ANN GLENDON, THE TRANSFORMATION OF FAMILY LAW 188-90 (1989).

9. Singer, *supra* note 3, at 1445. Singer notes that "most states now permit divorcing couples to make binding and non-modifiable separation agreements with respect to both property division and spousal support." *Id.* at 1474.

10. *See supra* note 8 (describing no-fault divorce). Under no-fault divorce laws, either party to a marriage may dissolve the marriage at the end of the requisite waiting period simply by applying to the court. *See, e.g.*, N.C. GEN. STAT. § 50-6 (1995). North Carolina's statute requires that the couple must have been separated for one year prior to such appli-

resulted from the passage of the Equitable Distribution of Property Act[11] in 1981.[12] The Act gave North Carolina courts the power to distribute marital property at divorce, but it also gave spouses the freedom to contract out of the statute.[13] Under the statute divorcing spouses may distribute marital property according to their own wishes, as long as the agreement is written, signed, and acknowledged.[14] The private agreement provision advanced two underlying

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cation. *Id.* If this requirement is satisfied, the divorce will be automatically granted. *See id.* In *Harrington v. Harrington*, the North Carolina Court of Appeals stated that the no-fault divorce statute was "enacted in order to enable a husband and wife to terminate their marriage without the sensationalism and public airing of dirty linen which necessarily accompany a divorce based on fault." 22 N.C. App. 419, 422, 206 S.E.2d 742, 745, *rev'd on other grounds*, 286 N.C. 260, 210 S.E.2d 190 (1974).

11. Equitable Distribution of Property Act, 1981 N.C. Sess. Laws 1184 (codified as amended at N.C. GEN. STAT. § 50-20 (1995)).

12. Sally B. Sharp, *The Partnership Ideal: The Development of Equitable Distribution in North Carolina*, 65 N.C. L. REV. 195, 196 (1987) [hereinafter Sharp, *Partnership Ideal*]. Prior to the new Act, title to property determined property distribution upon divorce in North Carolina. Sharp, *Semantics*, *supra* note 7, at 326. Because of the title system, "North Carolina courts were, quite literally, lacking in power to transfer real property . . . upon divorce. . . . [T]here was nothing in the history or experience of the North Carolina legal system to cushion its abrupt introduction to equitable distribution principles, or even to the concept of 'marital property.' " Sharp, *Partnership Ideal*, *supra*, at 196-97. Professor Sharp concludes: "Substantively and procedurally . . . the divorce settlement process in this State has been rebuilt from the ground up, from 1981 to the present." *Id.* at 197.

13. N.C. GEN. STAT. § 50-20(d) (1995). This provision states:

> Before, during or after marriage the parties may by written agreement, duly executed and acknowledged in accordance with the provisions of G.S. 52-10 and 52-10.1 . . . provide for distribution of the marital property in a manner deemed by the parties to be equitable and the agreement shall be binding on the parties.

Id. Section 52-10 provides that contracts between husbands and wives not inconsistent with public policy are valid, and that married persons may release any rights in each other's property which they acquired by marriage as long as the release is in writing and acknowledged by the parties before a certifying officer. N.C. GEN. STAT. § 52-10(a) (1991). The certifying officer must not be a party to the contract. § 52-10(b). Section 52-10.1 authorizes any married couple to execute a separation agreement not inconsistent with public policy. § 52-10.1. Separation agreements are also required to be in writing and acknowledged before a certifying officer as defined in § 52-10(b). *Id.*

14. Case law has added the requirement that the agreement not be the product of fraud or duress. Knight v. Knight, 76 N.C. App. 395, 398, 333 S.E.2d 331, 333 (1985) ("[A] court of equity will refuse to enforce a separation agreement, like any other contract, which is unconscionable or procured by duress, coercion or fraud."). The North Carolina Court of Appeals noted in *Johnson v. Johnson* that the court would not even require a showing of fraud to invalidate an agreement:

> Courts have thrown a cloak of protection about separation agreements and made it their business, when confronted, to see to it that they are arrived at fairly and equitably. To warrant equity's intervention, no actual fraud need be shown, for relief will be granted if the settlement is manifestly unfair to a spouse because of the other's overreaching.

67 N.C. App. 250, 255, 313 S.E.2d 162, 165 (1984). Transactions between husband and wife "must be fair and reasonable." Eubanks v. Eubanks, 273 N.C. 189, 196, 159 S.E.2d 562, 567 (1968); *cf.* Hagler v. Hagler, 319 N.C. 287, 293, 354 S.E.2d 228, 234 (1987) (noting, in the

policies: the importance of the freedom to contract and the encouragement of separation agreements "in order to avoid the excessive costs, in terms of both money and time, that judicial equitable distribution entails."[15] North Carolina courts have "accepted the soundness of these policies by deferring to the language of separation agreements when the intent of such agreements is clear and the agreements conform to traditional rules of fair contracting."[16]

However, the move toward allowing complete freedom of contract in separation agreements has not been as clear-cut as this summary suggests.[17] States still retain a public policy interest in regulating certain aspects of divorce.[18] Particularly in North Carolina, a tension remains between treating settlement agreements as "any other contract" and treating them as a special type of contract requiring the " 'utmost concern' in the form of judicial scrutiny for unfairness and overreaching."[19] In North Carolina, this tension surfaces in the provision that allows couples to construct private separation agreements

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course of validating a separation agreement, that the parties neither showed nor attempted to show fraud or duress in entering the agreement).

15. Heather Newton, Note, Hagler v. Hagler: *The North Carolina Supreme Court Construes a Separation Agreement*, 66 N.C. L. REV. 1254, 1255 (1988).

16. *Id.*; *see, e.g.*, Hartman v. Hartman, 80 N.C. App. 452, 455, 343 S.E.2d 11, 13 (1986) (upholding a separation agreement, which expressed the parties' clear intent to fully dispose of their marital property, as precluding the court's application of equitable distribution principles).

17. *See* Sharp, *Partnership Ideal*, *supra* note 12, at 198 (noting that North Carolina courts have "faced very difficult interpretative problems in all stages of the property division process," and emphasizing that the courts have been forced to deal with these issues "virtually without the benefit of any useful precedent or reliable legislative history"); *see also supra* note 12 (pointing out that North Carolina's switch from its former title system for distribution of marital property to equitable distribution forced the state to create a new settlement process). In fact, Professor Sharp concludes that in "virtually every state," the law concerning separation agreements is "at times nothing less than impenetrable." Sharp, *Semantics*, *supra* note 7, at 320.

18. *See* Sharp, *Semantics*, *supra* note 7, at 322 (noting the state interest in ensuring both that the agreements are procedurally and substantively fair).

19. *Id.* at 322-23 (quoting Johnson v. Johnson, 67 N.C. App. 250, 255, 313 S.E.2d 162, 165 (1984)). One reason for the lingering public policy concern surrounding separation agreements is that, traditionally, women have been the parties most harmed by divorce settlements. *See* Suzanne Reynolds, *The Relationship of Property Division and Alimony: The Division of Property to Address Need*, 56 FORDHAM L. REV. 827, 829 (1988) ("Numerous studies report that divorce leaves the wife at a severe economic disadvantage and explain the coining of the phrase 'the feminization of poverty.' "); Singer, *supra* note 3, at 1445 n.2 ("A plethora of recent studies establish that no-fault divorce results in severe economic dislocation for many women and children."); *see also* Sharp, *Partnership Ideal*, *supra* note 12, at 196 (noting that the rise in no-fault divorce "appears to have been a major cause of the well-documented decline in the economic well being of dependent spouses [(usually women)] and their children after divorce" because "no-fault . . . eliminated what had been the only true source of bargaining power for a financially dependent spouse—the ability to preclude the other spouse from obtaining a divorce").

generally. This provision states that "[a]ny married couple is hereby authorized to execute a separation agreement *not inconsistent with public policy* which shall be legal, valid, and binding in all respects."[20] Thus, a husband and wife in North Carolina who wish to dissolve their marriage may draft a private agreement as to the terms of the separation, but any provisions of this agreement that a court later deems in violation of public policy may not be enforced.[21]

Although the issue arose in the somewhat unusual context of attorneys' fees, *Bromhal v. Stott*[22] tested the balance between freedom of contract and judicial supervision of divorce; the North Carolina Supreme Court for the first time clearly indicated its intent to treat separation agreements differently than "any other contract." The court upheld as consistent with public policy a provision in a private separation agreement that, should either party fail to comply with the terms of the agreement, the party who brought a successful suit for enforcement would be awarded attorneys' fees and any other costs incurred in the enforcement action.[23]

However, contractual provisions awarding attorneys' fees in a successful action to enforce a contract had traditionally been declared void as against public policy in North Carolina, unless statutory authority existed for such an award.[24] Therefore, if the court had treated the separation agreement in this case like "any other contract,"[25] the provision would have been invalidated. However, relying heavily on public policy grounds[26] that separation agreements are indeed unlike "any other contract," the court upheld the award.[27]

This Note first discusses the facts and procedural history of *Bromhal*, including the opinions of both the North Carolina Court of Appeals and the North Carolina Supreme Court.[28] It then details the traditional law of contractual indemnification clauses,[29] followed by

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20. N.C. GEN. STAT. § 52-10.1 (1991) (emphasis added).

21. *Id.* Note that, unlike the Equitable Distribution Act, agreements made pursuant to this provision are not limited to the distribution of property upon separation or dissolution, but can include matters such as alimony and child support. *See id.*

22. 341 N.C. 702, 462 S.E.2d 219 (1995).

23. *Id.* at 707, 462 S.E.2d at 222; *see infra* notes 36-58 and accompanying text (discussing the facts and holding of *Bromhal*).

24. *See infra* notes 59-84 and accompanying text.

25. *See supra* text accompanying note 19.

26. *See infra* notes 127-33 and accompanying text.

27. *Bromhal*, 341 N.C. at 707, 462 S.E.2d at 222.

28. *See infra* notes 36-58 and accompanying text.

29. *See infra* notes 59-84 and accompanying text.

the relatively brief history[30] of case law involving attorneys' fees provisions in separation agreements.[31] The Note then analyzes the court's opinion in *Bromhal* in the context of this background law, including an analysis of the opposing argument made by the dissenting judge on the North Carolina Court of Appeals, and finds *Bromhal* to be an attempt by the North Carolina Supreme Court to clarify a confusing, but ultimately correct, disposition by the court of appeals.[32] Finally, the Note concludes that the court's decision followed logically from both the precedent involving attorneys' fees indemnification provisions and the limited precedent involving those provisions in separation agreement litigation.[33] By setting separation agreements apart from ordinary commercial contracts based on the fact that they take place in significantly different "markets,"[34] the court paved the way for more positive steps for dependent spouses, and resurrected the role of public policy from the ashes to which the revolution in divorce law seems to have reduced it.[35]

Laura Bromhal (Stott) and Gregory Stott were married on April 23, 1977, and had two children during the course of their ten-year marriage.[36] The Stotts separated on or about August 17, 1987, and entered into a separation agreement.[37] They subsequently entered into a modification agreement.[38] When Mr. Stott failed to comply with the child support provision of the separation agreement, Ms. Bromhal brought suit against him.[39] In her complaint, Bromhal sought both an order requiring Stott to pay the child support he owed

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30. *See supra* notes 10-14 and accompanying text (discussing significant changes in North Carolina law with respect to divorce in recent years).

31. *See infra* notes 85-102 and accompanying text.

32. *See infra* notes 103-37 and accompanying text. There was no dissent from the decision of the North Carolina Supreme Court.

33. *See infra* notes 138-51 and accompanying text.

34. *See infra* note 136 and accompanying text.

35. *See infra* notes 152-56 and accompanying text; *see also* Sharp, *Semantics*, *supra* note 7, at 325-26. Professor Sharp observes:

> [T]he most significant victim, and innocent bystander, of [the developments in the settlement process in recent decades] is the current state and role of public policy in North Carolina.... Quite simply, the settlement agreement process now seems to be largely unguided by meaningful principles of public policy or judicial review.

Id.

36. *Bromhal*, 341 N.C. at 703, 462 S.E.2d at 220.

37. *Id.*

38. *Id.* Under North Carolina law, a modification of an original separation agreement must be made pursuant to the same formalities and requirements as the original agreement as set forth in section 52-10.1. Greene v. Greene, 77 N.C. App. 821, 823, 336 S.E.2d 430, 432 (1985). That is, it must be consistent with public policy, in writing, and acknowledged by both parties before a certifying officer not a party to the agreement. § 52-10.1.

39. *Bromhal*, 341 N.C. at 703, 462 S.E.2d at 220.

and reimbursement of attorneys' fees incurred in bringing the enforcement action, pursuant to a provision of the original agreement which stated: "Suit costs. If either party shall fail to keep and perform any agreement or provision hereof, the other party shall be entitled to recover reasonable attorney's fees and any and all other expenses incurred in any action instituted to enforce provisions of this agreement."[40]

The trial court awarded Bromhal approximately $22,500 for the unpaid child support (plus interest) and an additional marital debt, plus $40,000 in attorneys' fees incurred throughout the enforcement proceeding.[41] Stott appealed this award to the North Carolina Court of Appeals.[42]

The North Carolina Court of Appeals upheld the award of attorneys' fees[43] and in support of its holding affirming the award cited two prior North Carolina Court of Appeals cases. *Edwards v. Edwards*[44] held that a similar provision was not inconsistent with public policy under North Carolina General Statutes section 52-10.1 and was thus binding.[45] *Carter v. Foster*[46] held that a similar provision was enforce-

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40. *Id.* (quoting Separation Agreement, ¶ 27).

41. *Id.*

42. *Id.* Of the many issues decided by the trial court, only two assignments of error were considered on appeal. Bromhal v. Stott, 116 N.C. App. 250, 253-54, 447 S.E.2d 481, 483-84 (1994), *aff'd*, 341 N.C. 702, 462 S.E.2d 219 (1995). The court disposed of Stott's first four arguments because the orders from which they arose were not designated in the notice of appeal as required by Rule 3(a) of the North Carolina Rules of Appellate Procedure. *Id.* at 253, 447 S.E.2d at 483. Furthermore, Stott failed to brief several of his arguments or cite any authority in support of them as required by Rule 28(b)(5) of the North Carolina Rules of Appellate Procedure; the court thus considered these arguments abandoned. *Id.*

43. *Bromhal*, 116 N.C. App. at 254-55, 447 S.E.2d at 484. The court of appeals in fact considered two assignments of error. The first assignment of error was the trial court's determination that Bromhal's acceptance and endorsement of certain checks from Stott did not constitute an accord and satisfaction of the child support obligation. *Id.* at 253-54, 447 S.E.2d at 484. The court of appeals affirmed the lower court's finding of fact on the basis that (1) there must have been an agreement between the parties that payment or acceptance of less than the full amount owed constituted an accord and satisfaction; and (2) this agreement had to be supported by consideration. *Id.* at 254, 447 S.E.2d at 484 (citing Fruit & Produce Packaging Co. v. Stepp, 15 N.C. App. 64, 189 S.E.2d 536 (1972), for the former proposition, and Baillie Lumber Co. v. Kincaid Carolina Corp., 4 N.C. App. 342, 167 S.E.2d 85 (1969), for the latter). Because neither of these requisite elements was present, no accord and satisfaction was found. *Id.* This issue was unrelated to the award of attorneys' fees, which was the only issue appealed to the North Carolina Supreme Court. *Bromhal*, 341 N.C. at 702, 462 S.E.2d at 220.

44. 102 N.C. App. 706, 403 S.E.2d 530, *discretionary review denied*, 329 N.C. 787, 408 S.E.2d 518 (1991). See *infra* notes 88-102 and accompanying text for further discussion of *Edwards*.

45. *Edwards*, 102 N.C. App. at 713, 403 S.E.2d at 533-34.

46. 103 N.C. App. 110, 404 S.E.2d 484 (1991). See *infra* notes 106-12 and accompanying text for further discussion of *Carter*.

able in the context of a separation agreement such as the present one, in which the parties entered into an agreement clearly settling all claims that might arise from the divorce.[47]

Judge Greene disagreed with the majority's holding on the attorneys' fees provision.[48] Although he acknowledged that this type of provision might well be consistent with public policy, Judge Greene pointed out that the North Carolina Supreme Court had held in *Stillwell Enterprises, Inc. v. Interstate Equipment Co.*[49] that an award of attorneys' fees, even pursuant to a " 'carefully drafted contractual provision,' " must have statutory authority supporting it in order to be upheld.[50] Judge Greene concluded that there was no statutory authority as required by *Stillwell* for the award of attorneys' fees in *Edwards* and *Carter*, the two cases cited by the majority.[51] Greene further observed that the courts in *Edwards* and *Carter* nonetheless upheld the fee awards without either applying or distinguishing *Stillwell*.[52] Because the holdings in *Edwards* and *Carter* disregarded what Greene considered the direct authoritative precedent of *Stillwell*, Judge Greene argued that the *Bromhal* majority incorrectly relied on *Edwards* and *Carter* to uphold the attorneys' fees award.[53]

The North Carolina Supreme Court then accepted the case solely on the issue of attorneys' fees.[54] Without directly addressing the concerns raised by Judge Greene, the court made explicit what had been merely implicit in the court of appeals' opinion: there was indeed statutory authority for the attorneys' fees award in this case, and that authority was to be found in North Carolina General Statutes section 52-10.1.[55] So long as the provision in question was consistent with public policy, the parties were free to place it in their agreement.[56] Relying

47. *Carter*, 103 N.C. App. at 117, 404 S.E.2d at 489.

48. Bromhal v. Stott, 116 N.C. App. 250, 255, 447 S.E.2d 481, 485 (1994) (Greene, J., concurring in part and dissenting in part), *aff'd*, 341 N.C. 702, 462 S.E.2d 219 (1995). Judge Greene agreed with other aspects of the majority's opinion. *See supra* notes 42-43 (discussing other issues raised on appeal).

49. 300 N.C. 286, 266 S.E.2d 812 (1980).

50. *Bromhal*, 116 N.C. App. at 255-56, 447 S.E.2d at 485 (Greene, J., concurring in part and dissenting in part) (quoting *Stillwell*, 300 N.C. at 289, 266 S.E.2d at 814-15). For further discussion of *Stillwell*, see *infra* notes 76-84 and accompanying text.

51. *Bromhal*, 166 N.C. App. at 256, 447 S.E.2d at 485 (Greene, J., concurring in part and dissenting in part).

52. *Id.* (Greene, J., concurring in part and dissenting in part).

53. *Id.* (Greene, J., concurring in part and dissenting in part).

54. *Bromhal*, 341 N.C. at 702, 462 S.E.2d at 220.

55. *Id.* at 703-04, 462 S.E.2d at 220; *see also supra* note 13, and notes 20-21 and accompanying text (discussing the statutory underpinnings for separation agreement indemnification provisions).

56. *See supra* text accompanying note 20.

on an article written by Professor Sally Sharp of the University of North Carolina at Chapel Hill School of Law, the court found that public policy weighed heavily in favor of the provision.[57] The court concluded by distinguishing past cases that had invalidated attorneys' fees contract provisions as contrary to public policy, finding such precedent applicable only in a commercial context.[58]

The general rule followed in this country, aptly termed the American Rule, states that attorneys' fees incurred by the successful party in an action are not recoverable in the absence of a statute or an enforceable contract authorizing their award.[59] North Carolina courts follow this rule with respect to statutorily authorized attorneys' fee awards,[60] but have traditionally held that contractual agreements providing for the payment of attorneys' fees by the losing party in an enforcement action are void as against public policy.[61]

As noted earlier, the case law in North Carolina specifically involving provisions for attorneys' fees in separation agreements is scant.[62] There is, however, early precedent with respect to contractual attorneys' fees indemnification provisions generally. The North Carolina Supreme Court first addressed a contractual indemnification provision for attorneys' fees in the 1892 case *Tinsley v. Hoskins*.[63] The provision in *Tinsley*, a stipulation in a promissory note, stated that "in case this note is collected by legal process, the usual collection fee shall be due and payable therewith."[64] The court concluded that provisions of this nature do not in actuality provide an award of attorneys' fees, but rather, such provisions impose a penalty or forfeiture

57. *Bromhal*, 341 N.C. at 704-05, 462 S.E.2d at 220-21 (quoting Sharp, *Semantics*, *supra* note 7, at 319-20, 326, 349); *see infra* notes 127-33 and accompanying text (detailing the *Bromhal* court's public policy discussion).

58. *Bromhal*, 341 N.C. at 705-07, 462 S.E.2d at 221-22. The court discussed, in order, Tinsley v. Hoskins, 111 N.C. 340, 16 S.E. 325 (1892) (involving an indemnification provision in a promissory note), Williams v. Rich, 117 N.C. 235, 23 S.E. 257 (1895) (same), Turner v. Boger, 126 N.C. 300, 35 S.E. 592 (1900) (same in deed of trust), and Stillwell Enters., Inc. v. Interstate Equip. Co., 300 N.C. 286, 266 S.E.2d 812 (1980) (involving provision in commercial lease and discussing similar provisions in cases involving promissory notes, deeds of trust, guaranty on promissory notes and commercial construction contracts).

59. Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 717 (1967); *see* Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 247-262 (1975) (discussing the history and development of the American Rule).

60. *See infra* notes 63-84 and accompanying text.

61. *See infra* notes 66-73 and accompanying text.

62. *See supra* notes 10-12 (discussing the fact that the law surrounding divorce and divorce settlement procedures has been substantially rewritten since 1981).

63. 111 N.C. 340, 16 S.E. 325 (1892).

64. *Id.*

on the breaching party.[65] According to the *Tinsley* court, attorneys' fees contract provisions " 'tend[ ] to the oppression of the debtor and . . . encourage litigation, [are] a cover for usury, . . . contrary to public policy and void.' "[66] The court concluded that "stipulations like the one now sued upon, when incorporated into obligations of this particular character, are against public policy and therefore invalid."[67]

Three years later, in *Williams v. Rich*,[68] the court applied the rule against contractual indemnification provisions to a similar provision in a promissory note. In *Williams* the defendant executed the note, secured by a deed of trust, payable to a mortgage company.[69] The provision in question stated that if the interest on the note was not promptly paid and had to be collected by suit, all costs of collection, plus a charge of ten percent of the principal and interest "as attorney's fees," were to be paid by the defendant debtor.[70] Relying on *Tinsley*, the court held that there was no error in a jury instruction that such a provision allowing for repayment of more than the loan amount plus ordinary interest "was evidence of the usurious nature of the transaction."[71] Again, as in the context of a promissory note, the court viewed the provision as imposing a forfeiture, possibly usurious, and as encouraging litigation.[72] Thus, the provision was void as against public policy.[73]

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65. *Id.* at 341, 16 S.E. at 325.

66. *Id.* (quoting Merchants' Nat. Bank v. Sevier, 14 Fed. 662, 663 (1882)). The court elaborated: " 'It would be idle to limit interest to a certain rate [under usury laws], if under another name forfeiture may be imposed to an amount without limit.' " *Id.* (quoting Bullock v. Taylor, 39 Mich. 137 (1878)).

67. *Id.* at 342, 16 S.E. at 325. The language, "when incorporated into obligations of this particular character," appears to support the *Bromhal* court's distinction between commercial contracts and separation agreements, whether interpreted to indicate promissory notes in particular, or commercial instruments generally. *See infra* notes 134-37 and accompanying text (distinguishing attorneys' fees provisions in a commercial contract from those in a separation agreement). *Tinsley* is usually cited for the proposition that an attorneys' fees indemnification provision specifically in a *promissory note* is invalid as against public policy, as opposed to such provisions appearing in contracts generally. *See, e.g.*, Yeargin Constr. Co. v. Futren Dev. Corp., 29 N.C. App. 731, 733, 225 S.E.2d 623, 625 (involving a commercial construction contract), *discretionary review denied*, 290 N.C. 660, 228 S.E.2d 459 (1976); EAC Credit Corp. v. Wilson, 12 N.C. App. 481, 482, 183 S.E.2d 859, 860 (1971) (involving a promissory note), *aff'd*, 281 N.C. 140, 187 S.E.2d 752 (1972).

68. 117 N.C. 235, 23 S.E. 257 (1895).

69. *Id.* at 236, 23 S.E. at 258.

70. *Id.* at 237, 23 S.E. at 258.

71. *Id.* at 240, 23 S.E. at 259.

72. *Id.*

73. *Id.*

North Carolina courts have continued to find such indemnification provisions invalid.[74] Consistently, these opinions have emphasized the fact that in the debtor-creditor context, such provisions could easily become a mask for usurious oppression of debtors, and such conduct could not be sanctioned by the courts. More recent opinions "clearly indicate that such provisions are generally deemed unenforceable without regard to the type of instrument in which they appear,"[75] at least in the commercial context.

North Carolina courts do recognize, however, the exception to the American Rule for statutorily authorized attorneys' fees awards. In *Stillwell Enterprises, Inc. v. Interstate Equipment Co.*[76]—the precedential case at issue in Judge Greene's dissent[77]—the North Carolina Supreme Court first repeated the general rule against allowing attorneys' fees indemnification clauses in debtor-creditor contracts.[78] The court reiterated the general North Carolina rule "that a successful litigant may not recover attorneys' fees, whether as costs or as an item of

74. *See, e.g.*, Stillwell Enters., Inc. v. Interstate Equip. Co., 300 N.C. 286, 290, 266 S.E.2d 812, 815 (1980) (lease agreement); Howell v. Roberson, 197 N.C. 572, 573, 150 S.E. 32, 33 (1929) (promissory note); Security Finance Co. v. Hendry, 189 N.C. 549, 557-58, 127 S.E. 629, 633 (1925) (promissory note); Turner v. Boger, 126 N.C. 300, 302, 35 S.E. 592, 593 (1900) (deed of trust); Brisco v. Norris, 112 N.C. 671, 677, 16 S.E. 850, 852 (1893) (promissory note); Yeargin Constr. Co. v. Futren Dev. Corp., 29 N.C. App. 731, 734, 225 S.E.2d 623, 625 (construction contract), *discretionary review denied*, 290 N.C. 660, 228 S.E.2d 459 (1976); EAC Credit Corp. v. Wilson, 12 N.C. App. 481, 482, 183 S.E.2d 859, 860 (1971) (promissory note), *aff'd*, 281 N.C. 140, 187 S.E.2d 752 (1972).

75. *See Stillwell*, 300 N.C. at 290, 266 S.E.2d at 815. While this language taken out of context could appear to expand the limitation on contractual indemnification provisions to *all* types of contracts, even outside the commercial world, this case involved a provision in a commercial instrument, a lease agreement. *Id.* at 287, 266 S.E.2d at 813. The court actually intended to expand the rule from applying only to *Tinsley* circumstances, involving a *specific* type of commercial instrument (promissory notes and security instruments), to circumstances involving *any* type of *commercial* instrument, "without regard to the type of instrument." *Id.* at 290, 266 S.E.2d at 815. Thus, the court in *Stillwell* referred approvingly to *EAC Credit Corp. v. Wilson*, which gave an expansive, generic interpretation of the *Tinsley* rule, by citing "*Tinsley* for the proposition that 'provisions calling for a *debtor* to pay attorney's fees incurred by a *creditor* in the collection of a debt' " were generally unenforceable. *Id.* (quoting *EAC Credit Corp.*, 12 N.C. App. at 482, 183 S.E.2d at 859) (emphasis added). Therefore, this language in *Stillwell* is arguably not intended to prohibit contractual indemnification clauses for attorneys' fees outside of the commercial context.

76. 300 N.C. 286, 266 S.E.2d 812 (1980).

77. *See infra* notes 114-21 and accompanying text.

78. *See Stillwell*, 300 N.C. at 289, 266 S.E.2d at 814. The case involved a commercial lease for a pushloading road scraper, which allegedly broke in two and caused damages to the plaintiff-lessee. *Id.* at 287, 266 S.E.2d at 813. When the plaintiff sued, the defendant-lessor countersued for the payment of back rental payments, and invoked an indemnification clause which provided for attorneys' fees in the event that the lessor had to sue to recover the debt. *Id.* at 287-88, 266 S.E.2d at 813. See *supra* note 75 and accompanying text (discussing the limitation of *Stillwell* to the commercial context).

damages, . . . [e]ven in the face of a carefully drafted contractual provision indemnifying a party for such attorneys' fees as may be necessitated by a successful action on the contract itself."[79] However, the court continued, finding that the rule yields when "such a recovery [of attorneys' fees] is expressly authorized by statute."[80]

In fact, the court in *Stillwell* found such statutory authority to validate the attorneys' fees provision in the commercial lease involved—section 6-21.2 of the North Carolina General Statutes. This statute authorizes a provision for attorneys' fees associated with "any note, conditional sale contract or other evidence of indebtedness" if collection through an attorney at law should become necessary after maturity.[81] To combat the concerns that such provisions would induce or encourage usurious interest rates masquerading as attorneys' fees,[82] the statute caps such an award at fifteen percent of the outstanding balance at the time collection is pursued.[83] The court in *Stillwell* found the leasing agreement involved therein to fall within the statute's ambit as a "note, conditional sale contract or other evidence of indebtedness," and therefore upheld the fee-shifting provision of the lease on this statutory ground.[84]

The antipathy of North Carolina courts toward contractual indemnification provisions for attorneys' fees seems to indicate that a similar statutory authorization for such provisions in separation agreements must exist in order to uphold their validity.[85] As discussed

79. *Stillwell*, 300 N.C. at 289, 266 S.E.2d at 814-15. For the proposition that litigants always bear the cost of their own attorneys' fees, the court cited Hicks v. Albertson, 284 N.C. 236, 238, 200 S.E.2d 40, 42 (1972). Again, this principle is consistent with the American Rule as generally followed in this country. *See supra* note 59 and accompanying text. In support of the proposition followed in North Carolina that this rule holds even when attorneys' fees provisions are purposefully placed in a contract, the court cited Howell v. Roberson, 197 N.C. 572, 150 S.E. 32 (1929), and Tinsley v. Hoskins, 111 N.C. 340, 16 S.E. 325 (1892). *See supra* notes 63-67 and accompanying text (discussing *Tinsley*).

80. *Stillwell*, 300 N.C. at 289, 266 S.E.2d at 814 (citing Hicks v. Albertson, 284 N.C. 236, 200 S.E.2d 40 (1972)). The North Carolina Supreme Court stated in *Hicks*: " 'The general rule in this State is that, *in the absence of statutory authority therefore*, a court may not include an allowance of attorneys' fees as part of the costs recoverable by the successful party to an action or proceeding.' " *Hicks*, 284 N.C. at 238, 200 S.E.2d at 42 (quoting *In re* King, 281 N.C. 533, 540, 189 S.E.2d 158, 162 (1972)) (emphasis added).

81. .N.C. GEN. STAT. § 6-21.2 (1986).

82. *See supra* notes 66-67 and accompanying text.

83. § 6-21.2(1). If no amount is specified in the instrument in question, the provision will be deemed to provide for recovery of fifteen percent of the outstanding balance. § 6-21.2(2).

84. *Stillwell*, 300 N.C. at 294-95, 266 S.E.2d at 818.

85. Section 6-21.2, applied in *Stillwell* to validate such a provision, does not expressly authorize fee-shifting in the separation agreement context, although it could be argued that the alimony or child support provisions of such an agreement are "evidences of indebtedness." According to the court in *Stillwell*, the legislative history of § 6-21.2 indicated

above, section 52-10.1 of the North Carolina General Statutes authorizes parties to a marriage to execute separation agreements, setting their own terms for marital dissolution; the only qualification is that no provision may be contrary to public policy.[86] Otherwise, the agreement will be "legal, valid, and binding *in all respects*."[87] According to the only North Carolina case to consider the issue before *Bromhal* reached the supreme court, section 52-10.1 provides the necessary statutory authorization for an attorneys' fees indemnification provision in a separation agreement.

In *Edwards v. Edwards*[88] the North Carolina Court of Appeals was faced with a separation agreement containing a clause which stated that if either party failed in its obligations, financial or otherwise, to the other party, or to the children involved, the defaulting party would indemnify the other for any enforcement costs, including reasonable attorneys' fees.[89] After recognizing the general rule that attorneys' fees are not awarded unless expressly authorized by statute,[90] the court noted that the statutory authority most relevant in this context was section 52-10.1.[91] Under the language of that statute, the court found the clause in question not to be inconsistent with public policy.[92] Therefore, because the agreement was executed "pursuant to the statute,"[93] the court found it to be " 'binding in all respects' including the indemnity clause."[94] Had the court ended the opinion there, *Edwards* would constitute the first arguably sound finding of statutory authorization for indemnity clauses in separation agreements.

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clearly that the statute was "intended to supplement [the Uniform Commercial Code and] those principles of law generally applicable to *commercial* transactions." *Id.* at 293, 266 S.E.2d at 817 (emphasis added). Furthermore, the North Carolina Court of Appeals has stated that "[i]t is clear that a 'note' and 'conditional sales contract' are the primary types of 'evidence of indebtedness' contemplated by the statute." State Wholesale Supply, Inc. v. Allen, 30 N.C. App. 272, 277, 227 S.E.2d 120, 124 (1976).

86. N.C. GEN. STAT. § 52-10.1 (1991); *see supra* text accompanying note 20.

87. § 52-10.1 (emphasis added).

88. 102 N.C. App. 706, 403 S.E.2d 530 (1991).

89. *See id.* at 712, 403 S.E.2d at 533.

90. *Id.*

91. *Id.* at 713, 403 S.E.2d at 533.

92. *Id.* The court did not elaborate on its underlying reasoning; it simply stated that "[w]e find nothing inconsistent with public policy in the . . . indemnity clause." *Id.*

93. *Id.* Presumably this language refers to the statute's technical requirements, that the agreement be "in writing and acknowledged by both parties before a certifying officer as defined in G.S. 52-10(b)." N.C. GEN. STAT. § 52-10.1 (1991). Thus the clause comported with both the substantive (public policy) and procedural requirements of § 52-10.1.

94. *Edwards*, 102 N.C. App. at 713, 403 S.E.2d at 534 (quoting § 52-10.1).

However, the *Edwards* court in fact confused its holding by continuing with the following statement:

> To hold otherwise would, in effect, hold that parties cannot contract for indemnification for attorneys' fees unless specifically authorized to do so by statute. We find that the general rule disallowing attorneys' fees unless statutorily authorized does not encompass this situation where the parties voluntarily contracted for indemnification for such fees. Therefore, we hold that the trial court did not err in allowing attorneys' fees.[95]

Strangely, this statement seems *extraneous* to the holding, rather than the *basis* for the holding, as the court claims.[96] The court had already found that, based on the statutory authority for separation agreements—which the court conceded was required for an award of attorneys' fees[97]—the provision was valid because it was consistent with public policy and was "executed pursuant to the statute."[98] However, in the quoted excerpt above, the court seemed to authorize the use of the second exception to the American Rule as it is generally accepted in jurisdictions outside North Carolina: not only are indemnity provisions authorized by *statute* excepted from the general rule against fee-shifting, but also indemnity provisions for which the parties voluntarily contracted, whether or *not* statutorily authorized.

If indeed this broader language was an attempt to create a new (at least in North Carolina) exception, the Court of Appeals' decision in *Edwards* would seem to contradict vast areas of prior North Carolina case law with respect to indemnity provisions.[99] In fact, the court did not explicitly limit the application of its broader language to the facts or context of a separation agreement between divorcing spouses; arguably, the court intended for the new *Edwards* "exception" to apply in all cases of voluntarily contracted-for indemnity provisions.[100] One commentator has even concluded that the court's statement,

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95. *Id.*

96. The first narrowly drawn conclusion of the court, that the provision was valid as consistent with the public policy and other requirements of § 52-10.1, appears to be a sufficient basis for the holding that the clause in question was valid. Perhaps, then, the later, more broad language can be dismissed as dicta, and not essential to the holding.

97. *See supra* note 90 and accompanying text.

98. *See supra* notes 92-95 and accompanying text.

99. *See, e.g., supra* note 74 (citing cases spanning this century which hold indemnity provisions to be invalid as against public policy in the debtor-creditor context *regardless* of the fact that the parties voluntarily contracted to include the clauses).

100. *See* Lucy V. Fountain, Note, Edwards v. Edwards *and the Award of Attorneys' Fees for Breach of a Separation Agreement*, 70 N.C. L. REV. 2016, 2016 (1992) (concluding that "while *Edwards* may be a good decision on its facts, the opinion creates confusion as to the status of traditional North Carolina contract law").

" 'To hold [otherwise] would, in effect, hold that parties cannot [voluntarily] contract for indemnification for attorneys' fees unless specifically authorized to do so by statute,' "[101] could have the effect of "overrul[ing] established precedent in all sorts of contract cases and render[ing] North Carolina's statutes specifying exceptions to the general prohibition against attorneys' fees meaningless."[102]

Against this backdrop, *Bromhal v. Stott*[103] reached the North Carolina Court of Appeals, and then the North Carolina Supreme Court. The court of appeals found the indemnity clause valid by relying on the narrow holding of *Edwards*, that section 52-10.1 authorizes attorneys' fees provisions, that the clause involved in *Edwards* was not against public policy, and that it was executed in accordance with the statute.[104] The court did not mention or even allude to the later, more broad language of *Edwards*, that merely voluntarily contracting for an indemnity provision could take parties out of the general rule that such clauses are void as against public policy.[105]

The court of appeals did, however, place additional reliance on a similarly dubious[106] holding in *Carter v. Foster*.[107] The court in *Carter* had statutory authorization at its disposal to hold the contractual indemnification provision in question valid—North Carolina General

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101. *Id.* at 2026 (quoting Edwards v. Edwards, 102 N.C. App. 706, 713, 403 S.E.2d 530, 534 (1991)).

102. *Id.* at 2025. This same commentator concedes that "if the *Edwards* decision is limited to its facts by subsequent panels [of the North Carolina Court of Appeals], the decision signals a recognition that separation agreements are by their nature quite distinct from traditional arm's-length transactions," but warns that "[u]nless the North Carolina General Assembly modifies the General Statutes or the courts limit the decision to its facts, . . . *Edwards* will create confusion and provide a convincing argument for those seeking to enforce indemnification clauses in all types of contracts." *Id.*

103. 341 N.C. 702, 462 S.E.2d 219 (1995).

104. Bromhal v. Stott, 116 N.C. App. 250, 254-55, 447 S.E.2d 481, 484 (1994), *aff'd*, 341 N.C. 702, 462 S.E.2d 219 (1995).

105. *See id.*; *see supra* text accompanying note 95.

106. *See, e.g.*, *supra* note 74 (listing cases holding indemnity provisions to be invalid as against public policy in the debtor-creditor context regardless of the fact that the parties voluntarily contracted to include the clauses); *supra* note 80 and accompanying text (discussing the only qualification of the general rule in North Carolina as the situation in which a statute specifically authorizes the fee award).

107. 103 N.C. App. 110, 404 S.E.2d 484 (1991). *Carter* involved a loan agreement detailing the manner in which certain promissory notes, which represented the plaintiff's loans totaling $155,000 to the defendant to capitalize his business venture, would be repaid. *Id.* at 111-12, 404 S.E.2d at 485-86. The business eventually failed, and the plaintiff filed suit alleging default on the promissory notes and the loan agreement. *Id.* at 112, 404 S.E.2d at 486. The parties then signed a "Stipulation and Settlement Agreement," intending to settle the matter, and this agreement contained a provision that the defendant owed the plaintiff attorneys' fees in the amount of fifteen percent of the outstanding amounts of the debts not yet repaid. *Id.*

Statutes section 6-21.2.[108] This section states that provisions for the payment of attorneys' fees appurtenant to a note or "other evidence of indebtedness" are "valid and enforceable" for as much as fifteen percent of the outstanding balance at the time collection is pursued.[109] The court noted that these sections " 'represent[ ] a far-reaching exception to the well-established rule against attorney's fees obligations.' "[110] However, after concluding that the provision at issue in *Carter* did *not* fall within the statutory language,[111] the court nonetheless held that "parties *may*, *in settling disputes*, *agree* to the payment of attorney's fees."[112] This was the language relied upon by the court of appeals in *Bromhal v. Stott*.[113]

Judge Greene strongly dissented from the portion of the majority opinion holding that the indemnification provision in *Bromhal v. Stott* was valid.[114] As to the majority's reliance on *Edwards*, Judge Greene focused his criticism on the ambiguity of the *Edwards* holding.[115] Arguing that attorneys' fees awards are valid if and only if they are spe-

108. *See supra* notes 81-84 and accompanying text.

109. N.C. GEN. STAT. §§ 6-21.2, 6-21.2(1) (1986).

110. *Carter*, 103 N.C. App. at 114, 404 S.E.2d at 487 (quoting State Wholesale Supply Inc. v. Allen, 30 N.C. App. 272, 276, 227 S.E.2d 120, 124 (1976)).

111. *Id.* at 115, 404 S.E.2d at 487-88. The court found that, because the indemnification provision appeared in the context of the *settlement agreement* between the parties, the attorneys' fees provided for therein were not an obligation for attorneys' fees "upon any note . . . or other evidence of indebtedness" under § 6-21.2. *Id.*

112. *Id.* at 115, 404 S.E.2d at 488 (emphasis added). This holding is potentially reconcilable with the general rule in North Carolina against contracting for attorneys' fees as a second exception. The court based its holding on the fact that this was not a typical contract, but rather it was the negotiated settlement of competing claims as to the terms of an already-existing contract. *See id.* The settlement through compromise of disputed claims is to be encouraged by the courts, and thus " 'the nature or extent of rights of each should not be nicely sc[r]utinized.' " *Id.* (quoting Armstrong v. Polkavetz, 191 N.C. 731, 734-35, 133 S.E. 16, 17-18 (1926)) (alterations in original). The court of appeals in *Bromhal* likened the separation agreement between divorcing spouses to this type of accord and satisfaction in that it was a settlement and release of any and all marital claims arising from the marital "contract." *See* Bromhal v. Stott, 116 N.C. App. 250, 255, 447 S.E.2d 481, 484 (1994), *aff'd*, 341 N.C. 702, 462 S.E.2d 219 (1995). Perhaps the court was searching for a way to except *Bromhal* from the general rule so as to uphold the award, without explicitly stating that separation agreements in the context of divorce are different than ordinary contracts and deserve special attention. *See supra* note 19 and accompanying text (discussing the treatment of separation agreements like other contracts). Such a holding might provide a way to distinguish separation agreements from ordinary contracts on the basis of "accord and satisfaction" principles, without explicitly stating that separation agreements are different than "any other contract." The supreme court did not have such difficulty in holding separation agreements to be different. *See infra* notes 135-36 and accompanying text (discussing the *Bromhal* holding).

113. *Bromhal*, 116 N.C. App. at 254-55, 447 S.E.2d at 484 (1994).

114. *Id.* at 255-56, 447 S.E.2d at 485 (Greene, J., concurring in part and dissenting in part).

115. *See supra* notes 95-98 and accompanying text.

cifically authorized by statute,[116] Judge Greene stated that "this Court in *Edwards*, without any citation to *Stillwell*, [either applying or distinguishing it,] upheld an award for attorneys' fees granted pursuant to a separation agreement even though there was no statutory authorization for such an award."[117] Judge Greene attacked *Carter v. Foster*[118] on the same basis: the court had upheld a fees award in the admitted absence[119] of specific statutory authority, without either acknowledging the rule of *Stillwell* or distinguishing *Stillwell* from the present facts.[120] Because the majority of the court of appeals in *Bromhal v. Stott* relied for its holding solely on these shaky decisions, both of which arguably disregarded the precedent of a higher court, Judge Greene could not agree.[121]

Finally, *Bromhal* reached the North Carolina Supreme Court. This court had not yet had the opportunity to decide the efficacy of indemnity clauses for attorneys' fees incurred in the enforcement of a separation agreement,[122] and had little precedent to guide it other

116. *Bromhal*, 116 N.C. App. at 255-56, 447 S.E.2d at 485 (Greene, J., concurring in part and dissenting in part) (relying on Stillwell Enters., Inc. v. Interstate Equip. Co., 300 N.C. 286, 289, 266 S.E.2d 812, 814-15 (1980)).

117. *Id.* at 256, 447 S.E.2d at 485 (Greene, J., concurring in part and dissenting in part).

118. 103 N.C. App. 110, 404 S.E.2d 484 (1991); *see supra* notes 108-12 and accompanying text (discussing the *Carter* decision).

119. In *Carter* the court clearly determined that the statute involved did not apply. *Carter*, 103 N.C. App. at 114-15, 404 S.E.2d at 487-88.

120. *Bromhal*, 116 N.C. App. at 256, 447 S.E.2d at 485 (Greene, J., concurring in part and dissenting in part).

121. *Id.* (Greene, J., concurring in part and dissenting in part). Judge Greene concluded that "because *Edwards* and *Carter* did not apply or purport to interpret *Stillwell* and because *Stillwell* is unambiguous in its holding and remains the law of this State, this Court is bound to follow *Stillwell*, not *Edwards* or *Carter*." *Id.* (Greene, J., concurring in part and dissenting in part).

122. Two cases involving this issue had recently reached the North Carolina Court of Appeals, but both were disposed of on other grounds. *See* Fountain, *supra* note 100, at 2020-22 (noting that "[b]oth decisions . . . left open the possibility for a court to grant attorneys' fees under a separation agreement clause in the proper circumstances"). The first, *Baird v. Baird*, involved an indemnification provision that authorized an award of attorneys' fees in the event that a suit for enforcement of the separation agreement became necessary. 86 N.C. App. 201, 206, 356 S.E.2d 823, 826 (1987). The court of appeals upheld the trial court's determination that this provision was inapplicable because the "matter was resolved by construction of the agreement, not enforcement of the agreement," and therefore "there is not a 'prevailing party' within the meaning of the [indemnification clause of the] Separation Agreement." *Id.* The second case, which reached the court of appeals the next year, arose from a similar provision in a separation agreement. Brown v. Brown, 91 N.C. App. 335, 371 S.E.2d 752 (1988). In order for attorneys' fees to be awarded to one party, the other party had to materially breach the separation agreement and be found in default. *See id.* at 340, 371 S.E.2d at 755. However, in *Brown*, the trial court dismissed the plaintiff's action for rescission based on material breach, and made no specific findings of fact that the defendant violated the separation agreement. *Id.* Therefore, no attorneys'

than general contract principles, public policy as to the dissolution of marriage,[123] and *Edwards*.[124] The court began by clarifying the lower court's reliance on *Edwards*, stating that the court of appeals had interpreted *Edwards* to mean that section 52-10.1 authorized the award of attorneys' fees in an enforcement action involving a separation agreement.[125] The court concluded that there could be "no question" that the broad language of section 52-10.1 authorizes a couple executing a separation agreement "to include any provision, including the one [for attorneys' fees in case an enforcement action becomes necessary], unless that specific provision violates public policy."[126]

The court then set about determining whether the inclusion of such a provision in a separation agreement violates the public policy of North Carolina. Quoting from a law review article by Professor Sally Sharp,[127] the court concluded that the North Carolina General Assembly clearly views separation agreements as "instruments of sound public policy" in response to "the growing number of divorces taking place in our society."[128] Noting that an assumption underlying Professor Sharp's article is the fundamental differences between separation agreements and other kinds of contracts,[129] the court appeared to agree with Sharp, stating that " '[t]he state has strong and legitimate policy interests in settlement agreements that differ markedly from its interests in most other private contracts.' "[130]

According to the court, allowing provisions for attorneys' fees to be recovered in an action to enforce such agreements furthers state policy by ensuring that the support provisions for the dependent

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fees could be awarded pursuant to the agreement for a default. *Id.* at 340-41, 371 S.E.2d at 755.

123. *See supra* notes 1-5 and accompanying text (discussing the tensions present in the courts' relationship to a divorcing couple).

124. Interestingly, Judge Orr, who wrote the court of appeals' arguably confusing opinion in *Edwards*, had moved to the North Carolina Supreme Court by the time *Bromhal* reached that court four years later. Justice Orr then wrote the opinion in *Bromhal*, in a unique position perhaps to remedy some of the confusion and anxiety caused by the earlier holding, *see supra* notes 95-102 and accompanying text, as well as address the concerns expressed by Judge Greene at the court of appeals, *see supra* notes 114-21 and accompanying text.

125. *Bromhal*, 341 N.C. at 703, 462 S.E.2d at 220.

126. *Id.* at 704, 462 S.E.2d at 220.

127. The court quoted at length from Sharp, *Semantics*, *supra* note 7, at 319-20.

128. *Bromhal*, 341 N.C. at 704, 462 S.E.2d at 220-21.

129. *Id.* at 704, 462 S.E.2d at 221.

130. *Id.* (quoting Sharp, *Semantics*, *supra* note 7, at 349). Sharp lists as examples the state's interest in protecting citizens from "bargaining contexts which are peculiarly conducive to overreaching tactics" and its interest in ensuring adequate measures are taken through settlement agreements to provide for dependent spouses and children. *Id.*

spouse and child will be enforced.[131] In this way, parties will not be disadvantaged by choosing private resolution over a court action for child support, custody, or alimony, in which attorneys' fees could clearly be granted under North Carolina General Statutes sections 50-13.6 and 50-16.4.[132] The court thus concluded that the public policy of North Carolina supported both separation agreements and the inclusion of an indemnification provision that takes effect if compliance becomes a problem.[133]

The court also distinguished the line of decisions holding indemnification provisions unenforceable.[134] The court differentiated between "business-oriented lawsuits" and cases such as *Bromhal*, concluding that the public policies applicable in the debtor-creditor and commercial contract cases do not apply in the context of separation agreements between divorcing parties.[135] Because a "separation agreement is different from a commercial, arms-length transaction[, i]t cannot be analyzed in terms of the marketplace and bargaining power."[136] Thus, the provision for attorneys' fees in the separation

131. *Id.* at 705, 462 S.E.2d at 221. That is, a spouse who would not ordinarily sue to enforce the agreement because of a lack of resources would be able to do so knowing that the costs will be reimbursed. *See id.*

132. *Id.* Section 50-13.6 provides that attorneys' fees may be awarded, in an action for custody and/or child support, to a plaintiff, acting in good faith, who otherwise could not afford to bring the action. N.C. GEN. STAT. § 50-13.6 (1995). Section 50-16.4 allows attorneys' fees to be awarded to a dependent spouse if that spouse would be entitled to alimony under § 50-16.3A or post separation support under § 50-16.2A. N.C. GEN. STAT. § 50-16.4 (1995). The purpose of § 50-16.4 is to enable the dependent spouse to meet the supporting spouse "on substantially even terms by making it possible for the dependent spouse to employ adequate counsel" in litigation over the issue of alimony. Hudson v. Hudson, 299 N.C. 465, 473, 263 S.E.2d 719, 724 (1980) (citing Schloss v. Schloss, 273 N.C. 266, 160 S.E.2d 5 (1968)). By analogy, the dependent spouse who constructs her own separation agreement (perhaps precisely because she cannot afford to apply to the court to settle the terms of her divorce) should be placed "on substantially even terms" as her former husband, should the judicial enforcement of her separation agreement ever become necessary due to his breach.

133. *Bromhal*, 341 N.C. at 707, 462 S.E.2d at 222.

134. *Id.* at 705-06, 462 S.E.2d at 221-22 (distinguishing, in order, Tinsley v. Hoskins, 111 N.C. 340, 16 S.E. 325 (1892); Turner v. Boger, 126 N.C. 300, 35 S.E. 592 (1900); and Williams v. Rich, 117 N.C. 235, 23 S.E. 257 (1895)). *See supra* notes 63-75 and accompanying text (discussing *Tinsley* and *Williams*).

135. *Id.*, 462 S.E.2d at 222 ("The policy reasons given for denying enforcement in the cases cited do not apply to the facts before us.").

136. *Id.* The court quoted with approval the following passage from Professor Sharp:

> Standard contract principles are designed to operate within the context of a rational, competitive market that assumes a relative parity of bargaining strength between the parties. To equate the "market" of settlement agreements, marriage dissolution—a situation virtually always accompanied by extraordinary stress and rarely accompanied by mutual desires to achieve fair results—with the paradigmatic "marketplace" in which strangers bargain at arms' length, is simply to ig-

agreement context was upheld as not inconsistent with public policy, and therefore was legal and binding under section 52-10.1.[137]

The supreme court's decision is consistent with the prior case law dealing with contractual provisions for attorneys' fees. The court followed the general rule that no attorneys' fees can be awarded without statutory authority[138] and found the authority for such an award pursuant to a separation agreement in section 52-10.1.[139] In so doing, the court both clarified the earlier confusion in the court of appeals' *Edwards* decision, and also answered Judge Greene's concerns below in *Bromhal.*

The court made no reference to the broader language in *Edwards*, which stated that parties could voluntarily contract for indemnification of attorneys' fees regardless of statutory authority.[140] The court focused solely on the narrower language of the holding of the

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nore the realities of human nature, the adversarial process, and the realities of most divorce bargaining.

Id. at 706-07, 462 S.E.2d at 222 (quoting Sharp, *Semantics*, *supra* note 7, at 350).

137. *Id.* at 707, 462 S.E.2d at 222.

138. *See supra* notes 79-80 and accompanying text.

139. Arguably, however, § 52-10.1 does *not* provide this authority. While the statute does allow couples to "execute a separation agreement not inconsistent with public policy which shall be legal, valid, and binding in all respects," N.C. GEN. STAT. § 52-10.1 (1991), the language does not explicitly provide for the award of attorneys' fees. In contrast, provisions under North Carolina law regarding the analogous context of awarding fees incurred in bringing an action for alimony and/or child support do expressly provide that attorneys' fees (or costs, alternatively) are recoverable in connection with those actions. *See, e.g.*, *supra* note 132 (discussing the award of attorneys' fees under N.C. GEN. STAT. §§ 50-13.6, 50-16.4 (1995)); N.C. GEN. STAT. § 6-21(4) (1986) (stating that costs in an action for alimony or divorce are taxable against either party, or may be apportioned between the parties, at the discretion of the court). Therefore, the supreme court's conclusion in *Bromhal*, that the legislature intended § 52-10.1 to encompass a provision for attorneys' fees, when other statutory provisions in this area explicitly provide for fee awards if at all, is questionable under the maxim of contract construction "expression unium est exclusio alterius." Because the legislature has indicated its tendency to expressly provide for fee-shifting when desirable, perhaps the absence of such a specific provision signifies a conscious intent *not* to allow fee-shifting in the context of separation agreements. *See generally* Fountain, *supra* note 100, at 2024 (arguing similarly with respect to the *Edwards* court's invocation of § 52-10.1 as authorizing attorneys' fees awards pursuant to an indemnification clause).

On the other hand, the injection of public policy as an element of the § 52-10.1 analysis arguably alters the above conclusion, allowing for a less strict reading of § 52-10.1 in the context of attorneys' fees. Because of its recognition that public policy supports treating separation agreements differently that other contracts, the court perhaps sees this policy as a reason to interpret § 52-10.1 more broadly than other statutes as to whether attorneys' fees need be *expressly* authorized by the statute in order to be awarded at all. Therefore, although there *is* explicit statutory authorization for the award of attorneys' fees in the context of alimony, child support, and child custody, these statutes need not be read as necessarily excluding the award of fees in the present context of § 52-10.1.

140. *See supra* text accompanying note 95.

court of appeals, which implicitly relied on section 52-10.1 for the statutory authority to award attorneys' fees.[141] In *Bromhal*, the court explicitly stated that this statute provided the authority for such an award, and thus the indemnification provision at issue was valid if consistent with public policy.[142]

With respect to Judge Greene's concerns, the court's response was twofold: The first response was the clarification of the *Edwards* holding, as discussed above.[143] The second issue argued by Judge Greene and addressed by the supreme court in *Bromhal* was the precedent established in *Stillwell*, requiring statutory authority for attorneys' fees awards.[144] The supreme court responded to Judge Greene's adherence to *Stillwell* not only by finding that statutory authority did exist in both *Edwards* and *Bromhal*[145]—and thus the holding of *Stillwell* was followed in both cases—but also by explicitly distinguishing *Stillwell* from the facts of *Bromhal* in its public policy discussion.[146] After finding that statutory authority allowed the indemnification provision in question if consistent with public policy, the court found that *Stillwell* was not necessarily the most appropriate precedential focus for a public policy discussion in the separation agreement context.[147] Although *Stillwell* did state the same general rule requiring statutory

141. *See supra* notes 90-94 and accompanying text.

142. *Bromhal*, 341 N.C. at 704, 462 S.E.2d at 220. Again, perhaps Justice Orr, the author of both the earlier court of appeals opinion in *Edwards* and the *Bromhal* supreme court opinion, was taking full advantage of his opportunity in *Bromhal* to clarify the confusing language of *Edwards*. *See supra* note 124.

143. *See supra* notes 95-102 and accompanying text. In addition, the court in *Bromhal* did not rely on Carter v. Foster, 103 N.C. App. 110, 404 S.E.2d 484 (1991), with its dubious holding that, in the accord and satisfaction context, parties may agree to attorneys' fees provisions even in the absence of statutory authority. *Carter*, 103 N.C. App. at 115, 404 S.E.2d at 488. Judge Greene took issue with the court of appeals' reliance on both *Carter* and *Edwards*. *See supra* notes 114-21 and accompanying text.

144. *See supra* notes 79-80 and accompanying text. Judge Greene concluded: "I am aware that panels of this Court are bound by prior decisions of this Court, but I do not believe that this rule applies when the prior decisions of this Court do not apply or purport to interpret a previous [North Carolina] Supreme Court opinion clearly requiring a contrary result." Bromhal v. Stott, 116 N.C. App. 250, 256, 447 S.E.2d 481, 485 (1994) (Greene, J., concurring in part and dissenting in part) (citation omitted), *aff'd*, 341 N.C. 702, 462 S.E.2d 219 (1995). In such cases, Judge Greene stated, "this Court has 'the responsibility to follow [North Carolina Supreme Court] decisions until otherwise ordered by the [North Carolina] Supreme Court.' " *Id.* (Greene, J., concurring in part and dissenting in part) (quoting Dunn v. Pate, 334 N.C. 115, 118, 431 S.E.2d 178, 180 (1993)).

145. This authority, in the form of § 52-10.1, was implicitly recognized in *Edwards*, and made explicit by the supreme court in *Bromhal*. *Bromhal*, 341 N.C. at 704, 462 S.E.2d at 220.

146. *See supra* notes 127-33 and accompanying text (discussing the public policy underpinnings of *Bromhal*).

147. *Bromhal*, 341 N.C. at 706, 462 S.E.2d at 222.

authority for attorneys' fees awards, *Stillwell* involved a commercial lease, not a separation agreement.[148] The court thus concluded that "the public policy justifications in debtor-creditor and commercial contract cases do not apply to a separation agreement."[149]

The court then enumerated the public policies that are involved in the separation agreement context. These include: " 'minimiz[ing] the psychological and economic costs of divorce, . . . creat[ing] better prospects for post-divorce cooperation between the parties, . . . lessen[ing] the impact of divorce upon children, and . . . promot[ing] judicial economy.' "[150] The court found that the judicial enforcement of attorneys' fees provisions in such agreements would help to promote the policies behind separation agreements generally, by encouraging dependent spouses to enforce the agreements in court, and thus found that public policy supported attorneys' fees awards as well as separation agreements generally.[151]

Because the conflicting policies of the law involving separation agreements—the "any other contract" approach versus the recognition that these agreements *are* different from contracts in the ordinary commercial marketplace—have never been resolved by the North Carolina Supreme Court, the court in *Bromhal* was navigating virtually uncharted waters.[152] In beginning to clearly define both the policies underlying the nature of separation agreements as well as a policy favoring enforcement of these agreements by upholding attorneys' fees provisions, the court has taken a positive step in developing meaningful standards with respect to seperation agreements.[153] The court not only opened the door for a greater role in the future for

148. Stillwell Enters., Inc. v. Interstate Equip. Co., 300 N.C. 286, 287-88, 266 S.E.2d 812, 813 (1980). *See supra* note 78.

149. *Bromhal*, 341 N.C. at 706, 462 S.E.2d at 222.

150. *Id.* at 704, 462 S.E.2d at 220 (quoting Sharp, *Semantics*, *supra* note 7, at 320).

151. *Id.* at 705, 462 S.E.2d at 221. *But see* Fountain, *supra* note 100, at 2024-25 (noting that North Carolina courts have commented in the past that the potential award of attorney's fees might induce plaintiffs to bring frivolous suits as a means of harassment).

152. *See supra* note 12 (discussing the fact that the law surrounding divorce and divorce settlement procedures has been substantially rewritten since 1981).

153. This positive step will most impact dependent spouses, usually women, and their children. *See supra* note 19. For a discussion of other steps that North Carolina courts have recently taken to help dependent spouses see Nancy E. LeCroy, Note, *Giving Credit Where Credit Is Due: North Carolina Recognizes Custodial Obligations as a Factor in Determining Alimony Entitlements*, 74 N.C. L. REV. 2128 (1996) (discussing a recent North Carolina Court of Appeals decision and new provisions of the North Carolina alimony statute, both of which allow for consideration of custodial obligations in the computation of alimony awards).

judicial supervision of the separation agreement process in general,[154] but the court's opinion, by specifically enunciating a policy in support of attorneys' fees provisions, will also enable the party with less bargaining power in the dissolving relationship to preserve some ability to enforce the agreement.[155] Parties and their attorneys should approach separation agreements with much greater caution following *Bromhal.* Not only is the court's opinion, which is actually a limited *extension* of the freedom to contract, open to broad interpretation, but even on its face the opinion carries great weight in favor of imposing values of fairness and equality into the divorce process on behalf of dependent spouses. The state appears once again to be a party to the marriage contract in North Carolina.

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154. Critics might not be so quick to applaud *Bromhal* as a conscious step toward judicial intervention to promote fairness between divorcing spouses. Although the opinion was unanimous, the court was unanimous in 93 percent of the cases decided in 1995, "a marked increase" compared with past years. Joseph Neff, *Today's State Supreme Court Not Inclined to Find Fault with Cases*, NEWS & OBSERVER (Raleigh, N.C.), Feb. 9, 1996, at A1. With the retirement of Justices Exum and Meyer, the "strong personalities" of the court, the court "has become more centrist and less divided." *Id.* at A1, A17. That is, *Bromhal* may or may not represent a new, strong judicial stance with respect to judicial intervention in separation agreements.

155. *See supra* note 19.

North Carolina's New Punitive Damages Statute: Who's Being Punished, Anyway?

"We are aware that the propriety of this doctrine has been questioned by some writers . . . ."

The United States Supreme Court in 1852[1]

The punitive damages doctrine has been criticized for well over a century.[2] In recent years, however, the criticism has reached a boiling point, fueled by reports of allegedly outrageous awards for seemingly minor injuries.[3] In response to the fear that juries are out of control, a majority of states have passed tort reform legislation imposing restraints on punitive damages.[4] Last year, the wave of anxiety hit North Carolina, prompting the General Assembly to pass tort reform legislation[5] that included a new series of statutes codified as Chapter 1D.[6] The new chapter limits the situations in which punitive damages can be imposed[7] and puts a cap on the amount which can be awarded.[8] However, by imposing a cap on punitive damages, the legislature arguably is punishing the very people the doctrine of punitive damages is intended to protect—the victims of outrageous conduct and unsafe products.[9] The sponsor of the legislation, State Representative Charles Neely, praises the new laws as a type of preventative

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1. Day v. Woodworth, 54 U.S. (13 How.) 363, 371 (1852).

2. *See* Tuttle v. Raymond, 494 A.2d 1353, 1355 (Me. 1985) ("Arguments against the availability of such awards have been circulating for one hundred years and longer."). *But see generally* Marc Galanter & David Luban, *Poetic Justice: Punitive Damages and Legal Pluralism*, 42 AM. U. L. REV. 1393 (1993) (discussing the philosophical underpinnings for punitive damages generally, rebutting the criticisms of the doctrine, and supporting the need for punitive damages as civil punishment).

3. *See infra* notes 118-24 and accompanying text.

4. A majority of the states have enacted some variant of punitive damages legislation. *See* Stephen Daniels & Joanne Martin, *Myth and Reality in Punitive Damages*, 75 MINN. L. REV. 1, 5 n.14 (1990). For an overview of punitive damage reform at the state level, see *infra* Appendix A.

5. *See* Act of June 20, 1995, ch. 309, § 1, 1995 N.C. Sess. Laws (codified at N.C. GEN. STAT. § 8C-1, Rule 702 (Supp. 1995)) (addressing medical malpractice); Act of July, 29, 1995, ch. 522, § 1, 1995 N.C. Sess. Laws (codified at N.C. GEN. STAT. § 99B-1 to -1.2 (1995)) (addressing products liability).

6. Act of July 29, 1995, ch. 514, § 1, 1995 N.C. Sess. Laws (codified at N.C. GEN. STAT. § 1D-1 to -50 (1995)).

7. N.C. GEN. STAT. § 1D-15.

8. *Id.* § 1D-25.

9. *See infra* notes 178-84 and accompanying text.

medicine.[10] However, many have criticized the legislation as a severe solution to an imaginary problem.[11]

This Note examines the new punitive damages statutes in detail to determine the impact they will have on trial practice in North Carolina.[12] The Note then gives a brief overview of punitive damages in North Carolina before the new laws were enacted, in order to compare and highlight the changes made by the legislation.[13] Next, the Note takes a broad look at the century-long debate over the doctrine of punitive damages and the current situation in North Carolina to determine if a change was really necessary.[14] Finally, the Note compares the North Carolina reform to similar reforms in other states and comments on the measures the North Carolina legislature decided to adopt.[15]

The new punitive damages statute "applies to every claim for punitive damages, regardless of whether the claim for relief is based on a statutory or a common-law right of action or based in equity."[16] Under the new statute, punitive damages may be awarded for two purposes: "to punish a defendant for egregiously wrongful acts and to deter the defendant and others from committing similar wrongful acts."[17] As a prerequisite for an award of punitive damages, a plaintiff

10. *See Punitive Damages Bill Debated*, GREENSBORO NEWS & RECORD, June 22, 1995, at B2 ("There have been few huge punitive damage awards so far in North Carolina but Rep. Chuck Neely, R-Wake, warned: 'We need to fix this ship before it sinks.' ").

11. *See, e.g.*, Sharon L. Brawley, *Tort Reform a Bad Idea For Consumers, Workers*, GREENSBORO NEWS & RECORD, July 1, 1995, at A8 ("North Carolina already has the most restrictive product-liability laws in the United States, in addition to the nation's shortest statute of repose and statutory prohibition of strict liability."); Michael Ballance, *Tilting at Windmills*, GREENSBORO NEWS & RECORD, Sept. 3, 1995, at F3 ("Punitive damages are notoriously rare in North Carolina . . . ."); *Punitive Legal Reform*, NEWS & OBSERVER (Raleigh, N.C.), April 18, 1995, at 8A (describing the legislative proposals as "drastic, arbitrary limits on punitive damages in all civil cases").

12. *See infra* notes 16-46 and accompanying text.

13. *See infra* notes 47-93 and accompanying text.

14. *See infra* notes 94-146 and accompanying text.

15. *See infra* notes 147-94 and accompanying text.

16. N.C. GEN. STAT. § 1D-10 (1995).

17. *Id.* § 1D-1. Courts widely agree that these two purposes are the definitive goals of punitive damages. *See, e.g.*, Honda Motor Co. v. Oberg, 114 S. Ct. 2331, 2339 (1994) ("What we are concerned with is the possibility that a guilty defendant may be unjustly *punished*. . . .") (emphasis added); Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 14 (1991) ("Imposing exemplary damages . . . creates a strong incentive for vigilance by those in a position 'to guard substantially against the evil to be prevented.' ") (quoting Louis Pizitz Dry Goods Co. v. Yeldell, 274 U.S. 112, 116 (1927)); Wilkes v. Wood, 98 Eng. Rep. 489, 498-99 (K.B. 1763) ("Damages are designed not only as a satisfaction to the injured person, but likewise as a *punishment to the guilty* [and] to *deter from any such proceeding for the future*. . . .") (emphasis added). *But cf.* David G. Owen, *A Punitive Damages Overview: Functions, Problems, and Reform*, 39 VILL. L. REV. 363, 374-81 (1994) (discussing the edu-

must prove that the defendant is liable for compensatory or nominal damages.[18] In addition, the plaintiff must prove by clear and convincing evidence[19] that an aggravating factor "was present and was related to the injury for which compensatory damages were awarded."[20]

This aggravating factor must be either fraud,[21] malice,[22] or willful or wanton conduct.[23] Willful or wanton conduct is defined by the statute as "the conscious and intentional disregard of and indifference to the rights and safety of others, which the defendant knows or should know is reasonably likely to result in injury, damage, or other harm."[24] According to the statute, willful or wanton conduct is a more egregious standard of conduct than gross negligence.[25] In addition, the statute provides that punitive damages cannot be awarded

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cation, retribution, deterrence, compensation, and law enforcement functions of punitive damages).

18. N.C. GEN. STAT. § 1D-15(a) (1995). Nominal damages are included in the definition of compensatory damages. *Id.* § 1D-5(2).

19. *Id.* § 1D-15(b). The clear and convincing standard of proof has been applied in several other areas of North Carolina law. *See, e.g.,* N.C. GEN. STAT. § 7A-289.30(e) (1995) (termination of parental rights); N.C. GEN. STAT. § 122C-267(h) (1993) (involuntary commitment); Leggett v. Rose, 776 F. Supp. 229, 236 (E.D.N.C. 1991) (existence of contract to devise property); Dorsey v. Dorsey, 306 N.C. 545, 547, 293 S.E.2d 777, 779 (1982) (reformation or cancellation of instruments); North Carolina State Bar v. Sheffield, 73 N.C. App. 349, 354, 326 S.E.2d 320, 323 (charge of attorney misconduct), *cert. denied*, 474 U.S. 981 (1985); Hall v. Piedmont Publishing Co., 46 N.C. App. 760, 764, 266 S.E.2d 397, 400 (1980) (where plaintiff in defamation action is a public figure), *disc. rev. denied*, 301 N.C. 88 (1980). *See generally* 2 HENRY BRANDIS, JR., BRANDIS ON NORTH CAROLINA EVIDENCE § 213 (3rd ed. 1988) (discussing the clear and convincing standard as well as such alternate formulations as the clear, strong, and convincing standard, and the clear, cogent, and convincing standard). See *infra* Appendix A for a list of other states which use this burden of proof in punitive damages litigation.

20. N.C. GEN. STAT. § 1D-15(a) (1995).

21. *Id.* § 1D-15(a)(1). This term "does not include constructive fraud unless an element of intent is present." *Id.* § 1D-5(4); *see infra* notes 162-66 and accompanying text.

22. N.C. GEN. STAT. § 1D-15(a)(2) (1995). Malice is "a sense of personal ill will toward the claimant that activated or incited the defendant to perform the act or undertake the conduct that resulted in harm to the claimant." *Id.* § 1D-5(5); *see infra* notes 159-73 and accompanying text.

23. N.C. GEN. STAT. § 1D-15(a)(3)(1995); *see infra* notes 171-73 and accompanying text. See *infra* Appendix A for similar aggravating factors in other states.

24. N.C. GEN. STAT. § 1D-5(7) (1995). It is unclear how this standard of conduct differs from the historical North Carolina definition, if at all. *See infra* notes 171-73 and accompanying text.

25. N.C. GEN. STAT. § 1D-5(7) (1995).

against a person on the basis of vicarious liability,[26] and cannot be awarded solely for breach of a contract.[27]

Even if a claimant is able to prove liability for compensatory damages and the presence of an aggravating factor, the new statute limits the amount of punitive damages that may be awarded.[28] A punitive damage award against a defendant may not exceed three times the amount of compensatory damages or $250,000, whichever is greater.[29] The jury may not be told about the cap,[30] and if they award an amount in excess of the cap, the court is required to enter a judgment for the maximum amount permitted under the statute.[31] The one exception to the limitation on punitive damages is for injury or harm caused by a defendant driving while impaired by alcohol or drugs.[32] Furthermore, if the claimant is pursuing another statutory remedy that provides for multiple damages, such as the unfair and deceptive trade practices statute,[33] the plaintiff must elect prior to judgment[34] between punitive damages and the alternative remedy.[35]

The statute also provides for certain procedural safeguards to ensure a fair punitive damages award. First, the jury *must* consider the

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26. *Id.* § 1D-15(c). This section states:

> Punitive damages may be awarded against a person only if that person participated in the conduct constituting the aggravating factor giving rise to the punitive damages, or if, in the case of a corporation, the officers, directors, or managers of the corporation participated in or condoned the conduct constituting the aggravating factor giving rise to punitive damages.

Id.

27. N.C. GEN. STAT. § 1D-15(d) (1995).

28. *Id.* § 1D-25. Only a few states have put such a limit on punitive damages. For a comprehensive list of those states, see *infra* Appendix A.

29. N.C. GEN. STAT. § 1D-25(b) (1995). It is unclear how multiple claims might affect this cap. For instance, if a claimant has two different claims against the same defendant, both of which entitle him to punitive damages, is the maximum cap $500,000 or $250,000? Also, if two plaintiffs have a claim against the same defendant for punitive damages and try them together, are both claims subject to the same $250,000 cap? The answer to these questions is uncertain, but the most logical approach would apply the cap to each separate claim. This would mean that the cap would be $500,000 if the defendant was liable on two separate claims, whether they were brought by the same plaintiff or two different plaintiffs.

30. *Id.* § 1D-25(c).

31. *Id.* § 1D-25(b).

32. *Id.* § 1D-26. The actions of the defendant must "give rise to an offense of driving while impaired under G.S. 20-138.1, 20-138.2, or 20-138.5." *Id.*; *see generally* William C. Cooper, Comment, *Punitive Damages and the Drunken Driver*, 8 PEPP. L. REV. 117 (1980) (arguing that punitive damages are an appropriate sanction for drunk drivers).

33. N.C. GEN. STAT. § 75-1.1 (1994). This statute provides for treble damages if a violation is found. *Id.* § 75-16.

34. According to traditional North Carolina law, prior to judgment does not mean before the verdict. *See infra* notes 66-67 and accompanying text.

35. N.C. GEN. STAT. § 1D-20 (1995).

purposes of punitive damages[36] and *may* consider evidence which relates to eight factors laid out in the statute, including the defendant's ability to pay.[37] The court is required to read these factors and purposes to the jury during its instructions.[38] Moreover, upon motion by the defendant, the trial will be bifurcated so the issues of liability and the amount of punitive damages are tried separately, although the same trier of fact will decide both phases.[39] The statute also provides for an award of reasonable attorneys' fees "against a claimant who files a claim for punitive damages that the claimant knows or should have known to be frivolous or malicious."[40] Finally, the statute requires the trial court to produce a written opinion detailing "its reasons for upholding or disturbing" an award of punitive damages.[41]

In addition to enacting section 1D, the General Assembly also made conforming changes to two existing statutes. The wrongful death statute was amended to reflect the higher standard of conduct required for a finding of liability for punitive damages.[42] Prior to the change, gross negligence gave rise to a claim for punitive damages in wrongful death actions.[43] The new law indicates that wrongful death actions are now governed by the same standard as all other punitive damages claims.[44] The legislature also codified special pleading requirements for punitive damages.[45] Under the new law, a claim for punitive damages must be "specifically stated, except for the amount, and the aggravating factor that supports the award of punitive damages shall be averred with particularity."[46]

The doctrine of punitive damages was first considered in North Carolina in 1797 in the case of *Carruthers v. Tillman*.[47] Subsequently,

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36. *Id.* § 1D-35(1); *see also supra* note 17 and accompanying text.

37. *Id.* § 1D-35(2). See *infra* text accompanying note 89 for the list of specified factors.

38. N.C. GEN. STAT. § 1D-40 (1995).

39. *Id.* § 1D-30. This is to prevent prejudicial evidence of past wrongful conduct and net worth during the liability phase of the trial. *See infra* notes 174-77 and accompanying text.

40. N.C. GEN. STAT. § 1D-45 (1995).

41. *Id.* § 1D-50.

42. N.C. GEN. STAT. § 28A-18-2(b) (Supp. 1995).

43. Act of July 29, 1995, ch. 514, § 2, 1995 N.C. Sess. Laws (codified at N.C. GEN. STAT. § 28A-18-2(b) (1984)) (codified as amended at N.C. GEN. STAT. § 28A-18-2(b) (Supp. 1995)).

44. N.C. GEN. STAT. § 28A-18-2(b) (Supp. 1995).

45. N.C. GEN. STAT. § 1A-1, Rule 9(k) (Supp. 1995).

46. *Id.*

47. 2 N.C. (1 Hayw.) 501 (1797). For a treatment of North Carolina law on punitive damages before 1981, see Sam J. Ervin, Jr., *Postscript: Punitive Damages in North Carolina*, 59 N.C. L. REV. 1255 (1981).

"North Carolina has consistently allowed punitive damages solely on the basis of its policy to punish intentional wrongdoing and to deter others from similar behavior."[48] Although punitive damages have an established place in North Carolina jurisprudence in serving this policy, the North Carolina Supreme Court has continually expressed its desire to constrain the expansion of the doctrine.[49]

Historically, the most substantial impediment to plaintiffs' ability to collect punitive damages has been the required presence of aggravating factors. This limitation was established early in the development of the punitive damages doctrine, and has been applied in a myriad of situations.[50] Aggravating factors have been defined differently depending on the type of actionable wrong upon which they were founded. For example, in the area of intentional torts, aggravated conduct has been defined as actual or express malice, such as personal ill will, insult, rudeness, indignity, oppression, bad motive, or

48. Newton v. Standard Fire Ins. Co., 291 N.C. 105, 113, 229 S.E.2d 297, 302 (1976); *see also* Overnite Transp. Co. v. International Bhd. of Teamsters, 257 N.C. 18, 30, 125 S.E.2d 277, 286 (1962) ("Punitive damages are never awarded as compensation. They are awarded above and beyond actual damages, as a punishment for the defendant's intentional wrong."), *cert. denied*, 371 U.S. 862 (1962); Cavin's Inc. v. Atlantic Mut. Ins. Co., 27 N.C. App. 698, 701, 220 S.E.2d 403, 406 (1975) ("Punitive damages, as the descriptive name clearly implies, are awarded as punishment.").

49. *See, e.g.*, Hinson v. Dawson, 244 N.C. 23, 27, 92 S.E.2d 393, 396 (1956) (stating that, despite some commentators' characterization of the punitive damages doctrine as an "anomaly," it occupies "an established place in our law" and the court is "not disposed to expand the doctrine beyond the limits established by authoritative decisions"); *see also Fourth Annual Survey of North Carolina Case Law—Punitive Damages*, 35 N.C. L. REV. 177, 223-24 (1957) (discussing history of punitive damages).

50. *See, e.g.*, *Newton*, 291 N.C. at 112, 229 S.E.2d at 301 (fraud); Oestreicher v. American Nat'l Stores, Inc., 290 N.C. 118, 136, 225 S.E.2d 797, 808 (1976) (fraud); Woody v. Catawba Valley Broadcasting Co., 272 N.C. 459, 463, 158 S.E.2d 578, 581-82 (1968) (libel); Van Leuven v. Akers Motor Lines, Inc., 261 N.C. 539, 546, 135 S.E.2d 640, 645 (1964) (appropriating land); General Tire and Rubber Co. v. Distributors, Inc., 253 N.C. 459, 473, 117 S.E.2d 479, 490 (1960) (seizing goods); Binder v. General Motors Acceptance Corp., 222 N.C. 512, 516, 23 S.E.2d 894, 896 (1943) (conversion of automobile); Hairston v. Atlantic Greyhound Corp., 220 N.C. 642, 645, 18 S.E.2d 166, 168 (1942) (assault and battery); Harris v. Queen City Coach Co., 220 N.C. 67, 69, 16 S.E.2d 464, 465-66 (1941) (company refusing to transport plaintiff); Horton v. Carolina Coach Co., 216 N.C. 567, 569, 5 S.E.2d 828, 830 (1939) (company made a woman passenger and her child disembark in a lonely place short of their destination); Ford v. McAnally, 182 N.C. 419, 421, 109 S.E. 91, 92 (1921) (assault, false arrest, and malicious prosecution); Cobb v. Atlantic Coast Line R.R., 175 N.C. 130, 132, 95 S.E. 92, 94 (1918) (nuisance by blasting); Smith v. Morganton Ice Co., 159 N.C. 151, 155-56, 74 S.E. 961, 963-64 (1912) (restraint of trade contrary to antitrust law); Carmichael v. Southern Bell Tel. & Tel. Co., 157 N.C. 17, 21, 72 S.E. 619, 621-22 (1911) (company refusing telephone service); Hayes v. Railroad, 141 N.C. 195, 199, 53 S.E. 847, 848 (1906) (railroad using excessive force to eject vagrant); Wylie v. Smitherman, 30 N.C. (8 Ired.) 236, 239 (1848) (burning county courthouse); Duncan v. Stalcup, 18 N.C. (1 Dev. & Bat.) 440, 441 (1836) (shooting livestock).

wanton and reckless disregard of the plaintiff's rights.[51] On the other hand, in wrongful death claims prior to the new statute, gross negligence constituted aggravated conduct.[52] For claims based on negligence, aggravated conduct has been found when the defendant wantonly committed the legal wrong against the plaintiff.[53] The terms "wanton" and "willful" have often been used interchangeably.[54] In addition, these terms have frequently been used in conjunction with the term "reckless."[55]

Historically, fraud and contract claims have been treated differently than other actions. The relationship between punitive damages and actions based on fraud has been called a "singularly confused" area of North Carolina law.[56] As stated in *Swinton v. Savoy Realty Co.*,[57] actions based on fraud were not exempt from the rule requiring the presence of an aggravating factor before punitive damages could be awarded.[58] However, in 1976, *Newton v. Standard Fire Insurance Co.*[59] overruled *Swinton* insofar as that case required "some kind of aggravated conduct in addition to actionable fraud or [made] any distinction between 'simple' and 'aggravated' fraud" in the recovery of punitive damages.[60] The *Newton* case controlled on this issue until the passage of Chapter 1D.[61]

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51. *See, e.g.*, Shugar v. Guill, 304 N.C. 332, 338-39, 283 S.E.2d 507, 509 (1981) (malice and personal ill will); *Newton*, 291 N.C. at 112, 229 S.E.2d at 301 (insult, rudeness, and oppression); *Woody*, 272 N.C. at 463, 158 S.E.2d at 582 (wanton and reckless disregard of plaintiff's rights).

52. N.C. GEN. STAT. § 28A-18-2(b) (1984) (codified as amended at N.C. GEN. STAT. § 28A-18-2(b) (Supp. 1995)); Cole v. Duke Power Co., 81 N.C. App. 213, 217-18, 344 S.E.2d 130, 132-33, *disc. rev. denied*, 318 N.C. 281, 347 S.E.2d 462 (1986).

53. Hinson v. Dawson, 244 N.C. 23, 28-29, 92 S.E.2d 393, 396-97 (1956). The *Hinson* court defined wanton as a "conscious and intentional disregard of and indifference to the rights and safety of others." *Id.* at 28, 92 S.E.2d at 397.

54. *See, e.g.*, Berrier v. Thrift, 107 N.C. App. 356, 358-61, 420 S.E.2d 206, 207-09 (1992), *disc. rev. denied*, 333 N.C. 254, 424 S.E.2d 918 (1993); Nance v. Robertson, 91 N.C. App. 121, 123, 370 S.E.2d 283, 284, *disc. rev. denied*, 323 N.C. 477, 373 S.E.2d 865 (1988); Starkey v. Cimarron Apartments, Inc., 70 N.C. App. 772, 774-75, 321 S.E.2d 229, 231 (1984), *disc. rev. denied*, 312 N.C. 798, 325 S.E.2d 633 (1985); Roberts v. Davis, 15 N.C. App. 284, 285, 189 S.E.2d 767, 768 (1972). For a discussion of the meaning of these terms in the new statute, see *infra* notes 159-73 and accompanying text.

55. *See, e.g.*, Swinton v. Savoy Realty Co., 236 N.C. 723, 725, 73 S.E.2d 785, 787 (1953), *overruled in part by* Newton v. Standard Fire Ins. Co., 291 N.C. 105, 229 S.E.2d 297 (1976).

56. *Newton*, 291 N.C. at 112, 229 S.E.2d at 301.

57. 236 N.C. 723, 73 S.E.2d 785 (1953), *overruled in part by* Newton v. Standard Fire Ins. Co., 291 N.C. 105, 229 S.E.2d 297 (1976).

58. *Swinton*, 236 N.C. at 725, 73 S.E.2d at 787.

59. 291 N.C. 105, 229 S.E.2d 297 (1976).

60. *Id.* at 113-14, 229 S.E.2d at 302 (citation omitted).

61. *See* Bumgarner v. Tomblin, 63 N.C. App. 636, 643, 306 S.E.2d 178, 183 (1983), *disc. rev. denied*, 324 N.C. 333, 378 S.E.2d 789 (1989); Shaver v. N.C. Monroe Constr. Co., 63 N.C. App. 605, 616, 306 S.E.2d 519, 526 (1983), *disc. rev. denied*, 310 N.C. 154, 311 S.E.2d

Under North Carolina common law, punitive damages also were not allowed for simple breach of contract, excluding contracts to marry and the failure of a public service company to perform an obligation imposed upon it by its public franchise.[62] Although the presence of an aggravating factor was still required, the breach could be grounds for recovery of punitive damages when it also constituted or was accompanied by an identifiable tortious action.[63] In addition, North Carolina traditionally allowed recovery of punitive damages from a corporation whose agent wantonly committed a tort in the course of employment.[64]

Other common-law checks on the award of punitive damages exist. First, a claim for punitive damages cannot constitute a cause of action standing alone, and such damages are only recoverable when the jury finds that an actionable legal wrong has been committed against the plaintiff or his property and awards the plaintiff either nominal or compensatory damages.[65] Second, if a claimant pursues

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294 (1984); Carter v. Parsons, 61 N.C. App. 412, 420, 301 S.E.2d 405, 410 (1983). *Newton* is still good law after the new statute, but under a slightly different theory. Under § 1D-15(a)(1), fraud is an aggravating factor which can give rise to an award of punitive damages. N.C. GEN. STAT. § 1D-15(a)(1) (1995). As a result, in actions based on fraud, the fraud itself will justify punitive damages. However, constructive fraud will no longer give rise to punitive damages. *See infra* notes 159-66 and accompanying text.

62. *See Newton*, 291 N.C. at 111, 229 S.E.2d at 301; King v. Insurance Co. of N. Am., 273 N.C. 396, 398, 159 S.E.2d 891, 893 (1968); *Swinton*, 236 N.C. at 726, 73 S.E.2d at 787; Mesimer v. Stancil, 45 N.C. App. 533, 534, 263 S.E.2d 32, 32 (1980); *see also* Sean Devereux, Comment, *Remedy—"Extra-Contractual" Remedies for Breach of Contract in North Carolina*, 55 N.C. L. REV. 1125 *passim* (1977) (discussing the possibilities for awarding punitive damages in breach of contract cases).

63. *See* Stanback v. Stanback, 297 N.C. 181, 196, 254 S.E.2d 611, 621 (1979) (breach of contract accompanied by intentional infliction of emotional distress); Hill v. Pinelawn Memorial Park, Inc., 50 N.C. App. 231, 237, 275 S.E.2d 838, 841-42 (describing plaintiffs seeking specific performance of contract to sell mausoleum crypt and damages resulting from subsequent sale of crypt to third parties), *rev'd on other grounds*, 304 N.C. 159, 282 S.E.2d 779 (1981); *cf.* Barnes v. Ford Motor Co., 95 N.C. App. 367, 374, 382 S.E.2d 842, 846 (1989) (finding that defendant's "willful" refusal to pay plaintiff did not give rise to a tort action or subject the defendant to liability for punitive damages). Chapter 1D explicitly codifies this traditional rule by stating that "[p]unitive damages shall not be awarded . . . solely for breach of contract." N.C. GEN. STAT. § 1D-15(d) (1995).

64. Clemmons v. Life Ins. Co., 274 N.C. 416, 424, 163 S.E.2d 761, 767 (1968), *superseded on other grounds*, Gatlin v. Bray, 81 N.C. App. 639, 344 S.E.2d 814 (1986); Binder v. General Motors Acceptance Corp., 222 N.C. 512, 516, 23 S.E.2d 894, 896 (1943). The new law partially overrules these holdings by awarding punitive damages against a corporation only when "the officers, directors, or managers of the corporation participated in or condoned the conduct constituting the aggravating factor giving rise to punitive damages." N.C. GEN. STAT. § 1D-15(c) (1995).

65. *Clemmons*, 274 N.C. at 423-24, 163 S.E.2d at 766; Parris v. H.G. Fischer & Co., 221 N.C. 110, 113, 19 S.E.2d 128, 130 (1942); Ransom v. Blair, 62 N.C. App. 71, 76, 302 S.E.2d 306, 309 (1983). This rule remains in force after the ratification of the new statute. N.C.

punitive damages while also seeking a statutory remedy that provides for multiple damages,[66] North Carolina case law does not allow the claimant to receive both awards; instead, the claimant must elect prior to judgment which damages to collect.[67]

After several landmark United States Supreme Court cases,[68] judges nationwide shifted their focus to another punitive damages arena: the standards that juries use in arriving at an amount, and the post-trial review procedures to be used in assessing that amount.[69] Probably the most important of these cases was *Pacific Mutual Life Insurance Co. v. Haslip*.[70] In ruling on the constitutionality of the Alabama system, the *Haslip* Court dealt with the question of what procedures were necessary to ensure that punitive damages awards did not violate due process.[71] While refusing to establish a "mathematical bright line" formula for determining whether an award was constitutional, the Supreme Court stated that "[o]ne must concede that unlimited jury discretion—or unlimited judicial discretion for that matter—

GEN. STAT. § 1D-15(a) (1995). Although this statute only speaks of compensatory damages, nominal damages are included in that definition. *Id.* § 1D-5(2).

66. *See, e.g.*, N.C. GEN. STAT. §§ 75-1.1, -16 (1994) (providing for treble damages for an unfair or deceptive trade practice).

67. Ellis v. Northern Star Co., 326 N.C. 219, 227, 388 S.E.2d 127, 132 (1990); United Lab., Inc., v. Kuykendall, 102 N.C. App. 484, 493, 403 S.E.2d 104, 110 (1991), *aff'd*, 335 N.C. 183, 437 S.E.2d 374 (1993); *see also* Mapp v. Toyota World, Inc., 81 N.C. App. 421, 427, 344 S.E.2d 297, 301 ("[I]t would be manifestly unfair to require plaintiffs in such cases to elect before the jury has answered the issues *and* the trial court has determined whether to treble the compensatory damages found by the jury. . . ."), *disc. rev. denied*, 318 N.C. 283, 347 S.E.2d 464 (1986). It is important to remember that the plaintiff may recover the punitive damages amount, the compensatory amount awarded for the statutory violation and attorneys' fees. *See United Lab., Inc.*, 102 N.C. App. at 493, 403 S.E.2d at 110, *aff'd* 335 N.C. 183, 437 S.E.2d 374 (1993). This rule was not always so clear. *See generally* Christopher Blair Capel, Note, *Unfair Trade Practices and Unfair Methods of Competition in North Carolina: Are Both Treble and Punitive Damages Available For Violations of Section 75-1.1?*, 62 N.C. L. REV. 1139 (1984) (arguing that North Carolina courts would reach the negative conclusion). This rule also is unchanged by the new statute. N.C. GEN. STAT. § 1D-20 (1995).

68. Honda Motor Co. v. Oberg, 114 S. Ct. 2331 (1994); TXO Prod. Corp. v. Alliance Resources Corp., 509 U.S. 443 (1993); Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1 (1991); Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257 (1989). For an analysis of these cases, see James R. McKown, *Punitive Damages: State Trends and Developments*, 14 REV. LITIG. 419, 427-36 (1995).

69. *See* McKown, *supra* note 68, at 430-36. North Carolina changed its procedures as a result of these cases. For a discussion of the changes, see *infra* notes 84-90 and accompanying text.

70. 499 U.S. 1 (1991).

71. *Id.* at 7-8. In *Haslip*, the Supreme Court upheld a punitive award of $840,000 arising out of a bad faith claim against an insurance company and its agent. *Id.* at 6-7, 24.

in the fixing of punitive damages may invite extreme results that jar one's constitutional sensibilities."[72]

In assessing Alabama's method, the Court found that its "constitutional calculus" benefited from three things.[73] First, Alabama's jury instructions were specific.[74] The trial court instructed the jury as to the purposes of punitive damages and told it to consider " 'the character and the degree of the wrong.' "[75] In addition, the jury was told that punitive damages are not compulsory, but discretionary.[76] Because of these instructions, the Court concluded that an Alabama jury's discretion "was not unlimited."[77]

Second, under the Alabama system, the trial court conducted a post-trial review of jury verdicts awarding punitive damages,[78] " 'reflect[ing] in the record the reasons for interfering with a jury verdict, or refusing to do so, on grounds of excessiveness of the damages.' "[79] The trial court took into consideration a number of factors in making this decision: the culpability of the defendant's conduct, the desirability of deterring others from similar conduct, the impact of the award upon the parties, the impact of the award on innocent third parties, and other factors.[80] The Supreme Court thus found that this procedure "ensures meaningful and adequate review by the trial court whenever a jury has fixed the punitive damages."[81]

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72. *Id.* at 18. In a more recent case, the Supreme Court again refused to establish a fixed mathematical formula for determining whether a punitive damages award was constitutional, but did set out three "guideposts" to aid in determining whether the award was "grossly excessive." *See* BMW of North America, Inc. v. Gore, 116 S. Ct. 1589 (1996) In *Gore*, the Court held that "[e]lementary notions of fairness . . . dictate that a person receive fair notice not only of the conduct that will subject him to punishment but also of the severity of the penalty . . . ." *Id.* at 1598. Three "guideposts" are indicators of the presence or absence of such notice: "[T]he degree of reprehensibility of the nondisclosure; the disparity between the harm or potential harm suffered by [the claimant] and his punitive damages award; and the difference between this remedy and the civil penalties authorized or imposed in comparable cases." *Id.* at 1598-99. Applying these guideposts to the facts, the Supreme Court overturned the punitive damage award as "grossly excessive." *Id.* at 1604.

It is too early to ascertain how state legislatures will respond to the *Gore* decision. However, the decision should not affect North Carolina's new punitive damages law as damages in North Carolina are now capped at a statutorily-set maximum amount. *See* N.C. GEN. STAT. § 1D-25(b) (1995).

73. *Id.* at 18-22.

74. *Id.* at 19-20.

75. *Id.* at 19.

76. *Id.*

77. *Id.*

78. *Id.* at 20.

79. *Id.* (citing Hammond v. City of Gadsen, 493 So. 2d 1374, 1379 (Ala. 1986)).

80. *Id.* (citing *Hammond*, 493 So. 2d at 1379 (Ala. 1986)).

81. *Id.*

Finally, appellate review of punitive damage awards in Alabama also considers a number of factors: (1) whether there is a reasonable correlation between the punitive damages and the harm done or likely to occur; (2) the reprehensibility of the defendant's conduct, the duration of the conduct, the defendant's concealment of the conduct, and the past existence and frequency of such conduct; (3) the profitability of the conduct and the desirability of eliminating the profit and creating a loss; (4) the defendant's economic position; (5) the costs of litigation; (6) the imposition of criminal sanctions on the defendant for his conduct (considered in mitigation); and (7) the existence of any additional civil awards against the defendant for the same conduct (also considered in mitigation).[82] The *Haslip* Court concluded that this "review makes certain that the punitive damages are reasonable in their amount and rational in light of their purpose to punish what has occurred and to deter its repetition."[83]

Before *Haslip*, North Carolina's pattern jury instructions on punitive damages were very similar to those used in Alabama.[84] However, North Carolina's trial courts only reviewed punitive damage verdicts upon motion of the defendant and then only to determine if the award was supported by the evidence or if the award was excessive.[85] Furthermore, appellate review was not guided by specific factors.

Many states reacted to *Haslip* with judicial determinations that their procedures provided sufficiently reasonable guidance or by incorporating procedures similar to those existing in Alabama.[86] North Carolina's Pattern Jury Instruction Committee issued two sets of new instructions which, in less complex cases, instructed jurors that punitive damage awards "must bear a rational relationship" to the amount needed to punish or deter and, in more complex cases, required jurors to consider the *Haslip* factors.[87]

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82. *Id.* at 21-22.

83. *Id.* at 21.

84. *See* N.C. Pattern Jury Instructions - Civil - 810.01 (Feb. 1986); N.C. Pattern Jury Instructions - Civil - 810.00 (May 1975).

85. *See* Shugar v. Guill, 304 N.C. 332, 339, 283 S.E.2d 507, 511-12 (1981); Harris v. Queen City Coach Co., 220 N.C. 67, 69, 16 S.E.2d 464, 465-66 (1941).

86. *See, e.g.*, Johnson v. Hugo's Skateway, 974 F.2d 1408, 1418 (4th Cir. 1992) (Virginia); Hospital Auth. of Gwinnett County v. Jones, 409 S.E.2d 501, 503 (Ga. 1991), *cert. denied*, 502 U.S. 1096 (1992); Alexander & Alexander v. B. Dixon Evander & Assocs., Inc., 596 A.2d 687, 708-10 (Md. Ct. Spec. App. 1991), *cert. denied*, 605 A.2d 137 (Md. 1992); Gamble v. Stevenson, 406 S.E.2d 350, 353-55 (S.C. 1991); Hodges v. S.C. Toof & Co., 833 S.W.2d 896, 901-02 (Tenn. 1992); Garnes v. Fleming Landfill, Inc., 413 S.E.2d 897, 908-10 (W. Va. 1991).

87. N.C. Pattern Jury Instructions—Civil—810.01-.02 (May 1992). Jurors had to be permitted to consider the *Haslip* factors in order to comply with the North Carolina Constitution, which provides for a right to trial by jury on all issues of fact. Thus, it is unconsti-

In accordance with *Haslip*, Chapter 1D requires that jurors be instructed regarding the purposes of punitive damages.[88] In addition, jurors must be told that they may consider the following factors:

a. The reprehensibility of the defendant's motives and conduct.
b. The likelihood, at the relevant time, of serious harm.
c. The degree of the defendant's awareness of the probable consequences of its conduct.
d. The duration of the defendant's conduct.
e. The actual damages suffered by the claimant.
f. Any concealment by the defendant of the facts or consequences of its conduct.
g. The existence and frequency of any similar past conduct by the defendant.
h. Whether the defendant profited from the conduct.
i. The defendant's ability to pay punitive damages, as evidenced by its revenues or net worth.[89]

The statute also requires the trial court to "state in a written opinion its reasons for upholding or disturbing the finding or award."[90]

Pleading requirements are also more stringent under the new law. Since North Carolina has adopted a form of notice pleading, it has not been necessary for punitive damages to be specially pleaded by name in the complaint.[91] The plaintiff was simply required to place the defendant on notice as to the aggravating circumstances which would justify an award of punitive damages.[92] Under the new pleading statute, however, a claim for punitive damages must be "specifically stated, except for the amount, and the aggravating factor . . . shall be averred with particularity."[93]

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tutional for trial and appellate courts to consider evidence that was not before the jury when reviewing an award. *See* N.C. CONST. art. I, §25.

88. N.C. GEN. STAT. § 1D-40 (1995).

89. *Id.* § 1D-35(2). These factors come in large part from *Haslip*. *See supra* notes 82-83 and accompanying text.

90. N.C. GEN. STAT. § 1D-50 (1995).

91. Shugar v. Guill, 304 N.C. 332, 338, 283 S.E.2d 507, 510 (1981).

92. *Id.* at 337-38, 283 S.E.2d at 510. In *Shugar*, the Supreme Court held that the allegation that " 'the defendant, without just cause, did intentionally, willfully and maliciously assault and batter the plaintiff' " was sufficient to state a claim for punitive damages. *Id.* at 335-36, 338, 283 S.E.2d at 509-10 (quoting plaintiff's complaint). A more recent case, prior to the enactment of the new reforms, had even called this minimal requirement into question. Huff v. Chrismon, 68 N.C. App. 525, 527, 315 S.E.2d 711, 712 (1984) (holding that a complaint need no longer set out allegations of "facts or elements showing aggravating circumstances which would justify an award of punitive damages"), *disc. rev. denied*, 311 N.C. 756, 321 S.E.2d 134 (1985).

93. N.C. GEN. STAT. § 1A-1, Rule 9(k) (Supp. 1995).

North Carolina's new punitive damages laws were spurred by widespread sentiment that punitive damage awards were out of control. Critics and courts alike have condemned the doctrine.[94] For example, Justice O'Connor has been a steadfast opponent of what she considers the pressing problem of punitive damages.[95] In her dissenting opinion in *Browning-Ferris Industries v. Kelco Disposal, Inc.*,[96] she wrote that "punitive damages are skyrocketing."[97] Further, she stated that "[a]s recently as a decade ago, the largest award of punitive damages affirmed by an appellate court in a products liability case was $250,000. . . . Since then, awards more than [thirty] times as high have been sustained on appeal."[98]

Several key cases on the national scene have exacerbated this image of a runaway tort system. Currently, one of the most famous is the McDonald's "hot coffee" case.[99] This case involved a woman who purchased coffee at a McDonald's drive-thru window and accidentally spilled it on her lap.[100] She then sued the corporation seeking punitive damages for burns she suffered from the excessive temperature of the coffee.[101] She was subsequently awarded the sum of $2.7 million in punitive damages.[102]

Another noteworthy suit is the *Exxon Valdez* case.[103] The plaintiffs, Alaskan fishermen, alleged damages stemming from an oil spill

94. *See* Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 18 (1991) ("We note once again our concern about punitive damages that 'run wild.' "); Peter Huber, *No-Fault Punishment*, 40 ALA. L. REV. 1037, 1050 (1989) ("[P]unitive damages remain a special problem, and one in need of urgent attention."); Sandra N. Hurd & Frances E. Zollers, *State Punitive Damages Statutes: A Proposed Alternative*, 20 J. LEGIS. 191, 197-98 (1994) ("Critics contend that punitive damages are routinely awarded, the amounts awarded are large, the frequency and size of awards has been rapidly increasing, and the problem is national in scope.").

95. *See* Browning-Ferris Indus. v. Kelco Disposal, Inc., 492 U.S. 257, 282-83 (1989) (O'Connor, J., concurring in part and dissenting in part).

96. 492 U.S. 257 (1989).

97. *Id.* at 282 (O'Connor, J., concurring in part and dissenting in part).

98. *Id.* (O'Connor, J., concurring in part and dissenting in part).

99. Liebeck v. McDonald's Restaurants, No. CV-93-02419, 1994 WL 782090 (LRP Jury) (Bernalillo County Dist. Court, N.M. Sept. 1994).

100. *Id.* at *1.

101. *Id.*; *see infra* notes 122-24 and accompanying text.

102. *Liebeck*, 1994 WL 782090, at *1; *see* Jack Torry, *Coffee Scalding Defines Tort Battle: Senate Hotly Debates Punitive Damages Ceiling For Lawsuits*, PITTSBURGH POST-GAZETTE, May 4, 1995, at A1.

103. *In re* The Exxon Valdez, No. A89-0095-CV, 1994 WL 182856 (D. Alaska Mar. 23, 1994).

from an Exxon oil tanker.[104] Exxon was ordered to pay $5 billion dollars in punitive damages.[105]

Some industries in particular have felt a blow from high punitive damage awards. For instance, juries appear to be more than ready to level big punches at insurance companies in bad-faith cases.[106] Punitive damage awards have, for all practical purposes, destroyed the asbestos industry.[107] Critics argue that punitive damages threaten research and development of new products, and may have led to the abandonment of potentially useful products.[108]

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104. *Id.* at *5; *see also* Caleb Soloman, *Exxon Is Told To Pay $5 Billion For Valdez Spill*, WALL ST. J., Sept. 19, 1994, at A3, A8 (discussing the case).

105. Soloman, *supra* note 104, at A3.

106. Andrew Blum, *Angry Jurors Take It Out On Insurers; Are the Recent Big Punitive Awards a Trend?*, NAT'L L.J., May 13, 1991, at 1 (pointing to a new study by Chicago-based American Bar Foundation). Blum cites three examples: (1) A motorist in Alaska won $1.2 million in punitive damages when an insurer refused her minor claim; (2) Lloyds of London was forced to pay $60 million in punitive damages after turning down a claim concerning a burned restaurant; and (3) A Mississippi anesthetist received $15 million in punitive damages from St. Paul Fire and Marine Insurance Co. *Id.* at 1, 10.

107. Formerly a very successful company in the asbestos industry, the Johns-Manville Corporation was a defendant in approximately 17,000 personal injury lawsuits and had tried or settled 3570 suits at an average cost of $20,000 each by the time it filed bankruptcy. *In re* Joint E. & S. Dist. Asbestos Litig., 129 B.R. 710, 751 (Bankr. S.D.N.Y. 1991); *see also* In re *Joint Eastern and Southern District Asbestos Litigation: Bankrupt and Backlogged—A Proposal for the Use of Federal Common Law in Mass Tort Class Actions*, 58 BROOK. L. REV. 553, 565-71 (1992) (giving more examples of the history of asbestos litigation). Also, an Illinois court noted that the Owens-Corning Fiberglass Corporation, a former producer of asbestos-containing products, may potentially be liable for "$8.5 billion for punitive damages alone." Kochan v. Owens-Corning Fiberglass Corp., 610 N.E.2d 683, 694 (Ill. App. Ct. 1993), *cert. denied*, 114 S. Ct. 1219 (1994).

Some members of the plaintiff's bar have openly expressed a desire to put certain other industries out of business. The tobacco industry may be one example:

> Longtime anti-tobacco lawyers, like [John] Banzhaf and [Richard] Daynard, predict the first big judgment against the [tobacco] companies will be handed down in fall 1995 or spring 1996. The first cigarette company will go bankrupt, they say, in 1997. Even some independent legal experts say they could be right this time.

Mark Curriden, *The Heat Is On*, A.B.A. J., Sept. 1994, at 58, 61.

108. Robert W. Pritchard, Comment, *The Due Process Implications of Ohio's Punitive Damages Law—A Change Must Be Made*, 19 U. DAYTON L. REV. 1207, 1224 n.138 (1994) (" 'The threat of such enormous awards has a detrimental effect on the research and development of new products. Some manufacturers of prescription drugs, for example, have decided that it is better to avoid uncertain liability than to introduce a new pill or vaccine into the market.' " (quoting Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 282 (1989) (O'Connor, J., concurring in part and dissenting in part)). This criticism is termed the "overdeterrence" problem with punitive damages. *See* Amelia J. Toy, Comment, *Statutory Punitive Damage Caps and the Profit Motive: An Economic Perspective*, 40 EMORY L.J. 303, 326-27 (1991).

Another argument against high punitive damages is that the unpredictability of awards is unfair and a violation of due process.[109] It is argued that the judicial system invites arbitrary and capricious judgments by allowing juries to set the amount of damages with "little more than an admonition to do what they think is best."[110] Critics also argue that punitive damage awards give plaintiffs an unfair advantage in settlement negotiations, decrease the availability and increase the cost of insurance coverage, and subject the defendant to multiple punishment for the same conduct.[111]

Still another generally held belief is that, because punitive damages result in a windfall to the plaintiff, these plaintiffs become "eager victims."[112] In other words, plaintiffs allow themselves to be injured by being contributorily negligent and then collecting both actual damages and bonus punitive damages.[113] This not only increases the heavy burden on the judiciary system, but allows persons to unfairly manipulate the system to their own advantage and to the detriment of others.

Supporters of the punitive damages doctrine claim that huge jury awards are the exception rather than the rule, citing "eye-glazing studies of numbers and size of awards to counter the assertions of the tort reformers."[114] Proponents assert that these studies invariably show

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109. Toy, *supra* note 108, at 323-24. The Supreme Court has ruled that there is a due process right that could be violated without sufficient guidance to juries and adequate post-trial review by the courts. *See* Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 23 (1991) (pointing out that although Alabama's procedures did not violate due process, the award at issue "may be close to the line"); *Browning-Ferris Indus.*, 492 U.S. at 280 (Brennan, J., concurring) ("I join the Court's opinion on the understanding that it leaves the door open for a holding that the Due Process Clause constrains the imposition of punitive damages in civil cases brought by private parties."); Bankers Life & Casualty Co. v. Crenshaw, 486 U.S. 71, 87 (1988) (O'Connor, J., concurring in part and concurring in the judgment) ("In my view, because of the punitive character of such awards, there is reason to think that this may violate the Due Process Clause.").

110. *Browning-Ferris*, 492 U.S. at 281 (Brennan, J., concurring). The jury was told that it could " 'take into account the character of the defendants, their financial standing, and the nature of their acts.' " *Id.* (Brennan, J., concurring). Justice Brennan argued that "[g]uidance like this is scarcely better than no guidance at all." *Id.* (Brennan, J., concurring).

111. *E.g.*, Thomas Koenig & Michael Rustad, *The Quiet Revolution Revisited: An Empirical Study of the Impact of State Tort Reform of Punitive Damages in Product Liability*, 16 JUST. SYS. J. 21, 21 (1993).

112. Toy, *supra* note 108, at 328-29.

113. *See* David D. Haddock, et al., *An Ordinary Economic Rationale for Extraordinary Legal Sanctions*, 78 CAL. L. REV. 1, 37-38 n.108 (1990); Toy, *supra* note 108, at 328-29.

114. Hurd & Zollers, *supra* note 94, at 191. The most comprehensive of these empirical studies is by Professor Michael Rustad. *See generally* Michael Rustad, *In Defense of Punitive Damages in Products Liability: Testing Tort Anecdotes with Empirical Data*, 78 IOWA L. REV. 1 (1992) (examining results of four previous studies—Rand Institute for Civil Jus-

that juries are not out of control in handing out punitive damage awards.[115] In one such study, Professors Michael Rustad and Thomas Koenig only located a total of 355 punitive damage awards among the thousands of product liability suits included in a twenty-five-year survey.[116]

Commentators are quick to point out that even if punitive damages are high and unpredictable, the harms to business interests are overstated.[117] In other words, if asbestos companies are forced out of business by punitive damages awards, it is because they produced an unsafe product and tried to conceal the dangers, not because something is wrong with the system.

The belief that punitive damages are running rampant in the United States stems largely from stories that focus on the amount of damages awarded rather than the egregious conduct of the company.[118] These skewed tales are then reported in the popular media as completely factual.[119] One example is President Reagan's tale of a man who successfully sued the telephone company when the booth from which he was making a call was struck by a drunk driver.[120] What the President omitted from this anecdote was the victim's perspective:

> I would not be standing on an artificial leg if the booth had not been installed so close to the road and if the door had opened as it was supposed to when I tried to get away from the oncoming car. It's nobody's fault but the telephone company's that I was in the way of that car when it hit.[121]

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tice Study, American Bar Foundation Study, GAO Study, and Landes and Posner Study—and then analyzing his own findings); *see also* Koenig & Rustad, *supra* note 111, at 25 (discussing the same earlier studies).

115. *See, e.g.*, Rustad, *supra* note 114, at 23, 85-88.

116. David G. Owen, *A Punitive Damages Overview: Functions, Problems and Reform*, 39 VILL. L. REV. 363, 372 (1994) (citing MICHAEL RUSTAD & THOMAS KOENIG PUNITIVE DAMAGES IN PRODUCTS LIABILITY: AN EMPIRICAL STUDY OF THE LAST QUARTER CENTURY OF VERDICTS 16 (Nov. 14, 1991)).

117. *See* Rustad, *supra* note 114, at 85-88 (discussing the social functions of punitive damages); Toy, *supra* note 108, at 324-26 (stating that unpredictability and large awards are needed to serve the deterrence function of punitive damages).

118. *See* Rustad, *supra* note 114, at 21 ("Stories abound of incredibly stupid or careless consumers collecting multi-million dollar windfalls after being hurt by their own folly.").

119. *See, e.g.*, Malcom S. Forbes, *Fact and Comment*, FORBES, Jan. 27, 1986, at 17.

120. *Victims Charge Administration Distorted Their "Sufferings" in Tort Reform Bid*, DAILY REP. FOR EXECUTIVES (BNA) No. 142, at A-13 (July 24, 1986).

121. *Id.*

Another such example is the all-too-famous McDonald's coffee case.[122] What caused such a stir was the $2.7 million award for spilled coffee,[123] but many people are not aware of the following facts:

1. McDonald's, by corporate policy, kept its coffee between 180 to 190 degrees. At that temperature, it could cause life-threatening burns within seven seconds if spilled.

2. The plaintiff was hospitalized for eight days and received skin grafts.

3. The plaintiff has permanent scars on over 16 percent of her body.

4. McDonald's own experts did not contest the fact that the coffee took 25 minutes to cool to a drinkable temperature.

5. The McDonald's quality-assurance manager testified that the corporation had a list of more than 700 other burn cases.

6. $2.7 million dollars was chosen by the jury because it was equal to two days of McDonald's coffee sales.[124]

In the midst of this concern over punitive damages, North Carolina passed its new statute designed to keep these awards at a reasonable level. However, there is even less evidence of excessive punitive damages in this state than there is nationwide. A search of both appellate cases and trial level jury verdicts that occurred before the new laws' passage reveals no apparent abuse of the doctrine of punitive damages.

First, a study of all North Carolina appellate cases for the last ten years suggests that punitive damage awards in North Carolina have been fairly modest.[125] Of the 319 cases which were analyzed, the jury awarded punitive damages in only fifty-two cases. Of these fifty-two

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122. *See* Liebeck v. McDonald's Restaurants, No. CV-93-02419, 1994 WL 782090 (LRP Jury) (Bernalillo County Dist. Court, N.M. Sept. 1994); *see supra* text accompanying notes 99-102.

123. *See* Ann Landers, *Juries Need Reality Check On Hot-Drink Suits*, GREENSBORO NEWS & RECORD, Oct. 6, 1995, at D3 (responding to a letter from "Still Angry in Atlanta" describing the plaintiff as "a malingering old biddy who pumped up her alleged injuries to get more money"). The jury award was lowered by the trial judge to $480,000, and McDonald's settled for an even lower amount, another fact that is sometimes omitted from accounts. Torry, *supra* note 102, at A1.

124. Charles Allen, *Fighting Over More Than Just Spilled Coffee*, FAYETTEVILLE OBSERVER-TIMES, March 30, 1995, at 15A (authored by the plaintiff's son-in-law).

125. This study includes cases from both the North Carolina Court of Appeals and the North Carolina Supreme Court dating from January 1986 through January 1996. A search for cases containing the words "punitive damages" was performed in the NC-CS database of Westlaw. Cases cited to both the North Carolina Court of Appeals and the North Carolina Supreme Court were counted as one case.

cases, fifteen were reversed on appeal,[126] five were cases in which the plaintiff elected to take treble damages instead of punitive damages,[127] and one was an arbitration award.[128] Therefore, only thirty-one cases remain in which punitive damage awards were upheld.[129]

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126. *See* McNeill v. Durham County ABC Bd., 322 N.C. 425, 431, 368 S.E.2d 619, 623 (1988) ($7000 for assault and battery); Abernathy v. Consolidated Freightways Corp., 321 N.C. 236, 242, 362 S.E.2d 559, 562 (1987) ($5000 for personal injury); Mullins by Mullins v. Friend, 116 N.C. App. 676, 686, 449 S.E.2d 227, 233 (1994) ($20,000 for false imprisonment); Edwards v. Hardin, 113 N.C. App. 613, 618, 439 S.E.2d 808, 812 (1994) (amount not given); Spry v. Winston-Salem/Forsyth County Bd. of Educ., 105 N.C. App. 269, 276, 412 S.E.2d 687, 691 ($150,000 for nonrenewal of teaching contract), *aff'd*, 332 N.C. 661, 422 S.E.2d 575 (1992); Flippo v. Hayes, 98 N.C. App. 115, 120, 389 S.E.2d 613, 616 ($45,000 for malicious prosecution), *aff'd*, 327 N.C. 490, 397 S.E.2d 512 (1990); Hunter v. Spaulding, 97 N.C. App. 372, 381, 388 S.E.2d 630, 636 (1990) ($1.1 million for fraud); Darnell v. Rupplin, 91 N.C. App. 349, 354, 371 S.E.2d 743, 747 (1988) ($50,000 for alienation of affections); Russell v. Town of Morehead City, 90 N.C. App. 675, 683, 370 S.E.2d 56, 61 (1988) ($17,301 for assault and battery); Hall v. Coplon, 85 N.C. App. 505, 510, 355 S.E.2d 195, 198 (1987) (plaintiff received $25,000 for assault; defendant received $30,000 for assault); Sheppard v. Community Fed. Sav. & Loan, 84 N.C. App. 257, 262, 352 S.E.2d 252, 255 ($130,000 on defendants' counterclaims), *disc. rev. denied*, 319 N.C. 459, 356 S.E.2d 6 (1987); Britt v. Britt, 82 N.C. App. 303, 318, 346 S.E.2d 259, 268 (1986) ($400,000 for fraud), *rev'd on other grounds*, 320 N.C. 573, 359 S.E.2d 467 (1989); Dunn v. Harris, 81 N.C. App. 137, 140, 344 S.E.2d 128, 130 ($75,000 for malicious prosecution), *disc. rev. denied*, 317 N.C. 702, 347 S.E.2d 40 (1986); York v. Taylor, 79 N.C. App. 653, 656, 339 S.E.2d 830, 832 (1986) ($10,000 for unfair trade practices); Pinehurst, Inc., v. O'Leary Bros. Realty, Inc., 79 N.C. App. 51, 65, 338 S.E.2d 918, 926 ($18,000 for unfair trade practices), *disc. rev. denied*, 316 N.C. 378, 342 S.E.2d 896 (1986).

127. *See* Ellis v. Northern Star Co., 326 N.C. 219, 227-28, 388 S.E.2d 127, 132 (1990) ($12,500 for libel); Myers & Chapman, Inc. v. Thomas G. Evans, Inc., 323 N.C. 559, 564, 374 S.E.2d 385, 389 (1988) (two dollars awarded for fraud); Jennings Glass Co. v. Brummer, 88 N.C. App. 44, 53, 362 S.E.2d 578, 584 (1987) (amount uncertain for fraud), *disc. rev. denied*, 321 N.C. 473, 364 S.E.2d 921 (1988); Mapp v. Toyota World, Inc., 81 N.C. App. 421, 427, 344 S.E.2d 297, 301 ($10,000 for unfair trade practices), *disc. rev. denied*, 318 N.C. 283, 347 S.E.2d 464 (1986); Wilder v. Hodges, 80 N.C. App. 333, 334, 342 S.E.2d 57, 58 (1986) ($3000 for false representation). Such an election is required under North Carolina law. *See supra* notes 66-67 and accompanying text.

128. *See* Carteret County v. United Contractors of Kinston, Inc., 120 N.C. App. 336, 346, 462 S.E.2d 816, 823 (1995) (amount not given).

129. The following cases include ones in which the case was reversed or remanded for reasons other than the punitive damage award. United Lab., Inc. v. Kuykendall, 335 N.C. 183, 188-89, 437 S.E.2d 374, 378 (1993) ($100,000 for interference with contract); Rowan County Bd. of Educ. v. United States Gypsum Co., 332 N.C. 1, 23, 418 S.E.2d 648, 662 (1992) ($1 million for asbestos claim); Hawkins v. Hawkins, 331 N.C. 743, 744, 417 S.E.2d 447, 448 (1992) ($25,000 for assault and battery); Investors Title Ins. Co. v. Herzig, 330 N.C. 681, 696, 413 S.E.2d 268, 276 (1992) ($100,000 for unfair trade practices); Hajmm Co. v. House of Raeford Farms, Inc., 328 N.C. 578, 595, 403 S.E.2d 483, 494 (1991) ($100,000 for breach of fiduciary duty); Huberth v. Holly, 120 N.C. App. 348, 356, 462 S.E.2d 239, 244 (1995) ($5000 for trespass); Lyon v. May, 119 N.C. App. 704, 707, 459 S.E.2d 833, 836 ($250,000 for interference with contract), *disc. rev. denied*, 341 N.C. 650, 462 S.E.2d 512 (1995); Muse v. Charter Hosp., Inc., 117 N.C. App. 468, 473, 475, 452 S.E.2d 589, 594-95 ($2 million against hospital and $4 million against hospital corporation for wrongful death; award warranted but error to award both), *aff'd*, 342 N.C. 403, 464 S.E.2d 44 (1995); Lee v.

Two of the punitive damage awards upheld by the court of appeals are somewhat anomalous. In *Muse v. Charter Hospital, Inc.*,[130] four million dollars were awarded against the hospital corporation and two million against the hospital itself.[131] The court of appeals held that it was error to award both amounts because the hospital was the instrumentality of the corporation.[132] However, this award has been included in the list of upheld awards since one of the awards will sur-

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Bir, 116 N.C. App. 584, 592, 449 S.E.2d 34, 39 ($100,000 awarded for trespass), *cert. denied*, 340 N.C. 113, 454 S.E.2d 652 (1994); McLean v. Mechanic, 116 N.C. App. 271, 279, 447 S.E.2d 459, 463 (1994) ($10,000 for criminal conversation), *disc. rev. denied*, 339 N.C. 738, 454 S.E.2d 654 (1995); Bryant v. Thalhimer Bros., Inc., 113 N.C. App. 1, 16, 437 S.E.2d 519, 528 (1993) ($225,000 for intentional infliction of emotional distress), *disc. rev. denied*, 336 N.C. 71, 445 S.E.2d 29 (1994); Juarez-Martinez v. Deans, 108 N.C. App. 486, 496, 424 S.E.2d 154, 160 ($30,000 for civil assault), *disc. rev. denied*, 333 N.C. 539, 429 S.E.2d 558 (1993); Lovell v. Nationwide Mut. Ins. Co., 108 N.C. App. 416, 427, 424 S.E.2d 181, 188 (1993) ($225,000 for insurance bad faith), *aff'd*, 334 N.C. 682, 435 S.E.2d 71 (1993); Berrier v. Thrift, 107 N.C. App. 356, 366, 420 S.E.2d 206, 212 (1992) ($250,000 for wrongful death), *disc. rev. denied*, 333 N.C. 254, 424 S.E.2d 918 (1993); Maintenance Equip. Co. v. Godley Builders, 107 N.C. App. 343, 354-55, 420 S.E.2d 199, 206 (1992) ($175,000 for trespass), *disc. rev. denied*, 333 N.C. 345, 426 S.E.2d 707 (1993); MacClements v. Lafone, 104 N.C. App. 179, 188, 408 S.E.2d 878, 883 ($135,000 for medical malpractice), *disc. rev. denied*, 330 N.C. 613, 412 S.E.2d 87 (1991); Jennings v. Jessen, 103 N.C. App. 739, 746, 407 S.E.2d 264, 268 (1991) ($300,000 for alienation of affection); Boyd v. L.G. DeWitt Trucking Co., 103 N.C. App. 396, 406, 405 S.E.2d 914, 921 (1991) ($4 million for wrongful death), *disc. rev. denied*, 330 N.C. 193, 412 S.E.2d 53 (1991); Shaw v. Stringer, 101 N.C. App. 513, 518, 400 S.E.2d 101, 104 (1991) ($50,000 for criminal conversation and alienation of affections); Jones v. McCaskill, 99 N.C. App. 764, 767, 394 S.E.2d 254, 256 (1990) ($75,000 for wrongful death); Harris v. Temple, 99 N.C. App. 179, 183-84, 392 S.E.2d 752, 754 ($7500 for slander), *disc. rev. denied*, 99 N.C. App. 179, 392 S.E.2d 752 (1990); New Bern Pool & Supply Co. v. Graubart, 94 N.C. App. 619, 629, 381 S.E.2d 156, 162 (1989) ($53,000 for fraud), *aff'd*, 326 N.C. 480, 390 S.E.2d 137 (1990); Brown v. Burlington Indus., Inc., 93 N.C. App. 431, 438-39, 378 S.E.2d 232, 236-37 (1989) ($50,000 for infliction of emotional distress); Bumgarner v. Tomblin, 92 N.C. App. 571, 577, 375 S.E.2d 520, 524 ($350,000 for breach of fiduciary duty), *disc. rev. denied*, 324 N.C. 333, 378 S.E.2d 789 (1989); Raymond U. v. Duke Univ., 91 N.C. App. 171, 185-86, 371 S.E.2d 701, 711 (1988) ($50,000 for slander upheld; $1 million for malicious prosecution reversed), *disc. rev. denied*, 323 N.C. 629, 374 S.E.2d 590 (1988); Robinson v. Seaboard Sys. R.R., 87 N.C. App. 532, 516, 361 S.E.2d 909, 921 (1987) ($105,000 for personal injury), *disc. rev. denied*, 321 N.C. 474, 364 S.E.2d 140 (1988); Medina v. Town and Country Ford, Inc., 85 N.C. App. 650, 659, 355 S.E.2d 831, 837 (1987) ($62,500 for malicious prosecution), *aff'd*, 321 N.C. 591, 364 S.E.2d 140 (1988); Stone v. Martin, 85 N.C. App. 410, 420-21, 355 S.E.2d 255, 261 ($300,000 for breach of fiduciary duty), *disc. rev. denied*, 320 N.C. 638, 360 S.E.2d 105 (1987); Olschesky v. Houston, 84 N.C. App. 415, 420-21, 352 S.E.2d 884, 888 (1987) ($77,500 actual and punitive damages combined for assault); Sanders v. Spaulding & Perkins, Ltd., 82 N.C. App. 680, 681-82, 347 S.E.2d 866, 868 (1986) ($1000 for fraud); Cole v. Duke Power Co., 81 N.C. App. 213, 227-28, 344 S.E.2d 130, 138 ($1.5 million for wrongful death), *disc. rev. denied*, 318 N.C. 281, 347 S.E.2d 462 (1986).

130. 117 N.C. App. 468, 452 S.E.2d 589 (1995).

131. *Id.* at 471, 452 S.E.2d at 593.

132. *Id.* at 473, 452 S.E.2d at 594.

vive remand. In *Olschesky v. Houston*,[133] the court of appeals never actually allocated the award between punitive and actual damages. Instead, the opinion merely stated that $77,500 was recovered for both combined.[134] For simplicity, the entire amount has been treated as punitive damages for the purpose of this study.

Including the amounts awarded in *Muse* and *Olschesky,* the total amount awarded in the thirty-one cases was approximately $15.6 million. The average award was $504,080.65 and the median award was $100,000. These figures do not shock the conscience, especially considering the fact that they are spread over a ten year time span.

Very high awards are certainly the exception. For instance, absent the two highest awards, *Muse*[135] and *Boyd v. L.G. DeWitt Trucking Co.*,[136] the numbers change dramatically. The median award remains at $100,000, but the average drops by more than half to $194,017. This demonstrates the manner in which a few extremely high awards can cast a different light on the entire system.

A study of selected jury verdicts returned similar results.[137] The thirty-four verdicts between April 1987 and August 1995 reveal slightly higher, but not outrageous, numbers.[138] The highest award

133. 84 N.C. App. 415, 352 S.E.2d 884 (1987).

134. *Id.* at 416, 352 S.E.2d at 886.

135. *Muse*, 117 N.C. App. at 471, 452 S.E.2d at 593 ($6 million).

136. *Boyd*, 103 N.C. App. at 400-01, 405 S.E.2d at 917-18 ($4 million).

137. These jury verdicts come from the Association of Trial Lawyers of America - Jury Verdict database (ATLA-JV) and the LRP-JV database on WESTLAW. These jury verdicts are not a scientific cross-section of the state as a whole, but are the verdicts which were voluntarily submitted to the database. If anything, this probably means the awards are higher than a random sample because the higher the award, the more incentive trial lawyers would have to place it on WESTLAW and advertise their victory.

138. Hardison v. Ferebee, No. 93 CVS 1160, 1995 WL 689899 (LRP Jury) (Craven County Aug. 1995) ($375,000 for infliction of emotional distress); Strickland v. Rush, No. 94 CVD 5377, 1995 WL 95133 (LRP Jury) (Wake County Jan. 1995) ($750,000 for wrongful death); Williams v. Patel, No. 94 CVS 2414, 1995 WL 689887 (LRP Jury) (Forsyth County Jan. 1995) ($10,000 for wrongful termination); Best v. Cox, No. 94 CVS 182, 1994 WL 767025 (LRP Jury) (Forsyth County Nov. 1994) ($100,000 for emotional distress); Koziol v. Rodwell, No. 92 CVS 2783, 1994 WL 766659 (LRP Jury) (Wake County Sept. 1994) ($50,000 for personal injury); Poy v. Mendez, No. 93 CVS 340, 1993 WL 553584 (LRP Jury) (Carteret County Dec. 1993) ($10,000 for assault and battery); Roberts v. First Citizens Bank & Trust Co., No. 91 CVS 11490, 1993 WL 553586 (LRP Jury) (Wake County Oct. 1993) ($1 million for wrongful termination); Denton v. Oreshack, No. 92 CVS 8352, 1993 WL 332998 (LRP Jury) (Wake County Mar. 1993) ($1500 for personal injury); Vann v. Rogers, No. 92 CVS 644, 1993 WL 370360 (LRP Jury) (Carteret County Mar. 1993) ($25,000 for personal injury); Allen v. McLamb, No. 91 CVS 474, 1993 WL 518916 (LRP Jury) (Johnston County Jan. 1993) ($25,000 for drunk driving injury); Hardy v. CSX Transp., Inc., No. 90 CVS 1443, 1992 WL 438766 (LRP Jury) (Pitt County July 1992) ($1.75 million for wrongful death); Watkins v. Ennis, No. 89 CVS 324, 1992 WL 438672 (LRP Jury) (Brunswick County Mar. 1992) ($35,000 for sexual harassment); Faison v. Hillhaven Corp., No. 89 CVS 64, 1991 WL 453508 (LRP Jury) (Hertford County Nov. 1991) ($7.5

was $7.5 million in *Faison v. Hillhaven Corp.*, a case in which a nursing home withheld a prescription of morphine from a patient who was dying of prostate cancer, administering a placebo instead.[139] The average award, however, was $674,394.72. If the *Faison* case is excluded, the average falls to $453,805.88. Moreover, many of these awards are so recent that at the time of this writing they have not yet been appealed.

Other studies support the conclusion that punitive damage awards are within reasonable limits in North Carolina.[140] One explanation for this phenomenon is that there were already several checks in place that discouraged punitive damage awards before enactment of the new laws. For example, North Carolina is still a contributory negligence state,[141] so that no award may be given if the plaintiff was even slightly negligent.[142] Therefore, if the McDonald's case[143] had come up in this state, there would not have been an award.[144] Other

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million for nursing home negligence); Vassallo v. Griffiths, 1991 WL 447308 (LRP Jury) (New Hanover County Mar. 1991) ($179,000 for wrongful death); Summerville v. Volk, No. 91 CVS 1330, 1992 WL 552359 (LRP Jury) (Henderson County Jan. 1991) ($5000 for medical malpractice); Hayes v. Hayes, No. 89 CVS 3269, 1990 WL 466092 (LRP Jury) (Forsyth County Oct. 1990) ($1 million for wrongful death); Parks v. Hayes, No. 89 CVS 3232, 1990 WL 466093 (LRP Jury) (Forsyth County Oct. 1990) ($1 million for wrongful death); Bobatsiaris v. Shook, No. 90 CVS 1194, 1990 WL 466167 (LRP Jury) (Buncombe County Oct. 1990) ($9000 for personal injury); Willcox v. Hedgepethe, No. 89 CVS 2503, 1990 WL 465756 (LRP Jury) (Wake County Sept. 1990) ($5000 for drunk driving accident); Kincey v. Collins, No. 89 CVS 612, 1990 WL 462675 (LRP Jury) (Wake County May 1990) ($8500 for personal injury); Bartlett v. Bartlett, No. 88 CVS 3362, 1989 WL 392082 (LRP Jury) (Buncombe County June 1989) ($50,000 for sexual assault by family member); Amos v. Celotex Corp., No. C-87-431-G, 1989 WL 388844 (LRP Jury) (Guilford County Feb. 1989) ($1.5 million for asbestos injuries); Locklear v. Blackmon, No. 88 CV 590, 1989 WL 388778 (LRP Jury) (Robeson County Jan. 1989) ($1000 for personal injury); Sargent v. Murray Sav. Ass'n, No. 87 CVS 746, 1988 WL 372422 (LRP Jury) (Wake County Oct. 1988) ($3.25 million shared by five employees subject to emotional distress from sexual harassment); Byrd v. Davis, No. 87 CVS 774, 1988 WL 368342 (LRP Jury) (Cumberland County Apr. 1988) ($3 million for paralysis caused by drunk driver); Braxton v. Davis, No. 86 CVD 8084, 1987 WL 233595 (LRP Jury) (Wake County Oct. 1987) ($600 for personal injury); Hutchins v. Southern R.R., No. 84 CVS 2210, 1987 WL 361280 (ATLA) (Wake County May 1987) ($105,000 for personal injury); King v. Dunn, No. 85 CVS 8222, 1987 WL 231507 (LRP Jury) (Wake County Apr. 1987) ($5800 for drunk driving accident).

139. *Faison*, 1991 WL 453508, at *1.

140. *See, e.g.*, Ballance, *supra* note 11, at F3 ("Punitive damages are notoriously rare in North Carolina, especially massive McDonald's coffee-type awards. Even when punitive damages are assessed, they fall in the $30,000 range, not in the millions of dollars, despite the fact that the state has never placed a cap on damage awards.").

141. *See, e.g.*, Miller v. Miller, 273 N.C. 228, 237, 160 S.E.2d 65, 73 (1968).

142. *Id.*

143. Liebeck v. McDonald's Restaurants, No. CV-93-02419, 1994 WL 782090 (LRP Jury) (Bernalillo County Dist. Court, N.M. Sept. 1994).

144. The plaintiff in the McDonald's case was found 20% comparatively negligent. *Id.* at *1.

checks on the doctrine stem from North Carolina's failure to recognize strict liability in product liability actions,[145] and a short statute of repose.[146]

Despite these preexisting limitations, the legislation was enacted,[147] and its passage required the legislature to choose what to include in the new law.[148] Four modifications included in North Carolina's new statute deserve further discussion: the new clear and convincing standard of proof,[149] the new standards of conduct required for an award of punitive damages,[150] the provision permitting bifurcation of the trial,[151] and the punitive award cap.[152]

The new statute requires clear and convincing evidence of an aggravating factor before punitive damages may be awarded.[153] Imposition of this heightened burden of proof is not a novel idea. In *Haslip*,[154] the Supreme Court suggested that although the "preponderance of the evidence" standard of proof was not a violation of due process, the "clear and convincing evidence" standard was probably a better choice.[155] Many states have agreed with the Court's assessment,[156] and the arguments for a higher standard of proof have sup-

145. N.C. GEN. STAT. § 99B-1.1 (1995).

146. N.C. GEN. STAT. § 1-50 (1983) (setting the statutory repose period at six years).

147. One explanation for the passage of the legislation could be the misconception held by many citizens that awards are often excessive. *See supra* notes 94-105, 114-24 and accompanying text. A more cynical explanation has been offered by many critics of the legislation. They point to the big-business connections of the bill's sponsor, Charles Neely, whose clients surely supported this new law. *See, e.g.*, Carol D. Leonnig, *Corporate Lawyer Authored Some Bills: Neely Says He Has No Conflict*, CHARLOTTE OBSERVER, Apr. 19, 1995, at 12A ("[Neely's] client list reads like a Who's Who of corporate liability cases: Dow Corning, maker of silicone breast implants; McDonald's Corp., seller of piping hot coffee; Ford Motor Co., manufacturer of the Pinto. It also includes Glaxo, Inc., North Carolina's largest pharmaceutical firm."). Neely claimed to have no conflict of interest in calling for this legislation, *id.*, but some commentators have questioned that assertion.

148. Presumably, the legislature looked to similar statutes in other states for guidance. See *infra* Appendix A for a comparison of punitive damage law in the fifty states.

149. *See infra* notes 153-58 and accompanying text.

150. *See infra* notes 159-73 and accompanying text.

151. *See infra* notes 174-77 and accompanying text.

152. *See infra* notes 178-90 and accompanying text.

153. N.C. GEN. STAT. § 1D-15(b) (1995). *See supra* note 19 for a summary of other areas of North Carolina law which are subject to the clear and convincing burden of proof.

154. 499 U.S. 1 (1991).

155. *Id.* at 23 n.11 ("There is much to be said in favor of a State's requiring . . . a standard of 'clear and convincing evidence' . . . .").

156. *See, e.g.*, Linthicum v. Nationwide Life Ins. Co., 723 P.2d 675, 681 (Ariz. 1986) (arguing that a higher standard is better because the deterrent effect of punitive damages is lessened if too "loosely assessed"); Tuttle v. Raymond, 494 A.2d 1353, 1363 (Me. 1985) ("[S]uch a higher standard of proof is appropriate for a claim for punitive damages."); Wangen v. Ford Motor Co., 294 N.W.2d 437, 457-58 (Wis. 1980) (stating that the quasi-criminal nature of punitive damages warrants a higher standard); see *infra* Appendix A

port.[157] For instance, because punitive damages are designed to punish, they are quasi-criminal fines, and thus should only be awarded in the "most egregious of cases."[158] Arguably, this principle also does not hurt the victim, as he should only be entitled to a windfall, if at all, when the defendant has done something outrageous.

In the new legislation, the North Carolina General Assembly consolidated the different standards of conduct which had historically been applied[159] into the terms of "fraud," "malice" and "willful or wanton conduct."[160] As Chapter 1D applies in every claim for punitive damages,[161] no such damages may be awarded unless fraud, malice, or willful and wanton conduct is proved.[162] It is unclear, however, whether these standards are more stringent than their common-law definitions. Certainly wrongful death actions, which previously allowed gross negligence as a basis for recovery of punitive damages, are subject to a higher standard.[163] Also, the statute explicitly excludes constructive fraud from the definition of fraud,[164] reversing North Carolina common law,[165] which allowed a recovery of punitive damages for constructive fraud.[166]

(listing states that have adopted the clear and convincing burden). *But see, e.g.*, Transportation Ins. Co. v. Moriel, 879 S.W.2d 10, 32 (Tex. 1994) (declining to judicially adopt the clear and convincing standard).

157. *See* McKown, *supra* note 68, at 453-58; Owen, *supra* note 116, at 407-08.

158. *See* Hodges v. S.C. Toof & Co., 833 S.W.2d 896, 901 (Tenn. 1992) ("[B]ecause punitive damages are to be awarded only in the most egregious of cases, a plaintiff must prove the defendant's intentional, fraudulent, malicious, or reckless conduct by clear and convincing evidence.").

159. *See supra* notes 50-61 and accompanying text.

160. N.C. GEN. STAT. § 1D-15 (1995) (stating that one of these factors must be met in every claim for punitive damages). Malice is "a sense of personal ill will toward the claimant that activated or incited the defendant to perform the act or undertake the conduct that resulted in harm to the claimant." *Id.* § 1D-5(5). Willful or wanton conduct is "the conscious and intentional disregard of and indifference to the rights and safety of others, which the defendant knows or should know is reasonably likely to result in injury, damage, or other harm." *Id.* § 1D-5(7).

161. *Id.* § 1D-10. Wrongful death actions are placed under this statute as well. N.C. GEN. STAT. § 28A-18-2(b)(5) (Supp. 1995).

162. N.C. GEN. STAT. § 1D-15 (1995).

163. N.C. GEN. STAT. § 28A-18-2(b)(5) (1984) (codified as amended at N.C. GEN. STAT. § 28A-18-2(b)(5) (Supp. 1995)).

164. N.C. GEN. STAT. § 1D-5(4) (1995) (the statute excludes constructive fraud "unless an element of intent is present").

165. *See supra* notes 56-61 and accompanying text.

166. *See, e.g.*, Hajmm Co. v. House of Raeford Farms, Inc., 94 N.C. App. 1, 13, 379 S.E.2d 868, 875 (1989), *rev'd on other grounds*, 328 N.C. 578, 403 S.E.2d 483 (1991); Bumgarner v. Tomblin, 92 N.C. App. 571, 576, 375 S.E.2d 520, 523, *disc. rev. denied*, 324 N.C. 333, 378 S.E.2d 789 (1989); Sanders v. Spaulding & Perkins, Ltd., 82 N.C. App. 680, 681, 347 S.E.2d 866, 867-68 (1986).

Since malice concerns cases where the defendant has ill will toward the particular claimant,[167] it sets a higher threshold than willful or wanton conduct, which only requires indifference.[168] Thus, it is unclear whether malice will ever have to be proven to receive punitive damages, since the statute authorizes an award if willful or wanton conduct is shown. Perhaps in those cases where malice has traditionally been required before punitive damages were awarded, such as in malicious prosecution actions,[169] this standard will still apply. If so, the standard will be somewhat more restrictive than the traditional North Carolina definition of actual malice, since the traditional definition included recklessness and a wanton disregard of the plaintiff's rights.[170]

The statutory definition of willful or wanton conduct, in turn, is taken verbatim from the definition of wanton conduct in *Huff v. Chrismon*,[171] and *Hinson v. Dawson*.[172] The Court of Appeals in *Huff* explicitly held that proof of motive or intent was not necessary to support a claim for punitive damages based on wanton conduct.[173] The new willful or wanton standard thus appears to be merely a codification of the common law.

North Carolina legislators also chose to include a very important procedural safeguard in the new punitive damages law. Under section 1D-30, the defendant may move for a bifurcated trial in which the issues of compensatory damages and punitive damages will be tried separately.[174] This is especially important because section 1D-35 permits the jury to consider evidence concerning past misconduct by the defendant and the net worth of the defendant in setting punitive dam-

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167. N.C. GEN. STAT. § 1D-5(5) (1995).

168. *Id.* § 1D-5(7).

169. *See, e.g.*, Cook v. Lanier, 267 N.C. 166, 170, 147 S.E.2d 910, 913 (1966); Mitchem v. National Weaving Co., 210 N.C. 732, 735, 188 S.E. 329, 330-31 (1936).

170. *See* Best v. Duke Univ., 337 N.C. 742, 753, 448 S.E.2d 506, 512 (1994) ("Actual malice exists 'only where the wrong is done willfully or under circumstances of rudeness, oppression or in a manner which evidences a reckless and wanton disregard of the plaintiff's rights.' ") (quoting United Labs., Inc. v. Kuykendall, 335 N.C. 183, 191, 437 S.E.2d 374, 379 (1993)); Jones v. Gwynne, 312 N.C. 393, 405, 323 S.E.2d 9, 16 (1984) (indicating that the plaintiff in a malicious prosecution suit "must offer evidence tending to prove that the wrongful action of instituting the prosecution was done for actual malice in the sense of personal ill-will, or under circumstances of insult, rudeness or oppression, or in a manner which showed the reckless and wanton disregard of the plaintiff's right.") (quoting Brown v. Martin, 176 N.C. 31, 33, 96 S.E.2d 642, 643 (1918)) (internal quotations omitted).

171. 68 N.C. App. 525, 531, 315 S.E.2d 711, 714, *disc. rev. denied*, 311 N.C. 756, 321 S.E.2d 134 (1984).

172. 244 N.C. 23, 28, 92 S.E.2d 393, 397 (1956).

173. *Huff*, 68 N.C. App. at 531-32, 315 S.E.2d at 714-15.

174. N.C. GEN. STAT. § 1D-30 (1995).

ages.[175] For the jury to hear such evidence about the defendant's wealth and prior misconduct before determining liability for compensatory damages could be unfairly prejudicial to the defendant. Bifurcating the trial bars such evidence until the jury has already decided the question of liability for compensatory damages. Most critics praise this particular reform as fair and logical.[176] In fact, one commentator argues that "bifurcation is necessary for a case to fulfill constitutional due process requirements."[177]

Without a doubt, the most controversial part of the new statute is the cap placed on punitive damage awards.[178] Although caps provide the benefit of constraining excessively high awards, several criticisms can be leveled against them. First, caps lend predictability to a doctrine whose real value lies in unpredictability.[179] If awards become predictable, large wealthy corporations may include them as a cost of doing business and thus will not be deterred from marketing unsafe products.[180] Second, caps may hurt small businesses disproportion-

175. *Id.* § 1D-35(2). Most scholars seem to agree that evidence of a defendant's wealth is necessary for the jury to impose a punitive damage award, because it gives them a standard by which to measure the severity of their punishment. *See generally*, Annotation, *Punitive Damages: Relationship To Defendant's Wealth As Factor In Determining Propriety of Award*, 87 A.L.R. 4th 141 (1995) (discussing the relation between the defendant's financial position and the proper amount of punitive damages). *But see* Kenneth S. Abraham & John C. Jeffries, Jr., *Punitive Damages and the Rule of Law: The Role of Defendant's Wealth*, 18 J. LEGAL STUD. 415, 415 (1989) ("In our view, the defendant's wealth is irrelevant to the goal of deterring socially undesirable conduct and is an improper consideration in assessing the basis for retribution.").

176. *See* McKown, *supra* note 68, at 446-53; Owen, *supra* note 116, at 408-09.

177. McKown, *supra* note 68, at 446 (citing Malcolm E. Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 VA. L. REV. 269, 272 (1983)).

178. N.C. GEN. STAT. § 1D-25(b) (1995). Upon deciding to place a cap on the amount of punitive damages, North Carolina legislators had at least three options. First, they could have placed an absolute dollar cap such as Virginia had at one time. VA. CODE ANN. § 8.01-38.1 (Michie 1992) (establishing a $350,000 ceiling on punitive damages). Second, they could have designed a dollar cap and carved out certain exceptions where the cap would not apply. *See, e.g.*, ALA. CODE § 6-11-21 (1993) (setting the cap at $250,000, but not to apply if actual malice is shown, if the conduct is part of a pattern or practice of intentional wrongful conduct, or to libel, slander, or defamation). Alabama's cap was declared unconstitutional as a denial of right to trial by jury in Hartsfield v. Alabama Power Co., 627 So. 2d 878 (Ala. 1993). Finally, North Carolina could have opted for a multiplier system, as in Texas, where punitive damages may not exceed a certain ratio of actual damages, such as four to one. *See, e.g.*, TEX. CIV. PRAC. & REM. CODE ANN. § 41.008 (West Supp. 1996) (establishing the cap as the greater of $200,000 or two times the amount of compensatory damages plus any non-economic damages, not to exceed $750,000). North Carolina opted for a combination fixed cap and multiplier. *See* N.C. GEN. STAT. § 1D-25(b) (1995).

179. Hurd & Zollers, *supra* note 94, at 200; *see also* Toy, *supra* note 108, at 324-26 (arguing that deterrence may only be accomplished by unpredictability of awards).

180. Toy, *supra* note 108, at 324-36. *But see* Diane Dimond, *Think It Over and Get Back To Us, Supreme Court Ruling on Punitive Damages Awards*, 52 INS. REV. 32, 32

ately as compared with large corporations, because large corporations may not feel as much sting from a capped punitive damage award, while small businesses could still be dealt a severe blow.[181] Third, in the case of multiplier or ratio caps, which set a maximum amount as a multiple or ratio of compensatory damages,[182] critics argue that it is not appropriate to link the amount of punitive damages to the amount of compensatory damages awarded.[183] The result would be that the focus for awarding punitive damages would not be on the conduct of the defendant, but on the harm suffered by the claimant. Commentators point out that the jury "must be free to consider what might have happened as a consequence of the defendant's behavior, not only what did happen, and punish accordingly."[184] Finally, the cap reduces the incentive for victims to take their case to court by limiting their potential awards. In conjunction with threatened sanctions for frivolous claims and a higher standard of proof, this incentive is reduced even further. With fewer victims taking these cases to trial, fewer unsafe products will be taken off the market. This saves large corporations money at the expense of the safety of the general public.

Based on existing limitations and the fact that punitive damages in North Carolina have historically not been excessive, a cap on punitive damages was not needed in North Carolina, and should not have been included in the statute. Drunk drivers were the only defendants excluded from the cap,[185] although the disregard they show for other's safety arguably is no worse than the decision of a wealthy corporation to knowingly market an unsafe product.

One of the valid arguments against punitive damages is the criticism of the large windfall given to the plaintiff.[186] Rather than preventing these windfalls through the use of caps, North Carolina should have followed the lead of several states by requiring a percentage of the award to be turned over to a general state fund, or a fund

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(1991) (quoting Martin Connor, President of the American Tort Reform Association, claiming that taking into account the wealth of the defendant is like "charg[ing] different fines for running a red light depending on how rich the driver is").

181. *See* Hurd & Zollers, *supra* note 94, at 200 ("An arbitrary cap set at a fixed dollar amount suggests that we can put a price *ex ante* on outrageous behavior."); Owen, *supra* note 116, at 409-10 (arguing that arbitrary limits rob the decision-maker of flexibility needed to further the purposes of punitive damages).

182. Hurd & Zollers, *supra* note 94, at 200-01. For instance, some statutes cap punitive damages at an amount not to exceed three times compensatory damages. *Id.*

183. *Id.*

184. *Id.* at 201. "The message is worth sending, whether or not the plaintiff has suffered great harm." *Id.* at 200.

185. N.C. GEN. STAT. § 1D-26 (1995).

186. *See* Hurd & Zollers, *supra* note 94, at 201-02; Owen, *supra* note 116, at 410-11.

established to fight the evils to which the victim was subjected.[187] The plaintiff has little standing to argue that she is entitled to this money as a matter of right, since her injuries have been compensated with other damages.[188] Although questions have been raised as to the constitutionality of such laws,[189] the policy of avoiding windfalls to plaintiffs while still punishing defendants is sound. However, the North Carolina bill does not contain such a provision. Rather, the defendant simply is not required to pay any money awarded in excess of the cap.[190]

Not only did the legislature include some provisions it should not have, it failed to include some items that would have enhanced the law's fairness toward the business interests it was designed to protect. If the North Carolina legislature was serious about protecting corporations from being put out of business for an isolated mistake, which is one of the main arguments in support of reform,[191] it omitted an excellent way to do just that. Georgia's statute provides that only one punitive damage award may be recovered from a defendant for the same conduct in product liability actions.[192] While this may not work well in mass-tort cases where claims mount over long periods of time, it is arguably appropriate for single-event disasters, such as plane crashes.[193] This is unlikely to result in a "race to the courthouse" if used in conjunction with a provision which puts punitive damages into a state fund,[194] since the first plaintiff to file would not receive the entire award. The defendant would be punished, but the award would be less likely to force the defendant to close its doors.

In summary, North Carolina's new punitive damages statute is deficient in a number of respects. First, it is an attempt to remedy a problem which does not yet exist and in all likelihood will never exist as long as North Carolina remains a contributory negligence state.[195] Furthermore, the statute is not a drastic change from the common law with two obvious exceptions: the damage cap and the heightened bur-

187. McKown, *supra* note 68, at 436-43. See *infra* Appendix A for a list of states that have such a provision.

188. *See* Woody v. Catawba Valley Broadcasting Co., 272 N.C. 459, 463, 158 S.E.2d 578, 581-82 (1968); Cotton v. Fisheries Prods. Co., 181 N.C. 151, 152-53, 106 S.E. 487, 488 (1921).

189. *See, e.g.*, Kirk v. Denver Publishing Co., 818 P.2d 262, 273 (1991) (holding Colorado's statute to be a violation of the state takings clause).

190. N.C. GEN. STAT. § 1D-25(b) (1995).

191. *See supra* notes 106-08 and accompanying text.

192. GA. CODE ANN. § 51-12-5.1(e)(1) (1987 & Supp. 1995).

193. Owen, *supra* note 116, at 411.

194. *See supra* notes 186-90 and accompanying text.

195. *See supra* notes 140-44 and accompanying text.

den of proof.[196] While the burden of proof is arguably justifiable, the cap is unfair and unnecessary.[197] Other sincere possibilities for reform were not included, such as a procedure by which a portion of punitive damage awards goes to a state fund for the general public, and a prohibition on more than one award being leveled against a defendant for the same conduct.[198]

The result of the new law is that the punitive damages doctrine is no longer a useful way to regulate conduct of corporations or individuals. Those who are wealthy enough to afford the capped amount may continue or possibly increase their unsafe conduct to the detriment of the general public. Even those who might still be deterred by the threat of a capped punitive damage award will face less of a threat from victims, who must meet a higher burden of proof, face less recovery and risk the possibility of sanctions. The punitive damages doctrine has been useful in the past by encouraging safer products and by putting a check on the non-criminal, but harmful conduct of others. This usefulness is limited under the new laws for the reasons discussed above. Ultimately, Chapter 1D takes a doctrine designed to punish egregious wrongdoers and subverts it in such a way that the people who will really feel the punishment are the innocent bystanders.

BRIAN TIMOTHY BEASLEY

196. *See supra* notes 153-77 and accompanying text.
197. *See supra* notes 178-85 and accompanying text.
198. *See supra* notes 186-94 and accompanying text.

Appendix A: Punitive Damages Reform at the State Level[1]

WHAT THE CATEGORIES MEAN:

Standard of Proof: What burden must be met in order to receive a punitive damages award?

Cap and Exceptions: Whether and when punitive damages are capped and at what amount?

Money to State: Whether any portion of the punitive damages award goes into a state fund?

Conduct Required: How must the defendant act to be subject to a punitive damages award?

1. ALABAMA

Standard of Proof: Clear and convincing evidence. ALA. CODE § 6-11-20 (1993 & Supp. 1995).

Cap and Exceptions: Punitive damages may not exceed $250,000 unless there exists a pattern or practice of wrongful conduct, actual malice, libel, slander, or defamation. ALA. CODE § 6-11-21 (1993). This section was declared unconstitutional by Henderson v. Alabama Power Co., 627 So. 2d 878, 894 (Ala. 1993).

Money to State: No. *See* Smith v. States Gen. Life Ins. Co., 592 So. 2d 1021, 1025 (Ala. 1992).

Conduct Required: Conscious and deliberate oppression, fraud, wantonness or malice with respect to the plaintiff. ALA. CODE § 6-11-20 (1993 & Supp. 1995).

2. ALASKA

Standard of Proof: Clear and convincing evidence. ALASKA STAT. § 09.17.020 (1994).

Cap and Exceptions: No cap on punitive damages.

Money to State: No.

Conduct Required: Reckless indifference, maliciousness, or wantonness. Sturm, Ruger & Co., Inc. v. Day, 594 P.2d 38, 46 (Alaska 1979), *cert. denied*, 454 U.S. 894 (1981).

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1. *See also* RICHARD L. BLATT ET AL., PUNITIVE DAMAGES: A STATE-BY-STATE GUIDE TO LAW AND PRACTICE (1991).

3. ARIZONA

Standard of Proof: Clear and convincing evidence. Linthicum v. Nationwide Life Ins. Co., 723 P.2d 675, 681 (Ariz. 1986).
Cap and Exceptions: No cap on punitive damages.
Money to State: No.
Conduct Required: Outrageous, malicious, and fraudulent conduct. *Linthicum*, 723 P.2d at 680.

4. ARKANSAS

Standard of Proof: Preponderance of the evidence. National Bank of Commerce v. McNeill Trucking Co., 828 S.W.2d 584, 590 (Ark. 1992) (Dudley, J., concurring).
Cap and Exceptions: No cap on punitive damages.
Money to State: No.
Conduct Required: Wanton conduct or such disregard that malice may be inferred. J.B. Hunt Transport, Inc. v. Doss, 899 S.W.2d 464 (Ark. 1995).

5. CALIFORNIA

Standard of Proof: Clear and convincing evidence. CAL. CIV. CODE § 3294(a) (West Supp. 1995).
Cap and Exceptions: No cap on punitive damages.
Money to State: No.
Conduct Required: Oppression, fraud, or malice. CAL. CIV. CODE § 3294(a) (West Supp. 1995).

6. COLORADO

Standard of Proof: Beyond a reasonable doubt. COLO. REV. STAT. ANN. § 13-25-127(2) (West 1987).
Cap and Exceptions: Punitive damages may be no more than actual damages unless judge finds either continued action during pendency of case or aggravated injury during pendency of case, in which case they may be no more than three times the amount of actual damages. COLO. REV. STAT. ANN. §§ 13-21-102(1)(a), (3) (West 1987).
Money to State: No.
Conduct Required: Fraud, malice, or willful and wanton. COLO. REV. STAT. ANN. § 13-21-102(1)(a) (West 1987).

7. Connecticut

Standard of Proof: Preponderance of the evidence. Freeman v. Alamo Management Co., 607 A.2d 370, 375 (Conn. 1992).

Cap and Exceptions: Punitive damages may not exceed two times actual damages in products liability cases. Conn. Gen. Stat. Ann. § 52-240b (West 1991).

Money to State: No.

Conduct Required: Reckless indifference, or intentional and wanton conduct. Gargano v. Heyman, 525 A.2d 1343, 1347 (Conn. 1987).

8. Delaware

Standard of Proof: Standard civil burden of preponderance of the evidence. *See, e.g.,* Cathleen C.Q. v. Norman J.Q., 452 A.2d 951, 954 (Del. 1982). Burden of proof has not been specifically addressed in the context of punitive damages.

Cap and Exceptions: No cap.

Money to State: No.

Conduct Required: Willful and wanton conduct. Jardel Co. v. Hughes, 523 A.2d 518, 529-30 (Del. 1987).

9. District Of Columbia

Standard of Proof: Clear and convincing evidence. Raynor v. Richardson-Merrell, Inc., 643 F. Supp. 238, 245 (D.D.C. 1986).

Cap and Exceptions: No cap.

Money to State: No.

Conduct Required: Willful and outrageous, gross fraud, evil motive, active malice, or deliberateness. Mariner Water Renaturalizer of Wash., Inc. v. Aqua Purification Sys., Inc., 665 F.2d 1066, 1071 (D.C. Cir. 1981).

10. Florida

Standard of Proof: Preponderance of the evidence for up to three times the compensatories. Clear and convincing evidence is needed to exceed cap. Fla. Stat. Ann. § 768.73 (West Supp. 1996).

Cap and Exceptions: Limited to three times compensatory damages unless clear and convincing evidence that award was not excessive. Fla. Stat. Ann. § 768.73(1)(a)-(b) (West Supp. 1996).

Money to State: 35% goes to state. Fla. Stat. Ann. § 768.73(2)(b) (West Supp. 1996).

Conduct Required: Wantonness, recklessness, or gross disregard. White Constr. Co., Inc. v. Dupont, 455 So. 2d 1026, 1028-29 (Fla. 1984).

11. GEORGIA

Standard of Proof: Clear and convincing evidence. GA. CODE ANN. § 51-12-5.1(b) (Supp. 1995).

Cap and Exceptions: $250,000 except in products liability actions and cases involving intentional torts. GA. CODE ANN. § 51-12-5.1(g) (Supp. 1995).

Money to State: 75% went to state for product liability actions. GA. CODE ANN. § 51-12-5.1(e)(2) (Supp. 1995). This statute, which became effective on July 1, 1987, was held unconstitutional in McBride v. General Motors Corp., 737 F. Supp. 1563, 1578 (M.D. Ga. 1990).

Conduct Required: Willful misconduct, malice, fraud, wantonness, or oppression. General Refractories Co. v. Rogers, 239 S.E.2d 795, 797-98 (Ga. 1977).

12. HAWAII

Standard of Proof: Clear and convincing evidence. Masaki v. General Motors Corp., 780 P.2d 566, 575 (Haw. 1989).

Cap and Exceptions: No cap.

Money to State: No.

Conduct Required: Wantonness, oppression, or malice. Beerman v. Toro Mfg. Corp., 615 P.2d 749, 755 (Haw. Ct. App. 1980).

13. IDAHO

Standard of Proof: Preponderance of the evidence. IDAHO CODE § 6-1604(1) (1990).

Cap and Exceptions: No cap.

Money to State: No.

Conduct Required: Oppressive, fraudulent, wanton, malicious, or outrageous conduct. IDAHO CODE § 6-1604(1) (1990).

14. ILLINOIS

Standard of Proof: Standard civil burden of preponderance of the evidence. *See, e.g., In re* Arya, 589 N.E.2d 832, 836 (Ill. App. Ct. 1992). Burden has not been specifically addressed in the context of punitive damages.

Cap and Exceptions: No cap.

Money to State: No.
Conduct Required: Fraud, actual malice, deliberate oppression, willfulness, or gross negligence. Kelsay v. Motorola, Inc., 384 N.E.2d 353, 359 (Ill. 1978).

15. INDIANA

Standard of Proof: Clear and convincing evidence. IND. CODE ANN. § 34-4-34-2 (Burns 1986).
Cap and Exceptions: Three times actual damages or $50,000, whichever is greater. IND. CODE ANN. § 34-4-34-4 (Burns Supp. 1995).
Money to State: 25% of the award goes to the plaintiff and 75% to the state. IND. CODE ANN. § 34-4-34-6(a) (Burns Supp. 1995).
Conduct Required: Willful and wanton misconduct. Bud Wolf Chevrolet, Inc. v. Robertson, 519 N.E.2d 135, 136 (Ind. 1988).

16. IOWA

Standard of Proof: Clear, convincing and satisfactory evidence. IOWA CODE § 668A.1(1)(a) (1987).
Cap and Exceptions: No cap.
Money to State: If conduct was directed specifically toward plaintiff, plaintiff gets entire award. If conduct was not directed specifically toward plaintiff, 75% of award goes to state. IOWA CODE § 668A.1(2) (1987).
Conduct Required: Willful or wanton disregard. IOWA CODE § 668A.1(1)(a) (1987).

17. KANSAS

Standard of Proof: Clear and convincing evidence. KAN. STAT. ANN. § 60-3702(c) (1994).
Cap and Exceptions: Limited to the lesser of either the defendant's adjusted gross income over the last five years or five million dollars unless the defendant profited from the conduct. KAN. STAT. ANN. § 60-3702(e) (1994).
Money to State: No.
Conduct Required: Willful or wanton conduct, fraud, or malice. KAN. STAT. ANN. § 60-3702(c) (1994).

18. KENTUCKY

Standard of Proof: Clear and convincing evidence. KY. REV. STAT. ANN. § 411.184(2) (Baldwin 1992).
Cap and Exceptions: No cap.

Money to State: No.
Conduct Required: Oppression, fraud, or malice. KY. REV. STAT. ANN. § 411.184(2) (Baldwin 1992).

19. LOUISIANA

Standard of Proof: Preponderance of the evidence. Galjour v. General Am. Tank Car Corp., 764 F. Supp. 1093, 1100 (E.D. La. 1991).
Cap and Exceptions: No cap.
Money to State: No.
Conduct Required: Varies according to statute. *See* LA. CIV. CODE ANN. art. 2315.3 (West Supp. 1996).

20. MAINE

Standard of Proof: Clear and convincing evidence. Tuttle v. Raymond, 494 A.2d 1353, 1363 (Me. 1989).
Cap and Exceptions: No cap.
Money to State: No.
Conduct Required: Malice. *Tuttle*, 494 A.2d at 1365.

21. MARYLAND

Standard of Proof: Clear and convincing evidence. Owens-Illinois v. Zanobia, 601 A.2d 633, 657 (Md. 1992).
Cap and Exceptions: No cap.
Money to State: No.
Conduct Required: Actual malice. *Owens-Illinois*, 601 A.2d at 652-53.

22. MASSACHUSETTS

Standard of Proof: Preponderance of the evidence. *See* LaLonde v. LaLonde, 566 N.E.2d 620 (Mass. App. Ct. 1991).
Cap and Exceptions: Varies according to statute. *See* MASS. GEN. LAWS ANN. ch. 160, § 225 (West 1992) ($5,000 cap for malicious injury to railroad); MASS. GEN. LAWS ANN. ch. 229, § 2 (West 1992) (no cap for damages for death by negligence).
Money to State: No.
Conduct: Varies according to statute. *See* MASS. GEN. LAWS ANN. ch. 160, § 225 (West 1992) (malicious injury to railroad requires malice); MASS. GEN. LAWS ANN. ch. 229, § 2 (West 1992) (damages for death by negligence requires willful, wanton, or reckless).

23. MICHIGAN

Standard of Proof: Preponderance of the evidence. Children of Chipewa, Ottawa, and Potawatomy Tribes v. Regents of Univ. of Mich., 305 N.W.2d 522, 529 (Mich. Ct. App. 1981).
Cap and Exceptions: No cap.
Money to State: No.
Conduct Required: Malicious, willful, and wanton. Kewin v. Massachusetts Mut. Life Ins. Co., 295 N.W.2d 50, 55 (Mich. 1980).

24. MINNESOTA

Standard of Proof: Clear and convincing evidence. MINN. STAT. § 549-20(1) (1988 & Supp. 1995).
Cap and Exceptions: No cap.
Money to State: No.
Conduct Required: Deliberate disregard. MINN. STAT. § 549-20(1) (Supp. 1995).

25. MISSISSIPPI

Standard of Proof: Preponderance of the evidence. Universal Life Ins. Co. v. Veasley, 610 So. 2d 290, 294 (Miss. 1992).
Cap and Exceptions: No cap.
Money to State: No.
Conduct Required: Insult, malice, or gross negligence. Fowler Butane Gas Co. v. Varner, 141 So. 2d 226, 233 (Miss. 1962).

26. MISSOURI

Standard of Proof: Preponderance of the evidence. Menaugh v. Resler Optometry, Inc., 799 S.W.2d 71, 76 (Mo. 1990).
Cap and Exceptions: No.
Money to State: 50% goes to state. MO. ANN. STAT. § 537.675 (Vernon 1987).
Conduct Required: Willful, wanton, malicious, or reckless disregard. McClellan v. Highland Sales & Inv. Co., 484 S.W.2d 239, 242 (Mo. 1972).

27. MONTANA

Standard of Proof: Clear and convincing evidence. MONT. CODE ANN. § 27-1-221(5) (1995).
Cap and Exceptions: No cap.
Money to State: No.

Conduct Required: Actual fraud or actual malice. MONT. CODE ANN. § 27-1-221(1) (1995).

28. NEBRASKA

Punitive damages are constitutionally prohibited in Nebraska. NEB. CONST. art. VIII, § 5; *see* Distinctive Printing and Packaging Co. v. Cox, 443 N.W.2d 566, 573-74 (1989).

29. NEVADA

Standard of Proof: Clear and convincing evidence. NEV. REV. STAT. § 42.005 (1981).

Cap and Exceptions: Three times compensatory damages or $300,000 if award is $100,000 or less. Does not apply to insurance bad faith, product liability, defamation, drunk driving, toxic substances, or housing discrimination actions. NEV. REV. STAT. § 42.005(a)-(e) (1981).

Money to State: No.

Conduct Required: Oppression, fraud, or malice. NEV. REV. STAT. § 42.005 (1981).

30. NEW HAMPSHIRE

Punitive damages are outlawed in New Hampshire. N.H. REV. STAT. ANN. § 507:16 (1986).

31. NEW JERSEY

Standard of Proof: Clear and convincing evidence. N.J. REV. STAT. § 2A:15-5.12a (Supp. 1996).

Cap and Exceptions: Five times compensatory damages or $350,000. Does not apply to discrimination, civil rights, AIDS testing, sexual abuse, bias, or drunk driving cases. N.J. REV. STAT. § 2A:15-5.14 (Supp. 1996).

Money to State: No.

Conduct Required: Actual malice or wanton and willful conduct. N.J. REV. STAT. § 2A:15-5.12 (Supp. 1996).

32. NEW MEXICO

Standard of Proof: Preponderance of the evidence. United Nuclear Corp. v. Allendale Mut. Ins. Co. 709 P.2d 649, 654 (N.M. 1985).

Cap and Exceptions: No cap.

Money to State: No.

Conduct Required: Malicious, fraudulent, oppressive, or wanton. Samedan Oil Corp. v. Neeld, 577 P.2d 1245, 1247 (N.M. 1978).

33. New York

Standard of Proof: The standard civil burden of preponderance of the evidence. See, e.g., Kalra v. Kalra, 539 N.Y.S.2d 761 (N.Y. App. Div. 1989). Burden of proof has not been specifically addressed in the context of punitive damages.
Cap and Exceptions: No cap.
Money to State: No.
Conduct Required: Reckless. Welch v. Mr. Christmas, Inc., 440 N.E.2d 1317, 1321 (N.Y. 1982).

34. North Dakota

Standard of Proof: Clear and convincing evidence. N.D. Cent. Code § 32-03.2-11(1) (1987).
Cap and Exceptions: No cap.
Money to State: No.
Conduct Required: Oppression, fraud, or malice. N.D. Cent. Code § 32-03-211(1) (1987).

35. Ohio

Standard of Proof: Clear and convincing evidence. Ohio Rev. Code Ann. § 2315.21(D)(3) (Anderson 1991).
Cap and Exceptions: No cap.
Money to State: No.
Conduct Required: Malice, aggravated or egregious fraud, oppression, or insult. Ohio Rev. Code Ann. § 2315.21(B)(1).

36. Oklahoma

Standard of Proof: Clear and convincing evidence. Okla. Stat. Ann. tit. 23, § 9A.1(A) (1995).
Cap and Exceptions: Various limits depending on the burden of proof and the type of defendant. Okla. Stat. Ann. tit. 23, § 9A.1(B)-(D) (1995).
Money to State: No.
Conduct Required: Wanton or reckless, oppression, fraud, or malice. Okla. Stat. Ann. tit. 23, § 9A.1 (1995).

37. OREGON

Standard of Proof: Clear and convincing evidence. OR. REV. STAT. § 18.537(1) (1995).
Cap and Exceptions: No cap.
Money to State: No.
Conduct Required: Malice or reckless and outrageous indifference. OR. REV. STAT. § 18.537(12) (1995).

38. PENNSYLVANIA

Standard of Proof: Preponderance of the evidence. Martin v. Johns-Manville Corp., 494 A.2d 1088, 1098 (Pa. 1985).
Cap and Exceptions: No cap.
Money to State: No.
Conduct Required: Evil motive, reckless indifference. *Martin*, 494 A.2d at 1096-98.

39. RHODE ISLAND

Standard of Proof: Preponderance of the evidence. Taglianetti v. New England Tel. & Tel. Co., 103 A.2d 67, 70 (R.I. 1954).
Cap and Exceptions: No cap.
Money to State: No.
Conduct Required: Willful, reckless, or wicked. Greater Providence Deposit Corp. v. Jenison, 485 A.2d 1242, 1244 (R.I. 1984).

40. SOUTH CAROLINA

Standard of Proof: Clear and convincing evidence. S.C. CODE ANN. § 15-33-135 (Law. Co-op. 1990 & Supp. 1995).
Cap and Exceptions: No cap.
Money to State: No.
Conduct Required: Malice, ill will, conscious or reckless disregard. King v. Allstate Ins. Co., 251 S.E.2d 194, 196 (S.C. 1979).

41. SOUTH DAKOTA

Standard of Proof: Clear and convincing evidence. S.D. CODIFIED LAWS ANN. § 21-1-4.1 (1987 & Supp. 1995).
Cap and Exceptions: No cap.
Money to State: No.
Conduct Required: Willful, wanton, or malicious. S.D. CODIFIED LAWS ANN. § 21-1-4.1 (1987 & Supp. 1995).

42. TENNESSEE

Standard of Proof: Clear and convincing evidence. Hodges v. S.C. Toof & Co., 833 S.W.2d 896, 901 (Tenn. 1992).
Cap and Exceptions: No cap.
Money to State: No.
Conduct Required: Intentionally, fraudulently, maliciously, or recklessly. *Hodges*, 833 S.W.2d at 896, 901.

43. TEXAS

Standard of Proof: Clear and convincing evidence. TEX. CIV. PRAC. & REM. CODE ANN. § 41.003 (West Supp. 1996).
Cap and Exceptions: $200,000 or two times economic damages plus up to $750,000 of awarded non-economic damages. Does not apply to intentional torts or actions done with malice. TEX. CIV. PRAC. & REM. CODE ANN. § 41.008 (West Supp. 1996).
Money to State: No.
Conduct Required: Malice, fraud, or gross negligence. TEX. CIV. PRAC. & REM. CODE ANN. § 41.003 (West Supp. 1996).

44. UTAH

Standard of Proof: Clear and convincing evidence. UTAH CODE ANN. § 78-18-1 (1992).
Cap and Exceptions: No cap.
Money to State: 50% of amount over $20,000 goes to state. UTAH CODE ANN. § 78-18-1 (1992).
Conduct Required: Willful and malicious or intentionally fraudulent. UTAH CODE ANN. § 78-18-1 (1992).

45. VERMONT

Standard of Proof: Preponderance of the evidence. Lyndonville Sav. Bank and Trust Co. v. Peerless Ins. Co., 234 A.2d 340, 342 (Vt. 1967).
Cap and Exceptions: No cap.
Money to State: No.
Conduct Required: Insult or oppression, reckless or wanton. Furno v. Pignona, 522 A.2d 746, 750 (Vt. 1986).

46. VIRGINIA

Standard of Proof: Clear and convincing evidence. Great Coastal Express, Inc. v. Ellington, 334 S.E.2d 846, 855 (Va. 1985).

Cap and Exceptions: $350,000. VA. CODE ANN. § 8.01-38.1 (Michie 1992).

Money to State: No.

Conduct Required: Actual malice. Peacock Buick Inc. v. Durkin, 277 S.E.2d 225, 227 (Va. 1981).

47. WASHINGTON

Punitive damages are prohibited in Washington. *See* Spokane Truck & Dray Co. v. Hoefer, 25 P. 1072, 1073-74 (Wash. 1891).

48. WEST VIRGINIA

Standard of Proof: Standard civil burden is preponderance of the evidence. *See, e.g.*, Burk v. Huntington Dev. & Gas Co., 58 S.E.2d 574, 581 (W. Va. 1950). Burden has not been specifically addressed in the context of punitive damages.

Cap and Exceptions: No cap.

Money to State: No.

Conduct Required: Gross fraud, malice, oppression, wanton, willful, or reckless conduct. Smith v. Perry, 359 S.E.2d 624, 625 (W. Va. 1987).

49. WISCONSIN

Standard of Proof: Clear and convincing evidence. Wangen v. Ford Motor Co., 294 N.W.2d 437, 457-58 (Wis. 1980).

Cap and Exceptions: No cap.

Money to State: No.

Conduct Required: Willful, wanton, or reckless. Jeffers v. Nysse, 297 N.W.2d 495, 499 (Wis. 1980).

50. WYOMING

Standard of Proof: Preponderance of the evidence. Campen v. Stone, 635 P.2d 1121, 1127 n.6 (Wyo. 1981).

Cap and Exceptions: No cap.

Money to State: No.

Conduct Required: Intentional, malice, willful and wanton. Mayflower Restaurant Co. v. Griego, 741 P.2d 1106, 1115 (Wyo. 1987).

Public Endangerment or Personal Liberty? North Carolina Enacts a Liberalized Concealed Handgun Statute

Does possession of concealed firearms by private citizens deter criminal acts and promote the valid exercise of self-defense? Or does it encourage violent crimes and bring about tragic consequences? These questions have dominated the impassioned public discourse over laws that regulate the carrying of concealed weapons.[1] The heightened public awareness of violent crime,[2] particularly homicide, has spurred political activity by advocates and opponents of private gun ownership. Gun control supporters have advocated tightening restrictions on the private ownership of handguns to prevent violent crimes and accidental shootings by diminishing the availability of weapons.[3] Proponents of gun ownership, however, extol the virtues of self-defense,[4] advocate the responsible use of guns,[5] and assert that the Second Amendment guarantees each individual the "right to keep and bear arms."[6]

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1. *See, e.g.*, Ted Gest, *The Great Gun Debate: Get the Picture?*, U.S. NEWS & WORLD REP., July 17, 1995, at 6; Gordon Witkin, *New Support for Concealed Weapons: Fear of Crime Inspires Liberalized Laws*, U.S. NEWS & WORLD REP., Nov. 28, 1994, at 56.

2. In 1993, nearly two million violent crimes were committed in the United States. UNIFORM CRIME REPORTS FOR THE UNITED STATES 10 (1994) (Federal Bureau of Investigation). This number decreased by three percent in 1994. *Id.* For murders and non-negligent manslaughters, the 1994 number was 23,305, a five percent reduction from 1993. *Id.* at 13. In 1994, the rate of violent crime in North Carolina decreased, but the rates for homicides and overall crime increased from 1993. J. Andrew Curliss, *Violent Crime Shows Slight Drop in N.C.*, NEWS & OBSERVER (Raleigh), Aug. 1, 1995, at A3. North Carolina was the site of 45,531 violent crimes in 1994. *Division of Criminal Information, State Bureau of Investigation*, STATE OF NORTH CAROLINA UNIFORM CRIME REPORT 1994 24 (1995). This figure included 756 murders, *id.* at 26, 29,837 aggravated assaults, *id.* at 46, 12,649 robberies, *id.* at 42, and 2,289 forcible rapes, *id.* at 34.

3. *See, e.g.*, Garen J. Wintemute et al., *When Children Shoot Children*, *in* THE GUN CONTROL DEBATE: YOU DECIDE 294, 294-98 (Lee Nisbet ed., 1990) (examining unintentional firearm deaths of children over a six-year period); Sarah Brady, *Working for a Safer America*, 10 ST. JOHN'S J. LEGAL COMMENT. 77, 80 (1994) ("Gun control is a proven means of successfully confronting our national gun violence epidemic . . . ."); *id.* at 84 ("[J]ust as the legislature has required automotive manufacturers to improve the safety of automobiles, so too should they require gun manufacturers to improve the safety of guns.").

4. *See, e.g.*, WAYNE R. LAPIERRE, GUNS, CRIME, AND FREEDOM 26 (1994) ("No would-be victim should be required to surrender his or her dignity, safety, property, or life to a criminal; no person should be required to retreat in the face of attack.").

5. *See, e.g.*, Don B. Kates, Jr., *Gun Accidents*, *in* THE GUN CONTROL DEBATE: YOU DECIDE 300, 300-02 (Lee Nisbet ed., 1990) (arguing that bans on gun ownership are unjustified and over-broad responses to concerns with firearm safety).

6. The Second Amendment of the federal Constitution provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. CONST. amend. II. *See, e.g.*, Don B. Kates, Jr.,

Against this backdrop of polarized debate about the legal and political soundness of gun control legislation,[7] North Carolina joined a nationwide movement towards laxity in concealed weapons regulations.[8] On July 10, 1995, the North Carolina General Assembly ratified a bill that established a statewide permitting program for carrying concealed handguns.[9] The law provides, among other things, that any citizen who is twenty-one or older may apply for a concealed handgun permit.[10] Although the law excludes certain individuals from acquiring a permit,[11] the sheriff of the county in which the applicant resides "shall issue" a permit to each applicant who completes an approved

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Gun Control: Separating Reality from Symbolism, 20 J. CONTEMP. L. 353, 359-60 (1994) [hereinafter Kates, *Separating Reality*] (concluding that contemporary constitutional scholarship favors a Second Amendment guarantee of an individual right to keep and bear arms over the collective state right to an armed militia).

7. *See, e.g.*, Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637, 658 (1989) (arguing that indifference to the meaning of Second Amendment is common and that serious legal scholarship on the subject is overdue).

8. *See infra* note 129 (listing state laws that have established liberalized permit programs for carrying concealed weapons).

9. N.C. GEN. STAT. § 14-415.10 to 415.23 (Supp. 1995).

10. *Id.* § 14-415.12(a)(2). The new permit program is distinct from the pre-existing requirements for purchasing a weapon. *See infra* note 124 (discussing other North Carolina gun laws). A recent survey found that approximately one-third of North Carolina's residents own pistols. *Poll Finds Most Oppose New Weapons Law*, NEWS & OBSERVER (Raleigh), Nov. 11, 1995, at B6 [hereinafter *Poll Finds Most Oppose*].

11. The statute prohibits issuing a permit to an applicant who:

> (1) Is ineligible to own, possess, or receive a firearm under the provisions of State or federal law.
>
> (2) Is under indictment or against whom a finding of probable cause exists for a felony.
>
> (3) Has been adjudicated guilty in any court of a felony.
>
> (4) Is a fugitive from justice.
>
> (5) Is an unlawful user of, or addicted to marijuana, alcohol, or any depressant, stimulant, or narcotic drug, or any other controlled substance as defined in 21 U.S.C. § 802.
>
> (6) Is currently, or has been previously adjudicated or administratively determined to be, lacking mental capacity or mentally ill.
>
> (7) Is or has been discharged from the armed forces under conditions other than honorable.
>
> (8) Is or has been adjudicated guilty of or received a prayer for judgment continued or suspended sentence for one or more crimes of violence constituting a misdemeanor, including but not limited to, a violation of a misdemeanor . . . .
>
> (9) Has had entry of a prayer for judgment continued for a criminal offense which would disqualify the person from obtaining a concealed handgun permit.
>
> (10) Is free on bond or personal recognizance pending trial, appeal, or sentencing for a crime which would disqualify him from obtaining a concealed handgun permit.
>
> (11) Has been convicted of an impaired driving offense . . . within three years prior to the date on which the application is submitted.

§ 14-415.12(b)(1)-(11).

training course, passes a background check, and remits an application fee.[12] The new handgun permit law is noteworthy for two reasons: It deliberately leaves little discretionary power to the sheriffs who are authorized to issue permits[13] and, with few exceptions, it prohibits local governments from enacting regulations relating to concealed handgun possession.[14]

This Note examines the North Carolina concealed handgun statute with particular emphasis on the policy implications of the right to bear concealed firearms. First, the Note discusses the provisions of the new law and describes its path through the legislative process.[15] Second, the Note summarizes the legal background and political history that preceded the enactment of the concealed handgun law.[16] Third, the Note analyzes the statute in light of the constitutional and public policy arguments that shaped the debate over the new concealed handgun law.[17] Finally, this Note concludes that the General Assembly, in attempting to empower private citizens and deter crime, has embarked on an experimental course that will test the virtue of gun carriers and the community at large.[18]

The concealed handgun statute, House Bill 90, originated in the North Carolina House of Representatives on February 1, 1995,[19] and

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12. *Id.* § 14-415.12(a), § 14-415.13.

13. Prior to the new permit program for concealed handguns, North Carolina law prohibited the carrying of concealed weapons. *See id.* § 14-269 (1994). When North Carolina instituted its permit program, however, it went further than states which have adopted discretionary permit programs, because those states require each applicant to demonstrate a need for a concealed weapon. *See, e.g.*, CAL. PENAL CODE § 12050 (West 1992 & Supp. 1996); N.Y. PENAL LAW § 400.00 (McKinney 1989 & Supp. 1996). Those programs have been criticized by proponents of gun ownership who argue that discretionary permit programs discriminate against most citizens because only celebrities and other influential public figures have been able to acquire permits to carry concealed weapons. *See* Clayton E. Cramer & David B. Kopel, *"Shall Issue": The New Wave of Concealed Handgun Permit Laws*, 62 TENN. L. REV. 679, 682-85 (1995) (alleging discriminatory permit reviews in Colorado, New York, and California).

14. The statute reflects the General Assembly's desire for statewide uniformity in the new concealed handgun permit program. *See* N.C. GEN. STAT. § 14-415.23 (Supp. 1995). *But see infra* note 50 and accompanying text (discussing the enactment of local restrictions on concealed handguns in municipal buildings and parks).

15. *See infra* notes 19-56 and accompanying text.

16. *See infra* notes 57-122 and accompanying text.

17. *See infra* notes 123-42 and accompanying text.

18. *See infra* notes 143-52 and accompanying text.

19. NORTH CAROLINA GENERAL ASSEMBLY, HISTORY OF HOUSE BILL H90, February 12, 1996, at 1 (a one-page historical compilation of House Bill H90). The bill, introduced by Republican Representative John M. Nichols, was one of four independent concealed weapons bills introduced in the General Assembly during the 1995 session. *See* Joseph Neff, *N.C. Concealed Weapons Bills Come Out From Under Cover*, NEWS & OBSERVER (Raleigh), Apr. 10, 1995, at A1. In the previous two terms of the General Assembly, con-

evolved through seven versions prior to ratification.[20] The bill gathered political momentum in the House, which had a new Republican majority after the 1994 election.[21] When the bill was referred to the legislative committee hearings, several political action groups and private citizens participated in the debate over the merits of a liberalized concealed weapons permit program.[22] Nonetheless, the bill enjoyed bi-partisan support during the committee hearings,[23] and the final floor votes in each chamber of the General Assembly demonstrated the popularity of the bill. The House voted to adopt the law by a vote of ninety-two to twenty-two.[24] After amending the House version, the Senate voted thirty-six to nine in favor of ratification,[25] and the House

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cealed handgun laws had been introduced, but were easily defeated in the Democratic-led House. *Id.* at A4.

20. *See* HISTORY OF HOUSE BILL H90, *supra* note 19, at 1; *see also infra* notes 23-25 and accompanying text (discussing amendments in the House and Senate Chambers prior to ratification).

21. The full House of Representatives consisted of sixty-eight Republicans and fifty-two Democrats. *See* 1995 NORTH CAROLINA GENERAL ASSEMBLY HOUSE OF REPRESENTATIVES, DIRECTORY OF MEMBERS, COMMITTEES, RULES, AND HOUSE OFFICERS 77-84 (1995).

22. The hearings in the House Judiciary Committee, in which the bill received its first public scrutiny, identified the major issues facing the legislators. *See* NORTH CAROLINA GENERAL ASSEMBLY, HOUSE JUDICIARY I COMMITTEE MINUTES, April 11, 1995 (10:00 a.m. and 12:00 noon meetings). This outline followed the testimony of various speakers regarding the beneficial and harmful effects of the proposed legislation. *Id.* For example, the Committee heard supporting testimony from Jalene Linner, a former security guard, who related an incident in which armed robbers shot her in the head and killed her colleague. Joseph Neff, *Measure to Allow Concealed Weapons Debated*, NEWS & OBSERVER (Raleigh), April 12, 1995 at A3. In contrast, law enforcement officers testified against the bill. *See id.* Charles Wilkins, Director of the North Carolina Association of Chiefs of Police told the committee that a majority of police chiefs in North Carolina opposed issuing concealed weapons permits. *Id.* The Committee also heard opposing testimony from Reverend Collins Kilburn, Executive Director of the North Carolina Council of Churches. HOUSE JUDICIARY I COMMITTEE MINUTES, *supra*, at 10:00 a.m. meeting. Later, the Committee heard supporting testimony from representatives of the North Carolina Sheriffs Association, the North Carolina Rifle and Pistol Association, and Grassroots North Carolina. *Id.* at 12:00 noon meeting.

23. On April 18, 1995, the House Judiciary I Committee reported favorably on its substitute of the original bill. HISTORY OF HOUSE BILL H90, *supra* note 19, at 1. The bill then passed without major modification through the House Committee on Finance and the House completed its floor vote on May 3. *See id.* The Senate received the bill from the House on May 8, 1995 and the measure was debated in the Senate Judiciary I Committee and in the Senate Finance Committee. *Id.* The Senate completed its floor vote on June 30, and six days later, the House voted to concur with the Senate's modifications. *Id.*

24. NORTH CAROLINA HOUSE OF REPRESENTATIVES, ROLL CALL, May 3, 1995 (House Bill 90).

25. NORTH CAROLINA GENERAL ASSEMBLY, SENATE RECORDED VOTE, HOUSE BILL 90 (June 30, 1995). The Senate modified the bill after the House approved the measure. *See* NORTH CAROLINA GENERAL ASSEMBLY, SESSION 1995, HOUSE BILL 90 (Seventh Edition). For example, the Senate deleted the permit classifications for revolvers and semiau-

motion to concur with the Senate amendments passed by a vote of ninety to eighteen.[26]

By passing this law and significantly reducing restrictions on carrying concealed handguns,[27] the North Carolina General Assembly carved out an exception to the pre-existing state law prohibiting any person from carrying a concealed deadly weapon when that person was not on his own premises.[28] Left intact by the revision is the ban on concealment of other deadly weapons such as daggers, brass knuckles, razors, and stun guns, when a person is not on her own premises.[29]

Through its enactment of the new statute, the General Assembly included specific provisions to establish a uniform statewide permit program.[30] When the new law became effective on December 1, 1995, most adult North Carolinians became eligible to obtain a permit to carry a concealed handgun throughout the state.[31] Each applicant

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tomatic handguns. *Id.* at 2; *see also* NORTH CAROLINA GENERAL ASSEMBLY, SESSION 1995, HOUSE BILL 90, at 2 (Fourth Edition) (House-approved version). The Senate also shortened the required time of residency in the state to thirty days and clarified the criteria for sheriffs to evaluate the mental competency of applicants as well as their incidence of controlled substance abuse. HOUSE BILL 90 at 2, 3 (Seventh Edition) The Senate increased the time period for the processing of applications from forty-five to ninety days and lowered the penalty for violation of the new law from a Class I felony to an infraction or Class 2 misdemeanor. *Id.* at 4, 6. Finally, the Senate deleted a provision that would have made the listing of issued permits a public record. *See* HOUSE BILL 90 at 4, 5 (Seventh Edition); HOUSE BILL 90 at 5 (Fourth Edition).

26. NORTH CAROLINA HOUSE OF REPRESENTATIVES, ROLL CALL, July 6, 1995 (House Bill 90). Under the North Carolina Constitution, the legislature has exclusive lawmaking authority: "All bills and resolutions of a legislative nature shall be read three times in each house before they become laws, and shall be signed by the presiding officers of both houses." *See* N.C. CONST. art. II, § 22. Hence, enactment of statutes in North Carolina does not require approval of the governor, and the governor has no power to veto legislation. *See* JOHN V. ORTH, THE NORTH CAROLINA CONSTITUTION: WITH HISTORY AND COMMENTARY 87 (1995). For a general description of the lawmaking process in North Carolina, see JOSEPH S. FERRELL, THE GENERAL ASSEMBLY OF NORTH CAROLINA: A HANDBOOK FOR LEGISLATORS (6th ed. 1990).

27. The statute defines a handgun as "[a] firearm that has a short stock and is designed to be held and fired by the use of a single hand." N.C. GEN. STAT. § 14-415.10 (Supp. 1995).

28. *See id.* § 14-269(a) (1994), *amended by* N.C. GEN. STAT. § 14-269(a1)(2) (Supp. 1995). Prior to the new permit program, North Carolina law had continuously prohibited concealed weapons since 1879. *See* THE CODE OF NORTH CAROLINA § 1005 (1883) (codifying original state prohibition on concealed weapons).

29. § 14-269(a) (Supp. 1995).

30. *See id.* § 14-415.23 ("It is the intent of the General Assembly to prescribe a uniform system for the regulation of legally carrying a concealed handgun."). *See also infra* note 124 (discussing the General Assembly's statutory preemption of local firearm regulations during the 1996 Regular Session).

31. *But see supra* note 11 (describing categories of people who are ineligible to receive permits for concealed carry under the new law).

must: be a United States citizen who has resided in North Carolina at least thirty days before filing an application;[32] be at least twenty-one years of age;[33] be free from "physical or mental infirmity that prevents the safe handling of a handgun";[34] complete an approved course in firearms safety and training;[35] and the applicant must not be otherwise ineligible to obtain a permit.[36]

After meeting those requirements, a person seeking a permit to carry a concealed handgun must apply to "the sheriff of the county in which . . . [she] resides."[37] The applicant must submit a completed application form,[38] a nonrefundable permit fee,[39] a set of fingerprints,[40] a certificate of completion from an approved training course,[41] and a release authorizing the disclosure of records to the sheriff in order to evaluate the applicant's mental health or competency.[42] The statute explicitly grants authority to the sheriff to "conduct any investigation necessary to determine the qualification or competency of the person applying for the permit, including record checks."[43]

Within ninety days of receiving of the application materials, "the sheriff shall either issue or deny the permit."[44] An applicant may ap-

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32. N.C. GEN. STAT. § 14-415.12(a)(1) (Supp. 1995).

33. *Id.* § 14-415.12(a)(2).

34. *Id.* § 14-415.12(a)(3).

35. *Id.* § 14-415.12(a)(4). The training course must include "actual firing of handguns and instruction in the law of this State governing the carrying of a concealed handgun and the use of deadly force." *Id.* Either the course or the instructors must be certified by the North Carolina Criminal Justice Education and Training Standards Commission or the National Rifle Association. *Id.*

36. *Id.* § 14-415.12(a)(5); *see supra* note 11 (describing categories of people who are ineligible to receive permits for concealed carry under the new law).

37. *Id.* § 14-415.13(a).

38. *Id.* § 14-415.13(a)(1).

39. *Id.* § 14-415.13(a)(2). The initial application fee is $80 plus an amount up to $10 that the sheriff may collect for processing the applicant's fingerprints. *Id.* § 14-415.19(b).

40. *Id.* § 14-415.13(a)(3). "The sheriff shall submit the fingerprints to the State Bureau of Investigation for a records check of State and national databases. The State Bureau of Investigation shall submit the fingerprints to the Federal Bureau of Investigation as necessary." *Id.* § 14-415.13(b). *See infra* notes 148-49 and accompanying text (discussing delays in the permitting process due to a backlog of fingerprint checks). The new law exempts "a sheriff who issues or refuses to issue a permit to carry a concealed handgun" from any civil or criminal liability resulting from performance of the duties prescribed by the new law. *Id.* § 14-415.20.

41. *Id.* § 14-415.13(a)(4).

42. *Id.* § 14-415.13(a)(5).

43. *Id.* § 14-415.15(a). The statute does not state precisely which types of record checks the sheriff may conduct. *See id.*

44. *Id.* Also, the sheriff has broad discretionary powers to grant a temporary permit prior to completing the mandatory background check of the applicant's criminal history: "[T]he sheriff may issue a temporary permit for a period not to exceed 90 days to a person

peal the denial of a permit by petitioning a district court judge in the district in which the applicant filed.[45] The permit is valid for four years throughout the state,[46] and may be renewed by filing a new set of fingerprints, a renewal fee, and a notarized affidavit that states that the permittee remains qualified to hold a permit.[47]

An applicant who receives a permit may carry a concealed handgun "unless otherwise specifically prohibited by law."[48] The statute places several restrictions on the holder of a concealed handgun permit. First, the permit holder "shall disclose to any law enforcement officer that the person holds a valid permit and is carrying a concealed handgun when approached or addressed by the officer, and shall display both the permit and the proper identification upon the request of a law enforcement officer."[49] Second, the statute sets forth locations where concealed handgun possession is prohibited.[50] Third, the law

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who the sheriff reasonably believes is in an emergency situation that may constitute a risk of safety to the person, the person's family or property." *Id.* § 14-415.15(b) (emphasis added).

45. *Id.* § 14-415.15(c). "The determination by the court, on appeal, shall be upon the facts, the law, and the reasonableness of the sheriff's refusal. The determination of the court shall be final." *Id.*

46. *Id.* § 14-415.11(b).

47. *Id.* § 14-415.16. The renewal fee is $80. *Id.* § 14-415.19(a). The sheriff must update the permittee's criminal history and may waive the training requirement. *Id.* § 14-415.16.

48. *Id.* § 14-415.11(a); *see infra* note 124 (describing other applicable state handgun regulations). The new concealed handgun statute cautions that a state permit for concealed handgun carry is not a defense to federal prosecution for illegal possession of a firearm. *See id.* § 14-415.14(b).

49. *Id.* § 14-415.11(a). Compelled disclosure by a permit holder bearing a concealed handgun circumvents problems with warrantless searches by police. *See In re* Whitley, 122 N.C. App. 610, 611-12, 468 S.E.2d 610, 611-12 (1996) (allowing pat-down search without a warrant where police officer concludes that criminal activity may be occurring and the suspect may be armed and dangerous).

50. *See id.* § 14-415.11(c):

> A permit does not authorize a person to carry a concealed handgun in the areas prohibited by G.S. 14-269.2 [educational campuses], 14-269.3 [assemblies and establishments where alcoholic beverages are sold and consumed], 14-269.4 [State property and in courthouses], and 14-277.2 [parades and demonstrations], in an area prohibited by rule adopted under G.S. 120-32.1 [outlining Legislative Services Commission's duties], in any area prohibited by 18 U.S.C. § 922 [federal firearms statute] or any other federal law, in a law enforcement or correctional facility, in a building housing only State or federal offices, in an office of the State or federal government that is not located in a building exclusively occupied by the State or federal government, a financial institution, or any other premises where notice that carrying a concealed handgun is prohibited by the posting of a conspicuous notice or statement by the person in legal possession or control of the premises.

Id. The law prohibits local governments from regulating concealed weapons under most circumstances, but the statute delegates to local governments and private property owners

prohibits the use of alcohol and most drugs while carrying a concealed handgun.[51] Fourth, the statute describes conditions under which the permit may be revoked or suspended.[52] Finally, the statute includes an incremental penalty if a permit holder violates a provision of the new program.[53] The permittee may violate the law by carrying a concealed handgun without a permit in his possession, or by failing to disclose possession of a concealed handgun to a law enforcement officer.[54] Under the new statute, the first violation is punishable as an infraction,[55] while each subsequent offense is punishable as a Class 2 misdemeanor.[56]

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the authority to restrict possession of concealed weapons on their own premises. *See id.* § 14-415.23. Most local jurisdictions that have considered the issue have banned carrying concealed weapons in government buildings and parks. *See, e.g.*, Timothy Roberts, *County Delaying Decision on Guns: Ban for Public Sites Sits on Back Burner*, CHARLOTTE OBSERVER, Dec. 10, 1995, at 1L (reporting bans on concealed handguns in government buildings in Cabarrus, Catawba, Mecklenburg, Nash, Pitt, and Wilson counties); James Eli Shiffer, *Board OKs Gun Limits*, NEWS & OBSERVER (Raleigh), Dec. 12, 1995, at B4 (reporting prohibitions against concealed weapons on county property in Chatham, Durham, and Orange counties). Similarly, some store owners have posted signs reading "No Concealed Weapons Allowed." *Wanted: Armed Shoppers*, NEWS & OBSERVER (Raleigh), Dec. 30, 1995, at A3.

51. § 14-415.11(c). The statute provides:

> It shall be unlawful for a person, with or without a permit, to carry a concealed handgun while consuming alcohol or at any time while the person has remaining in his body any alcohol or in his blood a controlled substance previously consumed, but a person does not violate this condition if a controlled substance in his blood was lawfully obtained and taken in therapeutically appropriate amounts.

Id.; cf. N.C. GEN. STAT. § 20-138.3(a) (1990 & Supp. 1994) (invoking same standard for driving by any person under the age of twenty-one after consumption of alcohol or drugs).

52. § 14-415.18. The sheriff of the county of issuance or residence may revoke the permit under various conditions:

> (1) Fraud or intentional or material misrepresentation in the obtaining of a permit.
> (2) Misuse of a permit, including lending or giving a permit to another person, duplicating a permit, or using a permit with the intent to unlawfully cause harm to a person or property.
> (3) The doing of an act or existence of a condition which would have been grounds for the denial of the permit by the sheriff.
> (4) The violation of any terms of the [permit statute].
> (5) The applicant is adjudicated guilty of or receives a prayer for judgment continued for a crime which would have disqualified the applicant from initially receiving a permit.

Id.

53. *See id.* § 14-415.21.

54. *Id.* § 14-415.21(a).

55. An infraction is a non-criminal violation punishable by a fine of up to $100. *Id.* § 14-3.1(a) (1993).

56. § 14-415.21. For examples of Class 2 misdemeanors, *see id.* § 14-47 (1995) (libel); *id.* § 14-117 (1995) (fraudulent and deceptive advertising); *id.* § 14-132 (1995) (disorderly conduct); *id.* § 14-292 (1995) (gambling). A person who does not hold a valid permit may not carry a concealed handgun off his own premises, unless he is a member of the armed

The enactment of North Carolina's concealed weapons permit law emerged from a period of political ferment on the issue of restricted handgun ownership. This contemporary debate over the legality of gun control has focused primarily on opposing views of the constitutional right to bear arms under the Second Amendment.[57] One group views gun ownership as an individual right, analogous to similarly phrased guarantees in the First and Fourth Amendments,[58] whereas the opposing group asserts that the right to bear arms is a collective right belonging to the states, and therefore, individual gun ownership can be constitutionally curtailed.[59] In many respects these disparate viewpoints have paralleled our nation's ongoing efforts to confront the resiliency of violent crime in the context of a modern society.[60] Unfortunately, the strengths of most arguments on all sides of the modern gun control debate are muted by the small amount of authoritative judicial precedent on the subject.[61] In particular, the ambivalence of the United States Supreme Court toward a contemporary articulation of the scope of the right to bear arms grants legislatures a wide berth in which to regulate private ownership of guns.[62]

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forces or a law enforcement agency and carrying out official duties. *Id.* § 14-269(a)-(b) (Supp. 1995). Violation of this law is punishable as a Class 2 misdemeanor for the first offense and as a Class I felony for each subsequent offense. *Id.* For examples of Class I felonies, *see id.* § 14-13 (1995) (counterfeiting); *id.* § 14-217 (1995) (bribery); *id.* § 20-138.5(b) (1995) (habitual impaired driving).

57. *See supra* notes 3-6 and accompanying text. For a discussion of the historical roots of the Second Amendment, see WARREN FREEDMAN, THE PRIVILEGE TO KEEP AND BEAR ARMS 43-52 (1989); STEPHEN P. HALBROOK, THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT 7-76 (1984); Keith A. Ehrman & Dennis A. Henigan, *The Second Amendment in the Twentieth Century: Have You Seen Your Militia Lately?*, 15 U. DAYTON L. REV. 5, 7-40 (1989); William Van Alstyne, *The Second Amendment and the Personal Right to Bear Arms*, 43 DUKE L.J. 1236, 1244-49 (1994).

58. *See* Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204, 213 (1983).

59. *See, e.g.*, Richard M. Aborn, *The Battle Over the Brady Bill and the Future of Gun Control Advocacy*, 22 FORDHAM URB. L.J. 417, 437 (1995) ("[C]ourts have consistently ruled that there is no constitutional right to own a gun for private purposes unrelated to the organized state militia."). For an analysis of the right to bear arms under the "collective" and "individual" frameworks, see EARL R. KRUSCHKE, THE RIGHT TO KEEP AND BEAR ARMS: A CONTINUING AMERICAN DILEMMA 13-45 (1985).

60. *See generally* RESTRICTING HANDGUNS: THE LIBERAL SKEPTICS SPEAK OUT (Don B. Kates, Jr., ed., 1979) [hereinafter RESTRICTING HANDGUNS] (critiquing the right to bear arms and gun control legislation from a civil libertarian viewpoint in a series of articles); Kates, *Separating Reality*, *supra* note 6, at 355 ("[T]he 'great American gun war' is really a culture conflict. It is less about criminology than about ideology and morality.").

61. *See infra* note 96 and accompanying text (summarizing interpretations of the Second Amendment by the federal circuit courts of appeals); *see also infra* note 62 (discussing the Supreme Court's reticence on Second Amendment issues).

62. *See, e.g.*, Robert J. Cottrol, *Introduction to* GUN CONTROL AND THE CONSTITUTION: SOURCES AND EXPLORATIONS ON THE SECOND AMENDMENT ix, xxx (Robert J. Cot-

The limited Supreme Court pronouncements regarding the right to bear arms suggest that its legal meaning remains unsettled.[63] One of the first Supreme Court decisions to tangentially raise the issue of the right to bear arms was the infamous decision, *Dred Scott v. Sandford*.[64] Writing for the Court, Chief Justice Taney implicitly recognized the right to keep and bear arms as an inherent entitlement of all United States citizens.[65] Despite the lamentable decision in *Dred Scott*, opponents of gun restrictions argue that the case endorsed the right to bear arms as a privilege and immunity of national citizenship, independent of the Second Amendment.[66]

In 1876, the Court examined the right to bear arms in tandem with the ability of private citizens to interfere with the constitutional

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trol, ed., 1993) ("The high Court has not considered a case on the subject since [United States v. Miller, 307 U.S. 174 (1939)] and indeed has generally denied certiorari petitions in cases involving Second Amendment claims. For the most part, not too much can be made of the modern federal court jurisprudence on the Second Amendment."); Van Alstyne, *supra* note 57, at 1240 ("The main reason there is such a vacuum of useful Second Amendment understanding, rather, is the arrested jurisprudence of the subject as such, a condition due substantially to the Supreme Court's own inertia").

63. *See supra* note 62. For a survey of Second Amendment jurisprudence and theory, see Sayoko Blodgett-Ford, *The Changing Meaning of the Right to Bear Arms*, 6 SETON HALL CONST. L.J. 101 (1995); Kates, *supra* note 58; Van Alstyne, *supra* note 57; David C. Williams, *Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment*, 101 YALE L.J. 551 (1991).

64. 60 U.S. 393 (1856). The main holding of the case was that states could deny African-Americans, slave or free, the privileges and immunities inherent in full national citizenship. *Id.*

65. *Id.* at 417. The Court concluded that endorsing full citizenship for black persons "would give to persons of the negro race, who were recognized as citizens in any one State of the Union, the right to enter every other State whenever they pleased . . . and it would give them the full liberty of speech in public and in private . . . and *to keep and carry arms wherever they went.*" *Id.* (emphasis added). The tenor of the Dred Scott decision lasted into the Reconstruction period, during which many of the southern states enacted laws that deprived emancipated blacks many freedoms that whites enjoyed. *See* CLAYTON E. CRAMER, FOR THE DEFENSE OF THEMSELVES AND THE STATE: THE ORIGINAL INTENT AND JUDICIAL INTERPRETATION OF THE RIGHT TO BEAR ARMS 97 (1994). Known as the Black Codes, these laws severely restricted the freedom of contract and movement in order to maintain the South's antebellum labor structure. *Id.* In addition, several southern states prohibited blacks from carrying firearms without a license. *Id.*; *see also* RESTRICTING HANDGUNS, *supra* note 60, at 12-13 (describing private acts of terrorism to intimidate and disarm blacks during the Civil War period). The prohibition of gun ownership by an identified class of citizens in the Reconstruction era was reminiscent of similar practices in England two centuries earlier. For example, the absolute English monarchs, in the name of stable sovereignty, disarmed citizens based on race, religion, nationality, and economic class. *See* HALBROOK, *supra* note 57, at 40. Moreover, just as Congress responded to the Black Codes by enacting the Fourteenth Amendment, the English Parliament adopted the English Bill of Rights in 1689 following the Glorious Revolution. *See id.* at 43-44. The English Bill of Rights placed restrictions on the crown and endorsed the right to bear arms. *Id.* at 46.

66. CRAMER, *supra* note 65, at 90.

rights of other individuals in *United States v. Cruikshank*.[67] In *Cruikshank*, the defendant was charged under the Enforcement Act of 1870 with impeding two black men from exercising the right "to keep and bear arms for a lawful purpose."[68] The Court's opinion, authored by Chief Justice Waite, overturned the conviction and found that the Second Amendment only prohibited Congress from infringing on the right to bear arms.[69] Moreover, the Court held that the police power of the states was the primary safeguard for enforcing the right to bear arms.[70]

Ten years after *Cruikshank*, the Supreme Court revisited the role of the states in observing the Second Amendment entitlements. In *Presser v. Illinois*,[71] the Court examined a state statute that prohibited non-militia groups from associating, parading, and bearing arms without permission from the Governor.[72] Observing that Article I of the Constitution granted Congress the power to coordinate the formation of the militia[73] and the authority to regulate the peacetime formation

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67. 92 U.S. 542 (1875).

68. *Id.* at 544-45.

69. *See id.* at 553. The Court concluded that the right to bear arms for a lawful purpose "is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence. The Second Amendment declares that it shall not be infringed; but this . . . means no more than that it shall not be infringed by Congress." *Id.* Hence, a broad reading of *Cruikshank* suggests that the Second Amendment does not prohibit infringement of the constitutional right to bear arms by state or private actors. *See also* Barron v. Mayor of Baltimore, 32 U.S. 243 (1833) (rejecting a Fifth Amendment claim for taking of private property by the state). On the other hand, some commentators conclude that *Cruikshank*, despite its narrow view of federal protection under the Second Amendment, recognized that the right to bear arms subsists independent of the Second Amendment. HALBROOK, *supra* note 57, at 158; *see generally* Nicholas J. Johnson, *Beyond the Second Amendment: An Individual Right to Arms Viewed Through the Ninth Amendment*, 24 RUTGERS L.J. 1, 11 (1992) ("[A] right to arms for self defense might be retrieved from the Ninth Amendment along with the right to engage in a myriad of other basic human activities.").

70. *Cruikshank*, 92 U.S. at 553; *see also* United States v. Lopez, 115 S. Ct. 1624, 1630-34 (1995) (invalidating the Gun-Free School Zone Act because it exceeded Congress's enumerated power under the Commerce Clause and interfered with the police power reserved to the states).

71. 116 U.S. 252 (1886).

72. *Id.* at 253-54.

73. *See id.* at 260. The Constitution empowers the Congress:

> [t]o provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress . . . .

U.S. CONST. art. I, § 8, cl. 16.

of troops by the states,[74] the Court upheld the state law because it did not interfere with the federal government's "rightful resource for maintaining the public security."[75] Hence, the facts of the case did not require adjudication of rights protected by the Second Amendment; rather, the case turned on the ability of Congress to regulate armed groups under its enumerated Article I powers. Nevertheless, the *Presser* Court, relying heavily on *Cruikshank*, further reasoned that the Second Amendment only guaranteed protection from federal encroachment, not from intrusion by state governments.[76]

Cruikshank and *Presser* presented the Court's view that the Second Amendment restrains the federal government's regulatory powers. Subsequently, the Court divulged more of its view of the type of activity that is protected from government interference. In *Robertson v. Baldwin*,[77] the Court examined the constitutionality of narrow exceptions to the explicit provisions of the Bill of Rights:

> [T]he first ten amendments to the Constitution, commonly known as the Bill of Rights, were not intended to lay down any novel principles of government, but simply to embody certain guaranties and immunities which we had inherited

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74. *Presser*, 116 U.S. at 260. The Constitution provides, "[n]o State shall, without the consent of Congress, keep Troops . . . in time of peace . . . ." U.S. CONST. art. I, § 10, cl. 3.

75. *Presser*, 116 U.S. at 265, 269.

76. *Id.* at 264-65. As it had done in *Cruikshank*, the Court declined to incorporate the Second Amendment into the Fourteenth Amendment. *See id.*; *see also* Miller v. Texas, 153 U.S. 535, 538 (1894) (holding that the Second and Fourth Amendments "operate only on the Federal power"). Although *Presser* has never been overruled, the Court shortly thereafter held that other provisions in the Bill of Rights could be incorporated into the Fourteenth Amendment. *See* Chicago, B & Q.R. Co. v. City of Chicago, 166 U.S. 226, 234-35 (1897) (requiring compensation for taking of private property by the state). During the 1960's, the Court significantly expanded its incorporation doctrine. *See, e.g.*, Duncan v. Louisiana, 391 U.S. 145 (1968) (Sixth Amendment right to criminal jury); Miranda v. Arizona, 384 U.S. 436 (1966) (Fifth Amendment privilege against compelled self-incrimination); New York Times v. Sullivan, 376 U.S. 254 (1964) (First Amendment freedom of speech and press); Abington School Dist. v. Schempp, 374 U.S. 203 (1963) (First Amendment establishment clause); Gideon v. Wainwright, 372 U.S. 335 (1963) (Sixth Amendment right to counsel); Mapp v. Ohio, 367 U.S. 643 (1961) (Fourth Amendment exclusionary rule to protect against unreasonable searches and seizures). These decisions buttress the argument that the Second Amendment has been implicitly incorporated as well. The implications of incorporating the Second Amendment's protections into the Fourteenth Amendment's authority over state action were articulated in United States v. Carolene Products, 304 U.S. 144, 152 n.4 (1938): "There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth." For a thorough discussion of incorporation of the complete Bill of Rights into the Fourteenth Amendment, see Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193 (1992).

77. 165 U.S. 275 (1897).

> from our English ancestors, and which had from time immemorial been subject to certain well-recognized exceptions arising from the necessities of the case. In incorporating these principles into the fundamental law, there was no intention of disregarding the exceptions, which continued to be recognized as if they had been formally expressed. Thus, the freedom of the press (art. 1) does not permit the publication of libels, blasphemous or indecent articles, or other publications injurious to public morals or private reputation; *the right of the people to keep and bear arms (art. 2) is not infringed by laws prohibiting the carrying of concealed weapons;* the provision that no person shall be twice put in jeopardy (art. 5) does not prevent a second trial, if upon the first trial the jury failed to agree, or if the verdict was set aside upon the defendant's motion . . . .[78]

This decision acknowledges two important tenets of federal constitutional law: The fundamental nature of the right to bear arms and the propriety of restrictions on possession of concealed weapons.[79]

The Court's last major pronouncement on the scope of the Second Amendment came in 1939. In *United States v. Miller*,[80] two defendants were indicted in federal court in Arkansas for violating the National Firearms Act of 1934.[81] The trial court quashed the indictment, holding that the federal statute violated the Second Amendment.[82] The Supreme Court unanimously reversed in an opinion authored by Justice McReynolds: "In the absence of any evidence tending to show that possession or use of [a sawed-off shotgun] . . . has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument."[83] The

78. *Id.* at 281-82 (emphasis added); *see also* Terry v. Ohio, 392 U.S. 1, 31-32 (1968) (Harlan, J., concurring) ("Concealed weapons create an immediate and severe danger to the public.").

79. For a discussion of concealed weapons regulations and the North Carolina constitution, *see infra* notes 103-22 and accompanying text.

80. 307 U.S. 174 (1939).

81. *Id.* at 175. The law prohibited transporting sawed-off shotguns in interstate commerce. *Id.* at 175 n.1.

82. *Id.* at 177.

83. *Id.* at 178. Since *Miller*, the Supreme Court has briefly examined whether the Second Amendment guarantees an individual or collective right to bear arms. *See, e.g.*, Lewis v. United States, 445 U.S. 55, 65 n.8 (1980) (upholding defendant's conviction for federal firearms violation because it did not "trench upon any constitutionally protected liberties"); Adams v. Williams, 407 U.S. 143, 151 (1972) (Douglas, J., dissenting) (concluding that the "Second Amendment . . . was designed to keep alive the militia"); *see also* United States v. Verdugo-Urquidez, 494 U.S. 259, 265 (1990) (comparing the references to "the people" in the First, Second, and Fourth Amendments).

Court noted that the weapon was not "part of the ordinary military equipment or that its use could contribute to the common defense."[84] Hence, *Miller* seemingly limited Second Amendment guarantees to activities within the scope of a well-regulated militia.[85]

In the immediate aftermath of *Miller*, there was sparse legal confrontation regarding the regulation of gun ownership.[86] However, political assassinations on American soil[87] spurred the enactment of the Gun Control Act of 1968,[88] representing a turning point toward the modern debate over gun control. The Act prohibited interstate shipment of firearms to private individuals, banned the sale of guns to minors,[89] drug addicts and convicted felons,[90] and increased licensing requirements for gun dealers.[91] Although the Act represented a comprehensive federal response to gun violence, many of its provisions were rolled back in the Firearms Owners Protection Act of 1986.[92]

In November 1993, President Clinton signed the Brady bill into law, instituting a five-day waiting period for handgun purchases and provided funding to help states improve their criminal record-keeping systems.[93] Then, following the trend set by the Brady bill, in 1994 an

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84. *Miller*, 307 U.S. at 178.

85. *Id.* In modern times, the term "militia" is synonymous with the National Guard of the United States and the National Guard of each state. *See, e.g.*, Perpich v. Department of Defense, 496 U.S. 334, 340-46 (1990) (tracing the history of the organized militia from the colonial period to the present).

86. *See* Cottrol, *supra* note 62, at xxix: "For nearly two decades after *Miller* little existed in the way of federal firearms regulation. State and local legislation, with a few exceptions . . . usually provided traditional regulations governing the manner of carrying weapons, not outright prohibitions. There was little serious attempt to mount constitutional challenges to these restrictions."

87. Congress debated several gun control proposals soon after the assassinations of Dr. Martin Luther King, Jr. and Senator Robert F. Kennedy in 1968. ROBERT J. SPITZER, THE POLITICS OF GUN CONTROL 143-45 (1995).

88. Pub. L. No. 90-618, 82 Stat. 1214 (codified at 18 U.S.C. §§ 921-28 (1968)).

89. 18 U.S.C. §§ 922(a), (b)(1) (1968) (codified as amended at 18 U.S.C. § 922 (1994)).

90. *Id.* § 922(d).

91. *Id.* § 923.

92. Pub. L. No. 99-308, 100 Stat. 449 (codified as amended at 18 U.S.C. §§ 921-29 (1986)). The Act relaxed the licensing requirements for dealers, 18 U.S.C. §923 (1986) (codified as amended at 18 U.S.C. § 923 (1994)), and permitted interstate sales of rifles and shotguns between residents of states whose laws allowed such sales. *Id.* § 926(A) (1986) (codified as amended at § 926 (1994)).

93. Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, 107 Stat. 1536 (codified as amended at 18 U.S.C. §921 (1993)); *see also* Stephen R. Rubenstein, *Brady Act Regulations and Requirements*, *in* NATIONAL CONFERENCE ON CRIMINAL HISTORY RECORDS: BRADY AND BEYOND 19, 19-21 (1995) (Department of Justice) (summarizing the main provisions of the Brady bill). The Brady Act's waiting period has been upheld in several federal court decisions. *See, e.g.*, Koog v. United States, 79 F.3d 452, 463 (5th Cir. 1996); Mack v. United States, 66 F.3d 1025, 1029-33 (9th Cir. 1995).

assault weapons ban was enacted, outlawing the sale and possession of nineteen types of semiautomatic weapons.[94]

In conjunction with the broadening federal legislation on gun possession, the public's awareness of violent crime prompted state laws and local ordinances.[95] Predictably, many of these laws and ordinances have been challenged by private citizens as violations of the Second Amendment, and in response, the federal courts of appeals have uniformly rejected their claims.[96] The most celebrated case, despite its relatively early date, is *Quilici v. Village of Morton Grove*.[97] In 1981, the village of Morton Grove, Illlinois enacted the first handgun ban in the United States.[98] Shortly thereafter, residents challenged the validity of the law under the Illinois and federal constitutions.[99] The federal district court rejected the plaintiff's claims under the Second, Fifth, and Ninth Amendments and upheld the law.[100] Subsequently, the United States Court of Appeals for the Seventh Circuit affirmed, holding that *Presser* controlled the plaintiff's Second Amendment objections to the ordinances and concluding that

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94. *Cf.* SPITZER, *supra* note 87, at 152-57 (describing a 1989 shooting spree in a Stockton, California school yard by a gunman armed with an AK-47 assault rifle). In March 1995, the House of Representatives voted 239 to 173 to repeal the assault weapons ban. John E. Yang, *House Votes Repeal of Assault-Gun Ban: Gingrich Fulfills Promise to NRA*, WASH. POST, Mar. 23, 1996, at A1.

95. *See generally* B. Bruce-Briggs, *The Great American Gun War*, *in* THE GUN CONTROL DEBATE: YOU DECIDE 63, 68-71 (Lee Nisbet ed., 1990) (discussing the limited effectiveness of local gun purchase restrictions because of widespread availability of firearms through a nationwide market).

96. *See, e.g.*, Hickman v. Block, 81 F.3d 98, 100 (9th Cir. 1996) (concluding the Second Amendment guarantees a right held by the states, not individuals); United States v. Broussard, 80 F.3d 1025, 1041 (5th Cir. 1996) (rejecting claim to a Ninth Amendment individual right to bear arms); Fresno Rifle and Pistol Club, Inc. v. Van de Kamp, 965 F.2d 723, 729-31 (9th Cir. 1992) (holding that a California state law banning assault weapons did not violate the Second Amendment because such a claim could only be made against the federal government); United States v. Johnson, 497 F.2d 548, 550 (4th Cir. 1974) (rejecting defendant's challenge to the federal law prohibiting possession of firearms by convicted felons because the Second Amendment only guarantees a collective right related to a well-regulated militia). The Fourth Circuit still follows the holding in *Johnson*. *See* Love v. Pepersack, 47 F.3d 120, 124 (4th Cir. 1995) (holding that "the Second Amendment preserves a collective, rather than individual, right").

97. 695 F.2d 261, 264 (7th Cir. 1982), *cert. denied*, 464 U.S. 863 (1983).

98. The law prohibited possession of any handgun that had not been rendered permanently inoperative. *See id.* at 263 n.1; *see also* HALBROOK, *supra* note 57, at 195 (contrasting the Morton Grove setting—a middle-class suburb—with the historically urban regions that enacted strict gun control ordinances).

99. For the Illinois Supreme Court's analysis of the ordinance, see Kalodimos v. Village of Morton Grove, 470 N.E.2d 266, 269-79 (Ill. 1984) (holding that the Morton Grove ban on operable handguns did not violate the Illinois Constitution).

100. Quilici v. Village of Morton Grove, 532 F.Supp. 1169 (N.D. Ill. 1981), *aff'd*, 695 F.2d 261 (1982), *cert. denied*, 464 U.S. 863 (1983).

the states' authority to regulate gun possession—unlike Congress's—was not restricted by the Second Amendment.[101] Furthermore, the court dismissed the Ninth Amendment claim and rejected the plaintiff's contention that the complete Bill of Rights had been implicitly incorporated into the Fourteenth Amendment.[102]

The North Carolina Constitution guarantees the right to bear arms in language that resembles the federal constitution's Second Amendment,[103] but the North Carolina constitutional provision is explicitly qualified for citizens carrying concealed weapons.[104] Several

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101. *Quilici*, 695 F.2d at 269. The court adamantly refused to ignore precedent from *Presser*—holding that the states were not bound by the Second Amendment—and *Miller*—holding that the right to keep and bear arms was enjoyed by individuals in order to maintain a well-regulated militia. *See id.* at 269-70. Some commentators dispute this states' rights view of the Second Amendment:

> If the Second Amendment creates a right on the part of the states, rather than individuals, then by necessity it works a pro tanto repeal of certain limitations on state military power found in the Constitution proper, renders the National Guard unconstitutional, at least as currently constituted, and creates a power on the part of state legislatures to nullify federal gun-control laws, if such laws are inconsistent with that state's scheme for organizing its militia.

Glenn Harlan Reynolds & Don B. Kates, *The Second Amendment and States' Rights: A Thought Experiment*, 36 WM. & MARY L. REV. 1737, 1743 (1995).

102. *Quilici*, 695 F.2d at 270, 271; *see supra* note 76 and accompanying text (discussing incorporation of the Bill of Rights into the Fourteenth Amendment). For commentary on the applicability of the Ninth Amendment, see Johnson, *supra* note 69.

103. The North Carolina Constitution of 1776 contained a provision which provided "[t]hat the people have the right to bear arms for the defence of the state." *See* State v. Dawson, 272 N.C. 535, 545, 159 S.E.2d 1, 8 (1968). For a detailed analysis of the relevant provisions in the Constitution of 1776, see Stephen P. Halbrook, *The Right to Bear Arms in the First State Bills of Rights: Pennsylvania, North Carolina, Vermont, and Massachusetts*, 10 VT. L. REV. 255, 279-87 (1985) (observing that North Carolina was influenced by the Pennsylvania Declaration of Rights which guaranteed the people a right to bear arms "for the defense of themselves, and the state"). Although Halbrook concludes that North Carolina's Constitution of 1776 guaranteed an individual right to bear arms, other commentators note that North Carolina omitted the Pennsylvania language "for the defense of themselves." *See* ORTH, *supra* note 26, at 73. North Carolina, like many other southern states, amended its Constitution during the Reconstruction period; the relevant clause, Article I, § 24, was modified in 1868 to conform to the federal constitution's Second Amendment. *See id.* In 1875, the Constitutional Convention added another clause that recognized the legislature's authority to regulate the carrying of concealed weapons. *Id.* Four years later, the General Assembly enacted a ban on concealed weapons. *See supra* note 28.

104. The North Carolina Constitution provides:

> A well regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed; and, as standing armies in time of peace are dangerous to liberty, they shall not be maintained, and the military shall be kept under strict subordination to, and governed by, the civil power. *Nothing herein shall justify the practice of carrying concealed weapons, or prevent the General Assembly from enacting penal statutes against that practice.*

N.C. CONST. art. I, § 30 (emphasis added).

decisions by the North Carolina state courts have helped to define the meaning of the right to bear arms.

In 1882, the North Carolina Supreme Court decided *State v. Speller*,[105] in which a defendant challenged the constitutionality of the state's concealed weapons statute.[106] The court held that the plain text of the North Carolina constitution allowed the prohibition,[107] but the court further held that even without explicit constitutional authority, the legislature could regulate the right to bear arms "in a manner conducive to the peace and safety of the public."[108]

The North Carolina Supreme Court reexamined the issue twelve years later in *State v. Dixon*.[109] In Dixon, a defendant indicted for carrying a concealed pistol attempted to show that he lacked criminal intent because he carried the pistol for the sole purpose of selling it.[110] The court disagreed with this contention, however, holding that "[t]he criminal intent in such cases is the intent to carry the weapon concealed."[111] According to the court, the statute presumed a criminal intent if the defendant carried a concealed weapon off his premises; however, the presumption could be rebutted by an express finding that the defendant carried the gun "without any thought or intent to conceal it."[112]

In a broader vein, the court wrote candidly about the right to bear *unconcealed* weapons in a 1921 decision, *State v. Kerner*.[113] In Kerner, the defendant was charged with violating a law that prohibited carrying a pistol off his premises without a permit.[114] The trial court directed a verdict of not guilty, holding that the law violated the

105. 86 N.C. 697 (1882).

106. *Id.* at 699. The defendant argued that the legislature could not deprive a citizen of the right to bear arms when he was under the threat of assault. *Id.* at 699-700.

107. *Id.* at 700.

108. *Id.*

109. 114 N.C. 850, 19 S.E. 364 (1894).

110. *Id.* at 851, 19 S.E. at 364.

111. *Id.* at 852, 19 S.E. at 364.

112. *Id.* at 854, 19 S.E. at 364-65. The Supreme Court reached a similar conclusion in State v. Reams, 121 N.C. 556, 27 S.E. 1004 (1897):

> The offense of carrying a concealed weapon about one's person and off his own premises consists in the guilty intent to carry it concealed and not upon the intent to use it; and the possession of the weapon raises the presumption of guilt, which presumption may be rebutted by the defendant.

Id. at 557, 27 S.E. at 1005; *see also* State v. Woodlief, 172 N.C. 885, 888, 90 S.E. 137, 138 (1916) ("[C]arrying a concealed weapon for a hostile or even a defensive purpose, instead of being an excuse for the act, or mitigation of the crime, tends rather to aggravate the offense, and amounts to doing precisely what the statute plainly intended to forbid.").

113. 181 N.C. 574, 107 S.E. 222 (1921).

114. *Id.* at 575, 107 S.E. at 223.

state constitutional right to bear arms.[115] On appeal, the North Carolina Supreme Court affirmed on two grounds: The law was "an unreasonable regulation, and, besides, it would be void because for all practical purposes it is a prohibition of the constitutional right to bear arms."[116] In the case, the court also wrote unfavorably about the movement towards laws that "disarm" citizens, noting the historical importance of an armed citizenry.[117]

In 1968, the most recent significant North Carolina Supreme Court decision on the right to bear arms came down. In *State v. Dawson*,[118] the court articulated a contemporary view of the state constitutional right to bear arms.[119] The defendant was convicted of the common-law crime of "going armed with unusual and dangerous weapons to the terror of the people," and subsequently appealed.[120] The supreme court affirmed the convictions, but in dicta, the court stated:

> *North Carolina decisions have interpreted our Constitution as guaranteeing the right to bear arms to the people in a collective sense—similar to the concept of a militia—and also to individuals* . . . . These decisions have, however, consistently pointed out that the right of individuals to bear arms, is not absolute, but is subject to regulation.[121]

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115. *Id.*

116. *Id.* at 579, 107 S.E. at 225. The court distinguished between the more generalized right to bear arms and the specific practice of carrying concealed weapons:

> The former is a sacred right, based upon the experience of the ages in order that the people may be accustomed to bear arms and ready to use them for protection of their liberties or their country when occasion serves. The provision against carrying them concealed was to prevent assassinations or advantages taken by the lawless, i.e., against the abuse of privilege.

117. *Id.* at 575, 107 S.E. at 223.

Id. at 578-79, 107 S.E. at 225. The court described the historical benefits of allowing the civilian population to train in the use of arms. For example, the colonies won their independence and the frontier extended beyond the Mississippi River in large part because "the common people" proficiently used firearms. *Id.* at 577, 107 S.E. at 224. The court further cautioned against tyrannical infringement on the right to bear arms:

> The usual method when a country is overborne by force is to "disarm" the people. It is to prevent the above and similar exercises of arbitrary power that the people in creating this Government "of the people, by the people, and for the people," reserved to themselves the right to "bear arms" that accustomed to their use they might be ready to meet illegal force with legal force by adequate and just defense of their persons, their property, and their liberties, whenever necessary.

Id. at 578-79, 107 S.E. at 225.

118. 272 N.C. 535, 159 S.E.2d 1 (1968).

119. *Id.* at 545-49, 159 S.E.2d at 9-11.

120. *Id.* at 537, 541, 159 S.E.2d at 3, 6. The defendant had driven his truck through a neighborhood and fired his gun at several residences. *Id.* at 538-39, 159 S.E.2d at 4-5.

121. *Id.* at 546, 159 S.E.2d at 9 (emphasis added). The court observed that at the time the constitutional provisions were adopted, private arms were the principal weapons of the

The court also approved a portion of the holding in *Kerner* that recognized the General Assembly's authority to exercise its police power and regulate gun possession.[122]

As these cases indicate, the North Carolina General Assembly has exercised its constitutional prerogative to regulate private gun ownership.[123] Statutes enacted in 1879—and modified thereafter—severely restricted the possession of concealed handguns.[124] Consequently, prior to the enactment of the concealed handgun permit

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militia. *Id.* However, the court declared that arms provided by the state, rather than privately owned guns, are the primary weapons of the modern militia. *Id.*

122. *Id.* at 547, 159 S.E.2d at 10. The *Dawson* court observed:

> "The right to bear arms, which is protected and safeguarded by the Federal and State constitutions, is subject to the authority of the General Assembly, in the exercise of the police power, to regulate, but the regulation must be reasonable and not prohibitive, and must bear a fair relation to the preservation of the public peace and safety."

Id. (quoting State v. Kerner, 181 N.C. 574, 579, 107 S.E. 222, 226 (1921)). Similarly, in State v. Dobbins, 277 N.C. 484, 505, 178 S.E.2d 449, 462 (1971), the court held:

> [T]he Second Amendment to the Constitution of the United States, if it reaches State action at all, reaches it by way of the Due Process Clause of the Fourteenth Amendment and, therefore, would, at the most, forbid only an unreasonable and arbitrary restriction by State or municipal law upon the right to keep and bear arms.

Id.

123. *See supra* notes 103-22 (discussing state constitutional authority for regulation of concealed weapons).

124. The concealed weapons prohibition, originally enacted in 1879, has been amended over fifteen times. *See* N.C. GEN. STAT. § 14-269 note (Supp. 1995) (listing amendments to the original North Carolina Code prohibiting concealed weapons). North Carolina has several other gun control regulations. *See id.* § 14-402 (1994 & Supp. 1995) (prohibiting purchase of a pistol or crossbow without a license or permit); *id.* § 14-269.7 (Supp. 1995) (codifying a 1993 statute that prohibits possession of a handgun by anyone under eighteen years of age). In addition, some local communities have established ordinances that place further restrictions on firearm possession. *See id.* § 160A-189 (1994) (granting general ordinance-making power to cities to regulate the discharge or display of firearms within city limits). In 1993, the town of Chapel Hill enacted the most severe gun restrictions in the history of the state. Jane Stancill, *Chapel Hill Passes Tough Gun Control Law*, NEWS & OBSERVER (Raleigh, Orange County ed.), Nov. 23, 1993, at A1. The ordinance forbids the display of firearms at public assemblies, on public property, at polling places, or while consuming alcohol. *Id.* at A8. Other forbidden acts include the displaying of pistols shorter than six inches and the possession of weapons of mass destruction while not on one's own premises. *Id.* During the 1996 Regular Session, the General Assembly severely restricted the authority of local communities to govern the "possession, ownership, storage, transfer, sale, purchase, licensing, or registration of firearms, firearms ammunition, components of firearms, dealers in firearms, or dealers in handgun components or parts." 1996 N.C. Sess. Laws 727 (to be codified at N.C. GEN. STAT. 14-409.39 to 409.40). Except for narrowly-drawn powers reserved to counties and municipalities, the General Assembly preempted the "entire field of regulation of firearms . . . by local governments . . . ." *Id.*

statute, North Carolina state law prohibited a person from carrying concealed weapons off his premises.[125]

North Carolina's passage of the concealed weapons permit program in 1995, however, reflects not only a dramatic change in North Carolina policy, but also a nationwide trend toward liberalized, non-discretionary permit programs. During the last decade, variations in the political climate and the uncertain constitutional status of the right to bear arms have brought about significant activity in state legislatures.[126] For example, shortly after the powerful National Rifle Association announced in 1985 that it would lobby for permissive concealed firearms programs,[127] Florida passed a non-discretionary "shall issue" concealed weapons permit law.[128] Between 1987 and 1996, nineteen states have followed Florida's lead and adopted liberal-

125. *See* N.C. GEN. STAT. § 14-269(a) (1993). The law did not apply to members of the armed forces and law enforcement agencies while discharging their official duties. *Id.* § 14-269(b).

126. *See, e.g.*, John C. Lenzen, Note, *Liberalizing the Concealed Carry of Handguns by Qualified Civilians: The Case for "Carry Reform"*, 47 RUTGERS L. REV. 1503, 1506-07 (1995) ("Within the last ten years alone, twenty states have adopted concealed carry permit systems to facilitate more liberal issuance of permits . . . ."). In conjunction with their fundamental platform of Second Amendment rights, advocates for gun ownership also maintain that concealed weapons deter or thwart criminal acts. *See* LAPIERRE, *supra* note 4, at 29-31. In a 1991 case, an Alabama man licensed to carry a concealed firearm disrupted an armed robbery in a restaurant. *Id.* at 29-30. During the same year, a Texas woman named Suzanna Gratia kept her gun in her car because state law prohibited carrying concealed weapons, and while she ate lunch with her parents, an armed gunman went on a rampage in the same restaurant, killing twenty-two people before shooting himself. *Id.* at 30. Gratia's parents were among those killed. *Id.*

127. *See* David McDowall et al., *Easing Concealed Firearms Laws: Effects on Homicide in Three States*, 86 J. CRIM. L. & CRIMINOLOGY 193, 193-94 (1995). With more than 2.5 million members, the NRA wields substantial political clout in the battle to protect the interests of gun owners. OSHA GRAY DAVIDSON, UNDER FIRE: THE NRA AND THE BATTLE FOR GUN CONTROL 282-83 (1993). The NRA also enjoyed successes in the elections of 1994. For example, 80% of the NRA's favored candidates won their federal congressional campaigns and 85% won at the state level. David Van Biema, *License to Conceal*, TIME, March 27, 1995 at 26, 28. The NRA's Institute for Legislative Actions (ILA) was also extremely influential in the sweeping liberalization of concealed weapons reform at the state level. *See* NRA-ILA GRASSROOTS, VICTORY REPORT FROM THE STATES (undated NRA publication summarizing state-by-state NRA involvement in statutory reform in 1995); *see also* John J. Fialka, *NRA's Latest Campaign Seeks to Recruit Women and Project New Image as Crime-Fighting Group*, WALL ST. J., May 22, 1995, at A14 (describing election of the NRA's first female president, Marion P. Hammer); Richard Lacayo, *Under Fire*, TIME, Jan. 29, 1990, at 16, *passim* (describing history and political objectives of the NRA).

128. *See* FLA. STAT. ANN. §790.06 note (West 1992 & Supp. 1996) (noting that original law, ch. 87-24, became effective Oct. 1, 1987); *see also* Richard Getchell, Comment, *Carrying Concealed Weapons in Self-Defense: Florida Adopts Uniform Regulations for the Issuance of Concealed Weapons Permits*, 15 FLA. ST. U. L. REV. 751 (1987) (discussing the new Florida law). Presently, nearly thirty states have adopted a more liberalized program for regulating concealed carry of firearms. *See* Lenzen, *supra* note 126, at 1504 n.4. In Vermont, no permit is required to carry a concealed firearm; instead, the state criminalizes

ized permit programs for carrying concealed weapons, bringing the total number of such programs to twenty-eight.[129]

North Carolina's principal firearms cases indicate that the General Assembly is authorized to reasonably regulate concealed handgun ownership.[130] Therefore, an analysis of the 1995 law should focus on the policies the General Assembly embraced when it established the permit program, not the underlying constitutional issues. The need to confront crime in the state has been well-documented,[131] and thus the debate over new concealed firearms laws is kindled in part by the unknown consequences of these reforms.[132] In order to determine whether lowering restrictions on carrying concealed weapons is effective in advancing the underlying public policy of enhancing public safety, several studies have been conducted to evaluate the effects of

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carrying concealed firearms if the carrier has the intent to injure others or is on the grounds of a state facility without permission. *See* VT. STAT. ANN. tit. 13, § 4003 (1974).

129. *See, e.g.*, ALA. CODE § 13A-11-75 (1994); ALASKA STAT. § 18.65.700 to .790 (1994); ARIZ. REV. STAT. ANN. § 13-3112 (1995); GA. CODE ANN. § 16-11-129 (Supp. 1995), *amended by* 1996 Ga. Laws 520; TENN. CODE ANN. § 39-17-1315 (Supp. 1995); VA. CODE ANN. § 18.2-308 (Michie Supp. 1995); W.VA. CODE § 61-7-4 (1992 & Supp. 1995).

130. *See supra* notes 63-122 and accompanying text (discussing constitutionality of handgun restrictions). Note, however, that the Second Amendment doctrine forms the framework for nearly all debates over handgun restrictions. *See supra* notes 63-102 and accompanying text. In 1991, former Chief Justice Warren Burger rejected an expansive view of the right to bear arms under the Second Amendment: "This [Amendment] has been the subject of one of the greatest pieces of fraud, I repeat the word 'fraud,' on the American public by special interest groups that I have ever seen in my lifetime." The MacNeil/Lehrer News Hour: First Freedoms, (Television Broadcast, Dec. 16, 1991), *available in* LEXIS, NEWS Library, NEWSHR File (interview with Charlayne Hunter-Gault). *See supra* note 127 for a discussion of the political activities surrounding the consideration of firearms laws.

131. *See supra* note 2 (discussing crime rates in North Carolina).

132. In conjunction with the new concealed handgun statute, the North Carolina General Assembly directed the Governor's Crime Commission to study the effects of the new law and report no later than the convening of the 1997 General Assembly:

> The Commission shall:
>
> (1) Review the number of permits denied, issued, and revoked.
>
> (2) Review any data on the use of concealed handguns by those who have permits including to the extent available:
>
> a. Instances where a crime was prevented by a person who was carrying a concealed handgun pursuant to a permit.
>
> b. Instances where a child or another person was accidentally injured by a handgun carried by a person with a concealed handgun permit.
>
> c. Instances where a handgun was used inappropriately by a person with a concealed weapon permit.
>
> (3) Attempt to determine the effect of Article 54B on crime in the State and on the safety of the public.

Act of July 29, 1995, ch. 542, §.5.1, 1995 N.C. Adv. Legis. Serv. 801.

liberalized permit programs.[133] A University of Maryland study investigated the homicide rate in three states—Florida, Mississippi, and Oregon—that had enacted non-discretionary or "shall issue" carry reform statutes.[134] The results showed that firearm homicides increased after the liberalization of concealed carry laws in four of the five urban areas studied.[135] The researchers concluded that "shall issue" laws do not reduce homicides in large urban areas, and alternatively, these laws may increase the number of firearm murders.[136]

Other criminological data contradict the results of the Maryland study. For example, one law review article surveyed the results from studies that focus on the merits of self-defense measures by armed citizens.[137] The authors reported that research "has indicated that victims who resist by using guns or other weapons are less likely to be injured compared to victims who do not resist or to those who resist without weapons."[138] These results support the General Assembly's efforts to enable the people of North Carolina to legally practice self-defense.[139]

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133. Much of the empirical evidence injected into the gun control debate has been gathered in the field of criminology. *See, e.g.*, JAMES D. WRIGHT ET AL., UNDER THE GUN: WEAPONS, CRIME, AND VIOLENCE IN AMERICA (1983). Additional studies have been performed in the area of public health. *See, e.g.*, Daniel J. French, *Biting the Bullet: Shifting the Paradigm from Law Enforcement to Epidemiology; A Public Health Approach to Firearm Violence in America*, 45 SYRACUSE L. REV. 1073 (1995); Arthur L. Kellerman & Donald T. Reay, *Protection or Peril? An Analysis of Firearm-Related Deaths in the Home*, 314 NEW ENG. J. MED. 1557, 1557-60 (1986). *But see* Don B. Kates et al., *Guns and Public Health: Epidemic of Violence or Pandemic of Propaganda?*, 62 TENN. L. REV. 513, 595 (1995) (arguing that there is an "emotional anti-gun agenda in the treatment of firearms issues in the medical and public health literature").

134. *See* McDowall et al., *supra* note 127, at 193-94.

135. *Id.* at 201-02. The researchers measured the change in reported homicides by firearm in five cities: Miami (+3%), Jacksonville (+75%), Tampa (+22%), Portland (-12%), and Jackson (+43%). *Id.* at 205. The NRA, however, reported that homicides in Florida decreased by 21% in the study period 1987-1992. Rebecca Voelker, *States Debate 'Carrying Concealed Weapons' Laws*, 273 JAMA 1741, 1741 (1995).

136. McDowall et al., *supra* note 127, at 203.

137. *See* Gary Kleck & Marc Gertz, *Armed Resistance to Crime: The Prevalence and Nature of Self-Defense with a Gun*, 86 J. CRIM. L. & CRIMINOLOGY 150 (1995).

138. *Id.* at 151-52. The authors cautioned that while "moderate regulatory measures" would not significantly reduce defensive use by victims, prohibition against gun ownership would hamper defensive measures "that otherwise would have saved lives, prevented injuries, thwarted rape attempts, driven off burglars, and helped victims retain their property." *Id.* at 180.

139. North Carolina courts have adopted a two-tiered analysis of justifiable homicide claims under the categories of perfect self-defense, which "excuses a killing altogether" and imperfect self-defense, which "may reduce a charge of murder to voluntary manslaughter." *See* State v. Ross, 338 N.C. 280, 283, 449 S.E.2d 556, 559 (1994). The four elements of perfect self-defense are:

Another study evaluated the impact of armed victims on the behavior of criminals. In a pool of over 1600 prisoners, nearly forty percent reported that at some point they had foregone a criminal activity because "they knew or believed that the victim was carrying a gun."[140] These results suggest that access to weapons by potential victims of crime—or at least the threat of armed defensive measures—may be a significant deterrent to criminal activity.[141] However, proponents of

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(1) [I]t appeared to the defendant and he believed it to be necessary to kill the deceased in order to save himself from death or great bodily harm; and
(2) defendant's belief was reasonable in that the circumstances as they appeared to him at that time were sufficient to create such a belief in the mind of a person of ordinary firmness; and
(3) defendant was not the aggressor in bringing on the affray . . . ; and
(4) defendant did not use excessive force, i.e., did not use more force than was necessary or reasonably appeared to him to be necessary under the circumstances to protect himself from death or great bodily harm.

State v. McAvoy, 331 N.C. 583, 595, 417 S.E.2d 489, 497 (1992). "Imperfect self-defense exists where there is evidence of the first two elements of self-defense and the State fails to prove beyond a reasonable doubt the non-existence of either element but does prove beyond a reasonable doubt that defendant either used excessive force or was the aggressor . . . ." State v. Watson, 338 N.C. 168, 180, 449 S.E. 2d 694, 702, *temp. stay and reconsideration denied*, 338 N.C. 523, 457 S.E.2d 302, *cert. denied*, 115 S.Ct. 1708 (1995). A person who is attacked with deadly force and who is free from fault in causing the attack has no duty to retreat " 'but may stand his ground and kill his adversary.' " *Id.* at 186, 449 S.E.2d at 705 (quoting State v. Pearson, 228 N.C. 34, 39-40, 215 S.E.2d 598, 603 (1975)). In addition:

> [O]ne may kill in defense of another if one believes it to be necessary to prevent death or great bodily harm to the other "and has a reasonable ground for such belief, the reasonableness of this belief or apprehension to be judged by the jury in light of the facts and circumstances as they appeared to the defender at the time of killing."

State v. Perry, 338 N.C. 457, 466, 450 S.E.2d 471, 476 (1994) (quoting State v. Terry, 337 N.C. 615, 623, 447 S.E.2d 720, 724 (1994)); *cf.* GARY KLECK, POINT BLANK: GUNS AND VIOLENCE IN AMERICA 101-51 (1991) (describing "the effects of guns in the hands of potential victims of crime"). Kleck summarizes the psychological security of handgun possession and argues that private gun ownership supplements police protection. *Id.* at 120, 142. Even where law enforcement officers are present, defensive gun use by private citizens is reasonable because the traditional, yet highly criticized, doctrine of sovereign immunity shields North Carolina municipalities from tort liability for negligent acts, including inadequate crime prevention and failing to respond to emergency calls. *See* Jones v. Kearns, 120 N.C. App. 301, 302-04, 462 S.E.2d 245, 246, *disc. rev. denied*, 342 N.C. 414, 465 S.E.2d 541 (1995) (stating general rule of government immunity that may be waived by purchase of liability insurance).

140. JAMES D. WRIGHT & PETER H. ROSSI, ARMED AND CONSIDERED DANGEROUS: A SURVEY OF FELONS AND THEIR FIREARMS 146, 147 (1986). Wright and Rossi also reported that approximately two-thirds of prisoners who had encountered an armed victim were either scared away or shot at; the remaining one-third were not deterred. *Id.* at 154. Hence, not all defensive measures actually thwart criminal acts. *Id.*

141. *But see* David McDowall et al., *Additional Discussion About Easing Concealed Firearms Laws*, 86 J. CRIM. L. & CRIMINOLOGY 221, 224 (1995) (arguing that "relaxed concealed firearm laws may set off an arms race" because criminals carry weapons to protect themselves from armed victims).

handgun restrictions fear that the availability of handguns will inevitably lead to the death of unarmed victims.[142]

Overall, the scarcity of reliable data concerning the effect of carrying concealed handguns continues to hamper advocates and opponents of liberal regulatory programs for firearms permits. The data appear to support nearly any plausible argument relating to concealed carry. Consequently, North Carolina and other states with non-discretionary permit programs will serve as laboratories in the ongoing public debate about crime control and the right to bear arms.[143] Nonetheless, the nationwide surge toward lax regulation of concealed handgun possession may be tempered by the changing political environment.[144] For example, North Carolina's Attorney General Michael Easley has expressed regret over the right-to-carry movement[145] and James Exum, the former Chief Justice of the North Carolina Supreme Court, has disparaged the state's new concealed handgun permit law.[146]

Another factor that will contribute to the law's overall effect on public safety in North Carolina is the number of permits applied for and granted. In states where similar concealed handgun laws have

142. Less than two months after Texas implemented its concealed weapons permit program, a permit holder shot and killed an unarmed man after a traffic incident. Robert Ingrassia, *Gun Law at Center of Fatality: Man Shot Dead in Traffic Dispute*, DALLAS MORNING NEWS, Feb. 22, 1996, at A1. The two men's side-view mirrors touched while they were driving. *Id.* The unarmed man approached the assailant's vehicle and started punching him before he was shot once in the chest. *Id.* The Dallas police arrested the gun owner, claiming that he unjustifiably used deadly force. *Id.* A grand jury declined to indict the shooter for murder. *See* Robert Ingrassia, *Gun-Permit Death Won't Go to Court: Grand Jury Declines to Indict GP Man*, DALLAS MORNING NEWS, Mar. 21, 1996, at A1; *see also* Gordon Witkin, *Should You Own a Gun?*, U.S. NEWS & WORLD REP., Aug. 15, 1994, at 24, 24 (describing accidental shooting of a 14-month-old boy by his 2-year-old brother in Georgia). In Florida, which enacted a non-discretionary concealed handgun permit program in 1987, there have been relatively few incidents involving permit holders. *See* Witkin, *supra* note 1, at 59. Florida issued approximately 250,000 permits between 1987 and 1994; eighteen permits were revoked and forty-three were suspended because the permit holders committed crimes with firearms. *Id.* In Dade County, the county encompassing the city of Miami, there were sixty-three incidents between 1987 and 1992, including twenty-five arrests and twelve incidents where individuals defended themselves against criminal activity. *Id.*

143. *Cf.* New State Ice Co. v. Liebmann 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (endorsing state experimentation with social and economic policies).

144. *See, e.g.*, Paul Bradley, *N. Va. Democrats Aim at Gun Law Reversal or Modification of Permit Rule Sought*, RICHMOND TIMES-DISPATCH, Dec. 1, 1995, at B1 (describing goals of Democrats in Virginia General Assembly who prevented Republican sweep of both chambers in November 1995 elections).

145. *See* Neff, *supra* note 19, at A4.

146. *Exum Asks Fellow Episcopalians to Help Repeal Concealed Gun Law*, NEWS & OBSERVER (Raleigh), Feb. 2, 1996, at A3 ("I think it's an ill-conceived law, passed hastily.").

been enacted, the citizens responded enthusiastically to the availability of permits by filing significant numbers of applications.[147] Within three months after the North Carolina program commenced, approximately 14,000 North Carolinians applied for a permit, but only a small number were issued.[148] Although the ninety-day processing period had expired for many applications, sheriffs were unable to complete most fingerprint checks due to delays in the criminal records system.[149]

Although North Carolina has plunged itself into the recent wave of permissive handgun legislation, it remains to be seen whether this legislative action against crime will continue to enjoy the tempered acceptance it received upon enactment.[150] In the meantime, the debate will be shaped by the politics of fear. Opponents of gun carrying fear the loss of innocent lives, while advocates of gun ownership fear defenselessness against criminal behavior. To be sure, the real issue surrounding the new law is whether one considers all gun carriers a threat to safety, or only those who are likely to commit an unlawful act. North Carolina's new law attempts to distinguish between responsible gun owners and those inclined to perpetrate gun-related

147. *See, e.g.*, Ted Gest & Marilyn Moore, *Gun Controls Lifted: Florida's New Crop of Pistol Packers*, U.S. NEWS & WORLD REP., Oct. 12, 1987, at 16, 16 (reporting 36,000 requests for applications one week after Florida law went into effect); Anne Saker, *Va. Points the Way With Concealed-Gun Law*, NEWS & OBSERVER (Raleigh), July 9, 1995, at B1 (describing initial surge of permit applications when Virginia's weapons law went into effect on July 1, 1995). As a preliminary estimate of the number of anticipated permit applicants, the North Carolina Senate's Finance Committee used the results from Florida, where approximately one percent of the population received permits within the first two years of the program, to estimate that North Carolina would issue over 70,000 permits from 1995 to 1997. NORTH CAROLINA GENERAL ASSEMBLY, SENATE FINANCE COMMITTEE MINUTES, June 27, 1995.

148. Todd Richissin, *Crime Suspects Get Gun Permits*, NEWS & OBSERVER (Raleigh), Mar. 10, 1996, at B1, B4.

149. In Wake County, for example, 775 residents applied for permits during the first three months of the program, but only three permits were issued. Fred Hartman, *Fingerprint-check Backlog Delays Permits for Concealed Guns*, NEWS & OBSERVER (Raleigh), Feb. 29, 1996, at B3. In contrast, the sheriff of Davidson County issued more than 200 "emergency" permits that are effective for ninety days; none of these applicants had his record checks completed. *See* Richissin, *supra* note 148, at B1. These disparate policies demonstrate that some sheriffs have decided to issue permits to applicants for whom background checks are not complete, while other sheriffs will wait until applicants are screened for prior criminal behavior. *See id.* at B4.

150. A survey of 623 North Carolina adults conducted in the fall of 1995 concluded that approximately 57% of North Carolina residents opposed the new concealed handgun law, while 33% supported it and 10% were undecided. *Poll Finds Most Oppose*, *supra* note 10, at B6. Each respondent was asked, "Do you support or oppose the new state law that allows people to carry concealed weapons?" *Id.* The survey was conducted by the School of Journalism and Mass Communication and the Institute for Research in Social Science at the University of North Carolina at Chapel Hill. *Id.*

crimes.[151] However, it is unrealistic to expect law-enforcement officials to successfully segregate all high-risk gun owners under the newly-enacted statutory criteria.

Hence, by establishing the concealed handgun permit program, the North Carolina General Assembly has initiated an experiment in civic virtue and crime control. The legislature is constitutionally entrusted with the authority to regulate concealed handgun possession.[152] Consequently, as the General Assembly observes the effects of its actions, it should be prepared to modify or even repeal the law. Regardless of the outcome, the lopsided political victory of the new concealed handgun law in the General Assembly suggests that we have deliberately chosen our own future.

WILLIAM F. LANE

151. For a discussion of the role of civic virtue in the regulation and ownership of guns, see Wendy Brown, *Guns, Cowboys, Philadelphia Mayors, and Civic Republicanism: On Sanford Levinson's* The Embarrassing Second Amendment, 99 YALE L.J. 661 (1989); Williams, *supra* note 63. For a comparison of American and foreign attitudes toward guns and violence, see DAVID B. KOPEL, THE SAMURAI, THE MOUNTIE, AND THE COWBOY: SHOULD AMERICA ADOPT THE GUN CONTROLS OF OTHER DEMOCRACIES? 383-93 (1992) ("Simply put, Americans do not trust authority as much as most citizens of the British Commonwealth and Japan do. . . . America places more faith in its citizens than do other nations.").

152. *See supra* notes 103-22 and accompanying text.

Strictly No Strict Liability: The 1995 Amendments to Chapter 99B, the Products Liability Act

In response to a perceived onslaught of frivolous lawsuits and skyrocketing damage awards, a tort reform movement has steadily spread throughout the United States.[1] From the movement's beginnings in the mid-1980s, states have attempted to contain the apparent litigation explosion of the last decade with a wide array of legislation, including damages caps and other changes in procedural and substantive law.[2] North Carolina legislators took up tort reform in 1995 and considered a package of five bills,[3] including a bill to amend the North Carolina Products Liability Act,[4] now codified in the North Carolina General Statutes Chapter 99B.

Chapter 99B was a tort reform act itself when it was originally passed in 1979.[5] Although "Products Liability Act" has the ring of consumer protection legislation, Chapter 99B was passed amid "concerted lobbying by the insurance industry, manufacturers, merchants,

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1. *See The Tort Reform Movement's Progress Across the Nation*, NAT'L L. J., Nov. 9, 1992, at 35-37 (detailing state-by-state tort reform measures instituted since 1985).

2. *See id.* Whether any such litigation explosion actually took place is a matter of debate. *See* Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System—and Why Not?*, 140 U. PA. L. REV. 1147, 1287 (1992) (denying the existence of a litigation crisis); *see generally* Andrew Blum, *Debate Still Rages on Torts*, NAT'L L.J., Nov. 16, 1992, at 1 [hereinafter Blum, *The Debate Still Rages*] (assessing the conflicting studies on the reality of the litigation explosion); Andrew Blum, *Assessing Tort Costs is a Game of Numbers*, NAT'L L.J., Nov. 16, 1992, at 32 (reviewing recent studies on the cost of the tort system).

3. The bills were: H.B. 636, 1995 General Assembly, 1st Sess. (1995) (proposing to amend Rule 11 of the North Carolina Rules of Civil Procedure to require a trial judge to order a party deemed to have filed a frivolous lawsuit to pay the other party's reasonable expenses) (not enacted); H.B. 637, 1995 General Assembly, 1st Sess. (1995) (amending the Product Liability Act (1995 N.C. Sess. Laws 522)); H.B. 729, 1995 General Assembly, 1st Sess. (1995) (capping punitive damages at three times the amount of compensatory damages or $250,000, whichever is greater, and requiring that punitive damages above attorney's fees be paid to the state General Fund rather than the plaintiff (1995 N.C. Sess Laws 514)); H.B. 730, 1995 General Assembly, 1st Sess. (1995) (setting standards for qualifications of expert witnesses in medical malpractice cases (1995 N.C. Sess. Laws 309)); and H.B. 731, 1995 General Assembly, 1st Sess. (1995) (proposing to allow juries to hear evidence that a plaintiff already has recovered compensation for an injury or loss from another party (not adopted)). State Representative Charles Neely sponsored the package. *North Carolina Legislators Consider Tort Reform*, LIABILITY WK., Apr. 17, 1995, *available in* 1995 WL 8596527.

4. N.C. GEN. STAT. §§ 99B-1 to 99B-11 (1995) [hereinafter Chapter 99B].

5. 1979 N.C. Sess. Laws 654. *See* Charles F. Blanchard & Doug B. Abrams, *North Carolina's New Products Liability Act: A Critical Analysis*, 16 WAKE FOREST L. REV. 171, 171-72 (1980).

wholesalers, and chambers of commerce."[6] As with the 1995 amendments, the original debate over Chapter 99B pitted pro-business forces, claiming that there was a statewide insurance crisis, against groups such as the North Carolina Academy of Trial Lawyers and the North Carolina Consumers Council.[7] Chapter 99B changed little from the 1979 version to the 1995 amendments, which represent the first major alteration of the statute. Three amendments are particularly noteworthy: a prohibition against strict liability in product liability actions,[8] a new section setting out a cause of action for inadequate warning or instruction[9] and a new section outlining liability for design defects.[10]

After briefly tracing the history of products liability law in North Carolina and Chapter 99B specifically,[11] this Note analyzes the 1995 modifications in the context of North Carolina case law and the law of products liability generally, focusing on the three sections indicated.[12] The Note then summarizes the other modifications to the law.[13] Finally, this Note analyzes the probable impact of the 1995 version of chapter 99B.[14]

The history of products liability law, both nationally and in North Carolina, is marked by the erosion of the doctrine of privity of contract and the rise of strict liability in tort. The general common law rule, formulated in the nineteenth century English case *Winterbottom v. Wright*,[15] required privity of contract between plaintiff and defendant in actions for injuries caused by defective products. The privity requirement precluded a consumer from suing any manufacturer, distributor, or seller other than the one who actually sold the item.[16] The

6. Blanchard & Abrams, *supra* note 5, at 171.
7. *Id.* at 171-72.
8. N.C. GEN. STAT. § 99B-1.1 (1995); *see infra* notes 48-51 and accompanying text.
9. N.C. GEN. STAT. § 99B-5 (1995); *see infra* notes 52-69 and accompanying text.
10. N.C. GEN. STAT. § 99B-6 (1995); *see infra* notes 70-105 and accompanying text.
11. *See infra* notes 15-39 and accompanying text.
12. *See infra* notes 40-105 and accompanying text.
13. *See infra* notes 106-12 and accompanying text.
14. *See infra* notes 113-23 and accompanying text.
15. 152 Eng. Rep. 402 (Ex. 1842), *reprinted in* 10 MEESON AND WELSBY'S REPORTS, Exchequer 109. In *Winterbottom*, the defendant contracted with the Postmaster General to keep the mail coaches in good repair, and the defendant's subsequent failure to comply resulted in injury to plaintiff coach driver. *Id.* at 109-110. Because the coach driver was not in privity with the defendant, he was denied recovery. *Id.* at 114. The court stated that "[u]nless we confine the operation of such contracts as this to the parties who entered into them, the most absurd and outrageous consequences, to which [we] can see no limit, would ensue." *Id.* at 114.
16. *See* MARSHALL S. SHAPO, THE LAW OF PRODUCTS LIABILITY, §§ 16.01-02 (3d ed. 1994). A consumer injured by a defective appliance, for example, might sue the local retailer but not the company that made the product. *Id.*

privity requirement was loosened throughout the late nineteenth and early twentieth centuries to allow recovery in cases involving "poisons, foods and articles affecting life and health,"[17] "imminently dangerous defects,"[18] and inherently dangerous products.[19] Eventually, the exceptions overcame the rule, and ultimately one case, *MacPherson v. Buick Motor Co.*,[20] started a trend which eliminated the privity requirement in most product liability actions. *MacPherson* may be regarded as the foundation of American products liability law.[21] After *MacPherson* the national trend moved toward the concept of strict liability in tort for products sold in a defective condition unreasonably dangerous to the user or consumer or to his property.[22] This new doctrine, originally formulated in *Greenman v. Yuba Power Products, Inc.*,[23] and embodied in section 402A of the Restatement (Second) of Torts,[24] has

17. BARNEY FINBERG & EMILY HIGHTOWER, PRODUCTS LIABILITY, THE LAW IN NORTH CAROLINA § 1-5 (1980).

18. *Id.* § 1-7, at 6 (citing Huset v. J.I. Case Threshing Mach. Co., 120 F. 865, 870 (8th Cir. 1903)).

19. *Id.* § 1-8, at 6 (citing Statler v. George A. Ray Mfg. Co., 88 N.E. 1063 (N.Y. 1909)).

20. 111 N.E. 1050 (N.Y. 1916). This noted opinion of Justice Cardozo held Buick liable for manufacturing a car with adefective wheel which caused injury to the plaintiff. *Id.* at 1055. Liability attached despite a lack of contractual privity between manufacturer and consumer. *Id.* at 1053-1055.

21. The case may be regarded as foundational in the sense that it introduced "the exception that destroyed the privity requirement." FINBERG & HIGHTOWER, *supra* note 17, § 1-9.

22. For a thorough discussion of the history and development of products liability law, see EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING, 7-19 (1949).

23. 377 P.2d 897, 900 (Cal. 1963). In *Greenman,* the plaintiff was injured when a woodworking machine malfunctioned. *Id.* at 899. The court held that "[a] manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being." *Id.* at 900. Perhaps the earliest formulation of the doctrine can be found in Escola v. Coca Cola Bottling Co., 150 P.2d 436, 440 (Cal. 1944) (Traynor, J., concurring in the judgment); *see infra* note 121.

24. *See* RESTATEMENT (SECOND) OF TORTS § 402A (1965). The Restatement presents the exception as follows:

> Special Liability of Seller of Product for Physical Harm to User or Consumer
>
> (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
>
> (a) the seller is engaged in the business of selling such product, and
>
> (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
>
> (2) The rule stated in Subsection (1) applies although
>
> (a) the seller has exercised all possible care in the preparation and sale of his product, and

been adopted, subject to various modifications, by all but three states.[25]

North Carolina has been reluctant to stray very far from the common law. Notes one treatise: "before 1979 the 'assault on the citadel of privity' . . . had barely passed the front gate" in North Carolina,[26] and strict liability in tort has never been adopted.[27] The law began to change in 1967 when the privity requirement in negligence actions was eliminated in *Corprew v. Geigy Chemical Corp.*[28] Privity in the warranty context has also been weakened but still has not been abandoned.[29]

Chapter 99B was adopted in 1979 in response to a claimed products liability insurance crisis brought on by "[t]he expansion of consumer-oriented products liability law."[30] A major source of this

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(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

25. *See* 2 LOUIS R. FRUMER & MELVIN I. FRIEDMAN, PRODUCTS LIABILITY § 8.01 (1995) (noting that Delaware, North Carolina, and Virginia are the only states that have not adopted the Restatement position). Massachusetts and Michigan do not recognize strict liability in tort, but in those states "a breach of implied warranty of merchantability cause of action is almost indistinguishable from a strict liability claim." *Id.*

26. FINBERG & HIGHTOWER, *supra* note 17, § 1-11 (referring to William L. Prosser, *The Assault Upon the Citadel*, 69 YALE L.J. 1099 (1960)).

27. *Id.*; *see supra* notes 22-25, and *infra* notes 36-39 and 49-51 and accompanying text (discussing the national trend toward strict products liability and North Carolina's rejection of it).

28. 271 N.C. 485, 497, 157 S.E.2d 98, 106 (1967). In *Corprew*, the plaintiff alleged that his crops were damaged after he applied a weed killer manufactured by the defendant chemical company. *Id.* at 487, 157 S.E.2d at 100-01. The plaintiff claimed inadequate warning and instructions and the court held that the "[privity] rule does not conform to modern conditions . . . . The manufacturer should be held liable because it is in a position to insure against liability and add the cost to the product. *Id.* at 490, 157 S.E.2d at 102. The court's justification for the imposition of liability on the manufacturer is based on the theory of loss spreading. *See infra* notes 120-23 and accompanying text. The court, recognizing that modern sales transactions are not the simple, face-to-face encounters of earlier times, characterized the *Winterbottom* rule as " 'horse and buggy' law for a 'horse and buggy' age." *Corprew*, 271 N.C. at 490, 157 S.E.2d at 102.

29. Goods in sealed packages on which the warranty is addressed to the ultimate consumer and whose label is addressed to that consumer are an exception to the privity rule, allowing the consumer to sue. Terry v. Double Cola Bottling Co., 263 N.C. 1, 3, 138 S.E.2d 753, 754 (1964). A further exception was held to apply in Tedder v. Pepsi-Cola Bottling Co., 270 N.C. 301, 305-06, 154 S.E.2d 337, 340 (1967), where the product was advertised to consumers and placed on store shelves by employees of the manufacturer. Privity is still required, however, under N.C. GEN. STAT. § 25-2-318 (1995), which extends the seller's warranty to the buyer to others *not* in privity *only* if they are "natural person[s] . . . in the family or household of [the] buyer or . . . guest[s] in his home if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty." *Id.*

30. *See* Charles Lee Cain & James P. Murray, *Survey of Developments in North Carolina Law, 1979: Commercial Law*, 58 N.C. L. REV. 1290, 1311 (1980).

allegation was a 1976 position paper by the Defense Research Institute which maintained that the unavailability and/or expense of product liability insurance was driving small manufacturers out of business.[31] Opponents challenged the existence of any such crisis but were unsuccessful in their bid to block the Products Liability Bill.[32] The North Carolina General Assembly enacted the bill as Chapter 99B and amended the statute of limitations and repose provisions of Chapter 1.[33]

The chapter's character as a manufacturer-protection law rather than a consumer-protection law is apparent from the fact that its four original sections[34] "are addressed primarily to circumstances in which the defendant may *not* be held liable."[35] Chapter 99B "is not . . . a source of liability for injuries caused by products"[36] since any products liability action must be based on some theory of wrongdoing, such as negligence or breach of warranty. Although litigants have attempted to make strict liability claims after the enactment of Chapter 99B, their claims have been repeatedly rejected. The North Carolina Supreme Court put it succinctly, stating that "recent comprehensive legislation in this area by the General Assembly does not adopt strict liability in product liability cases."[37] In short, the mere existence of a

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31. *Id.* The paper is DEFENSE RESEARCH INSTITUTE INC., PRODUCTS LIABILITY POSITION PAPER, *reprinted in* 5 LOUIS R. FRUMER & MELVIN I. FRIEDMAN, PRODUCTS LIABILITY app. at 1 (1979).

32. 1979 N.C. Sess. Laws 654; *see* Blanchard & Abrams, *supra* note 5, at 172.

33. N.C. GEN. STAT. § 1-50 was amended to provide a six year statute of repose under which no products liability action could be brought more than six years after the initial purchase. 1979 N.C. Sess. Laws 654. N.C. GEN. STAT. § 1-52 was amended to provide a ten-year statute of limitations under which the cause of action did not accrue until the harm became or should have become apparent and not more than ten years after the last act or omission of the defendant. 1979 N.C. Sess. Laws 654.

34. N.C. GEN. STAT. §§ 99B-1 to 99B-4 (1979) (amended 1995). Section 99B-10 was added in the second legislative session of 1979 and exempts donors of food to non-profit enterprises from liability except in cases of "gross negligence, recklessness or intentional misconduct." *Id.* § 99B-10 (current version at N.C. GEN. STAT. §99B-10 (1995)). Finally, section 99B-11 was added in 1987 and applies only to firearms and ammunition. This section establishes two burdens of proof on the plaintiff and adds a provision precluding any "comparison or weighing" of risks and benefits in a products liability action. *Id.* § 99B-11 (1987) (current version at N.C. GEN. STAT. §99B-10 (1995)). The reasons for precluding the use of a risk/utility analysis in the case of firearms becomes apparent when one considers the rather stark terms in which such an analysis might be framed: weighing the utility (killing) against the risk (killing).

35. CHARLES E. DAYE & MARK W. MORRIS, NORTH CAROLINA LAW OF TORTS 450 (1991) (emphasis added).

36. *Id.* at 449.

37. Smith v. Fiber Controls Corp., 300 N.C. 669, 678, 268 S.E.2d 504, 509-10 (1980); *see also,* Bryant v. Adams, 116 N.C. App. 448, 473, 448 S.E.2d 832, 845 (1994) ("North Carolina expressly rejects strict liability in products liability actions."), *disc. reiew., denied,* 339 N.C. 736, 454 S.E.2d 647 (1995); Driver v. Burlington Aviation, Inc., 110 N.C. App. 519,

defect will not automatically result in liability to the manufacturer.[38] In addition to negligence, a products liability claim may be brought on a theory of breach of express or implied warranty or on "other theories of recovery incud[ing] deceit and misrepresentation."[39]

The 1995 amendments to Chapter 99B[40] serve purposes similar to the original legislation. Neither represent consumer protection legislation and both are framed in terms of what will *not* result in liability for the manufacturer or seller.[41] Each was enacted in reaction to a perceived "crisis" attributed to large damages awards and frivolous lawsuits unfairly targeting the "deep pockets" of business and industry.[42] The 1979 legislation and the 1995 amendments were arguably driven by national trends, out-of-state cases, and legal developments not necessarily reflective of the actual state of affairs in North Carolina.[43] Additionally, they might fairly be characterized as an attempt

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530, 430 S.E.2d 476, 483 (1993) ("To date . . . North Carolina courts have limited the imposition of strict liability to ultrahazardous activities."); Warren v. Colombo, 93 N.C. App. 92, 102, 377 S.E.2d 249, 255 (1989) ("North Carolina expressly rejects strict liability in products liability actions."); Holley v. Burroughs Wellcome Co., 74 N.C. App. 736, 742, 330 S.E.2d 228, 232 (1985) ("North Carolina does not recognize strict liability in products liability actions."), *aff'd*, 318 N.C. 352, 348 S.E.2d 772 (1986); Byrd Motor Lines, Inc. v. Dunlop Tire & Rubber Corp., 63 N.C. App. 292, 299, 304 S.E.2d 773, 778 (1983) ("North Carolina does not recognize this [strict liability] doctrine . . . ."), *disc. review denied*, 310 N.C. 624, 315 S.E.2d 689 (1984).

38. *See* DAYE & MORRIS, *supra* note 35, at 454. Professors Daye and Morris note:

> The manufacturer must have been negligent with respect to that defect, either in failing to exercise ordinary care in the design or the manufacture of the product, or in failing to discover the defect. Ordinary care may require the manufacturer to supply adequate directions or instructions in the use of the products, or to provide proper warning of the dangers posed by the product of which the manufacturer is or should be aware.

Id. at 454-55.

39. DAYE & MORRIS, *supra* note 35, at 450 n.4.

40. 1995 N.C. Sess. Laws 522.

41. *See supra* text accompanying note 35.

42. *See supra* notes 1, 6 and accompanying text (discussing the perception of frivolous lawsuits, and noting lobbying by businesses and industries which surrounded the original enactment of Chapter 99B).

43. *See supra* notes 30-33 and accompanying text (discussing the national perception that strict products liability drove small manufacturers out of business, and noting the failure of Chapter 99B's opponents to convince the General Assembly that such perception was not true in North Carolina). The debate continues both nationally and state-wide over the need for tort reform. *See* Blum, *The Debate Still Rages*, *supra* note 2, at 1. ("The debate has gotten clouded—with anecdotes, horror stories and subsequent denials."). As Blum notes, a major problem is the lack of reliable data due to the fact that observers " 'have nothing like the Consumer Price Index' " with which to accurately measure litigation activity. *Id.* (quoting Wisconsin Law Professor Marc Galanter). A favorite example used by tort reform advocates is the $2.9 million awarded to Stella Liebeck after she spilled a hot cup of McDonald's coffee on her lap at a drive-through window. Liebeck v. McDonald's Restaurants, P.T.S., Inc., No. CV-93-02419, 1995 WL 360309 (N.M. Dist. Aug. 18,

to preempt the undesirable trends and excesses of other jurisdictions. In fact, the 1995 amendments to Chapter 99B do not so much change the law of products liability as assure that it will *not* embrace strict liability. Rather than imposing any new doctrine, the 1995 amendments effectively prevent the courts from developing and expanding the law of products liability.

The 1995 amendments make three noteworthy additions to Chapter 99B as well as a number of more minor and technical changes. First, strict liability is explicitly rejected as a theory of recovery in product liability actions.[44] Second, an extensive section is added outlining what a claimant must prove to prevail on a claim based on inadequate warning or instruction.[45] Third, a further section is added detailing what a claimant must prove to prevail on a claim based on inadequate design or formulation.[46] These three sections are conceptually interrelated in that warning and design defects are two members of the "defect triumvirate" which also includes manufacturing defects.[47] Together, these three amendments to Chapter 99B form a statutory practice that stands foursquare against strict liability.

Instead of representing a reaction to any judicial decision applying strict liability, section 99B-1.1's rejection of strict products liability simply codifies what the North Carolina courts have held repeatedly since *Smith v. Fiber Controls Corp.*[48] in 1980. In light of North Caro-

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1994). The story, however, seems considerably less outrageous when one considers that the seventy-nine year-old plaintiff had to undergo skin graft surgery, suffered permanent scarring, and that McDonald's served its coffee at forty to fifty degrees hotter than recommended, and had received hundreds of previous complaints. CV-93-02419, 1994 WL 782090, at *1 (LRP Jury). Further, the punitive damage award was later reduced to $480,000 and the compensatory award to $160,000. *Id.* In the context of North Carolina law it is noteable that Ms. Liebeck was found 20% negligent. *Id.* If the incident had taken place in North Carolina she would have been barred from recovery because of her contributory negligence. *See* DAYE & MORRIS, *supra* note 35, at 273-82 (discussing the doctrine of contributory negligence in North Carolina); Brian Beasley, Note, *North Carolina's New Punitive Damages Statute: Who's Being Punished Anyway?*, 74 N.C. L. REV. 2174, 2175-78 (1996) (describing punitive damage reform in North Carolina).

44. N.C. GEN. STAT. § 99B-1.1 (1995) ("There shall be no strict liability in tort in product liability actions."); *see infra* notes 48-51 and accompanying text.

45. N.C. GEN. STAT. § 99B-5 (1995); *see infra* notes 52-69 and accompanying text.

46. N.C. GEN. STAT. § 99B-6 (1995); *see infra* notes 70-105 and accompanying text.

47. 2 FRUMER & FRIEDMAN, *supra* note 25, at § 12.01. "Unlike its cousins involving designs and warnings, which are usually analyzed . . . using negligence concepts, the treatment given to flaws in manufacturing are generally faithful to the origins of the strict liability doctrine . . . ." *Id.* at § 11.02[3].

48. 300 N.C. 669, 678, 268 S.E.2d 504, 510 (1980); *see supra* note 37 and accompanying text. The original bill did not flatly prohibit strict liability but merely eschewed any endorsement of it: "This Chapter is not intended to establish, approve, or endorse the common-law principles of strict liability in product liability cases." H.B. 637, 1995 General Assembly, 1st Sess. (March 30, 1995 version). Strict liability in this context has been

lina's history of antipathy toward national trends in products liability law,[49] the state's refusal to adopt strict liability[50] makes section 99B-1.1 more notable for its redundancy than for its novelty. Courts have repeatedly confirmed that "in enacting the Products Liability Act [of 1979], the Legislature reaffirmed the reasoning of the pre-statute cases holding that the essential elements of an action for products liability are based upon negligence . . . ."[51] That section 99B-1.1 is regarded with dismay by the plaintiff bar is little more than an affirmation that hope springs eternal. What the statute now assures is that strict liability will not slip into North Carolina by way of the common law but will have to arrive, if at all, in the noonday sun of the General Assembly.

Similarly, the section on claims based on inadequate warning or instruction does little to change the law, but rather codifies and elaborates on the negligence standard which is already the basis of actions based on inadequate warning or instruction.[52] As in the case of sec-

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adopted by a majority of jurisdictions, subject to various limitations by judicial decision or by statute. *See* SHAPO, *supra* note 16, § 7.02[2] ("Over the years, an increasing majority of states has adopted strict liability in tort, either by wholesale acceptance of section 402A or, in a few cases, through other formulations."). In its most pure form, strict liability would hold a manufacturer liable for injury caused by its product regardless of fault. This view is well expressed in Ford Motor Co. v. Carter, 238 S.E.2d 361, 365 (Ga. 1977), in which the court stated that "liability may be incurred irrespective of negligence, privity of contract, warranties, or exclusions" and that "a manufacturer can still be held liable irrespective of how carefully he observes; or any degree of care, precaution or vigilance he observes, in trying to protect the interest of another." *Id.* Some courts have nevertheless included an element of fault in their strict liability analyses even though such a position would appear to dilute the doctrine with elements of negligence. *See* SHAPO, *supra* note 16, § 7.04[2][b].

49. *See supra* note 26 and accompanying text.

50. The lone exception to this rule is in the area of abnormally dangerous activities. *See* Guilford Realty & Ins. Co. v. Blyth Bros. Co., 260 N.C. 69, 75, 131 S.E.2d 900, 905 (1963) (adopting strict liability in the context of a blasting case); DAYE & MORRIS, *supra* note 35, at 355-57.

51. Driver v. Burlington Aviation, Inc., 110 N.C. App. 519, 527, 430 S.E.2d 476, 482 (1993) (quoting McCollum v. Grove Mfg. Co., 58 N.C. App. 283, 286, 293 S.E.2d 632, 635, *disc. review granted*, 306 N.C. 742, 295 S.E.2d 760 (1982), *aff'd*, 307 N.C. 695, 300 S.E.2d 374 (1983)).

52. N.C. GEN. STAT. § 99B-5 (1995) states:

> (a) No manufacturer or seller of a product shall be held liable in any product liability action for a claim based upon inadequate warning or instruction unless the claimant proves that the manufacturer or seller acted unreasonably in failing to provide such warning or instruction, that the failure to provide adequate warning or instruction was a proximate cause of the harm for which damages are sought, and also proves one of the following:
>
> (1) At the time the product left the control of the manufacturer or seller, the product, without an adequate warning or instruction, created an unreasonably dangerous condition that the manufacturer or seller knew, or in the exercise of ordinary care should have known, posed a substantial risk of harm to a reasonably foreseeable claimant.

tion 99B-1.1, section 99B-5 provides assurances that the law will retain a fault based negligence standard for products liability. Although the section does not appear to impose any new or higher standard on the plaintiff, it does seem to limit a court's discretion and flexibility in determining what conduct on the part of manufacturers and sellers will constitute negligence.

North Carolina has long recognized that failure to warn or provide adequate instructions constitutes "negligent conduct for which manufacturers may be held liable . . . ."[53] The seller has also been under a duty to "warn of hazards attendant to the assembled and installed product's use but only when the seller 'has actual or constructive knowledge of a particular threatening characteristic of the product' and simultaneously 'has reason to know that the purchaser will not realize the product's menacing propensities for himself.' "[54]

Section 99B-5 sets out the three elements necessary for an inadequate warning/instruction claim: 1) the manufacturer or seller acted unreasonably in failing to provide adequate warning or instruction;[55]

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(2) After the product left the control of the manufacturer or seller, the manufacturer or seller became aware of or in the exercise of ordinary care should have known that the product posed a substantial risk of harm to a reasonably foreseeable user or consumer and failed to take reasonable steps to give adequate warning or instruction or to take other reasonable action under the circumstances.

53. *Driver*, 110 N.C. App. at 526, 430 S.E.2d at 481. Some twelve years before the original enactment of Chapter 99B the supreme court delineated the standard of care for manufacturers:

> He [the manufacturer] may be negligent in failing to inspect or test his materials, or the work itself, to discover possible defects, or dangerous propensities. He may fail to use proper care to give adequate warning to the user, not only as to dangers arising from unsafe design, or other negligence, but also as to dangers inseparable from a properly made product. The warning must be sufficient to protect third persons who may reasonably be expected to come in contact with the product and be harmed by it; and the duty continues even after the sale, when the seller first discovers that the product is dangerous. He is also required to give adequate directions for use, when reasonable care calls for them.

Corprew v. Chemical Corp. 271 N.C. 485, 491, 157 S.E.2d 98, 103 (1967) (citing WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 665 (3d. ed. 1964)).

54. Crews v. W.A. Brown & Son, Inc. 106 N.C. App. 324, 330, 416 S.E.2d 924, 928 (1992) (quoting Ziglar v. E.I. Du Pont De Nemours & Co., 53 N.C. App. 147, 151, 280 S.E.2d 510, 513, *disc. review denied*, 304 N.C. 393, 285 S.E.2d 838 (1991)). *Crews* involved a latching mechanism on a walk-in freezer which was designed to prevent anyone from being inadvertently locked in. *Id.* at 327, 416 S.E.2d at 926-27. When the latch malfunctioned, a teen aged girl was locked in the freezer and suffered severe frostbite. *Id.* at 327, 416 S.E.2d at 927. Not only were the warnings and instructions inadequate but the manufacturer had affixed a helpful informational label on the inside of the door which read, "YOU ARE NOT LOCKED IN!" and explained that being locked in was impossible due to the special "EASY ACTION" latch assembly. *Id.* at 326, 416 S.E.2d at 926.

55. N.C. GEN. STAT. § 99B-5(a) (1995).

2) such failure was the proximate cause of the harm;[56] 3) the manufacturer or seller a) knew or should have known of the unreasonably dangerous condition created at the time the product left its control,[57] or b) became aware or should have known of the risk to the foreseeable user or consumer after the product left its control and failed to instruct, warn, or take other action.[58] Two further provisions preclude liability for failure to warn of open and obvious dangers[59] and relieve the manufacturer or seller of prescription drugs from having to provide warning or instruction directly to the consumer if it is provided to the prescriber unless direct consumer warning is required by the FDA.[60]

This section does no more than provide a succinct summary of the elements of a negligence action for products liability.[61] Although the bill's sponsor correctly asserted that the amendments "codify current case law on providing the elements of negligence to establish a claim,"[62] the need for codification of the elements of common law negligence is unclear beyond its symbolic value as a reiteration of the rejection of strict liability.

Similarly, the alternatives provided to establish liability once the standard elements of negligence are proven deal specifically with the knowledge requirement. There is little here that cannot be found already stated in the case law.[63] These two subsections strongly resemble what is known as the "state of the art" defense which asserts:

> [L]iability based upon a failure to warn users of a product's inherently dangerous quality or characteristic may be im-

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56. *Id.*

57. *Id.* § 99B-5(a)(1).

58. *Id.* § 99B-5(a)(2).

59. *Id.* § 99B-5(b).

60. *Id.* § 99B-5(c).

61. *See supra* note 53 and text accompanying note 55-60. These elements are unchanged from the common law: "1) evidence of a standard of care owed by the reasonably prudent person in similar circumstances; 2) breach of that standard of care; 3) injury caused directly or proximately by the breach; and 4) loss because of the injury." Driver v. Burlington Aviation, 110 N.C. App. 519, 527, 430 S.E.2d 476, 482 (1993) (quoting McCollum v. Grove Mfg. Co., 58 N.C. App. 283, 286, 293 S.E.2d 632, 635, *disc. review granted*, 306 N.C. 742, 295 S.E.2d 760 (1982), *aff'd*, 307 N.C. 695, 300 S.E.2d 374 (1983)).

62. *North Carolina Legislators Consider Tort Reform, supra* note 3.

63. *See supra* notes 53-54 and accompanying text; *see also* DAYE & MORRIS, *supra* note 35, at 456; Ziglar v. E.I. Dupont de Nemours & Co., 53 N.C. App 147, 151, 280 S.E.2d 510, 513, *disc. review denied*, 304 N.C. 393, 285 S.E.2d 838 (1981). These elements of knowledge, presented as options, are very similar to the model statute on the duty to warn or instruct provided in the American Insurance Association Proposals. AMERICAN INSURANCE ASSOCIATION PROPOSALS, PROPOSED STATUTE ON DUTY TO WARN, *reprinted in* 4A LOUIS R. FRUMER & MELVIN I. FRIEDMAN, PRODUCTS LIABILITY, app. J at 1406 (1995). Such a resemblance underscores the 1995 amendments' protection of defendants.

> posed only where the manufacturer, distributor or seller . . . had actual or constructive knowledge of the dangerous quality or characteristic. The application of this rule . . . clearly renders not liable a defendant whose failure to warn was associated with an absence of knowledge of the dangerous quality or characteristic because it was not "knowable" . . . [because] of its not even having been then known to the scientific community.[64]

Interestingly, this defense is typically employed in strict liability cases because "when a negligence theory is applied there is no question that actual or constructive knowledge is an essential element."[65] Indeed, the concept of "state of the art" as a defense to a strict liability action has been criticized for "inject[ing] negligence principles into a strict liability case."[66] The amendment's exclusion of the warning requirement in the case of open and obvious dangers[67] is in line with both prior North Carolina case law[68] and "the vast majority of states . . . regardless of whether the cause of action is asserted in negligence or in strict liability."[69]

Section 99B-6,[70] addressing claims based on inadequate design or formulation, also appears to add little to the existing negligence cause of action for design defects. Like section 99B-5, it has the effect of fixing the law to prevent what the legislature considered undesirable potential developments. In a format similar to that of section 99B-5, this section lays out the standard elements for unreasonable design and formulation cases and provides two alternative ways of proving negligence. The first option is to prove that the manufacturer unreasonably failed to adopt a safer alternative design that could have been adopted without substantial impairment of the product.[71] The second option is to prove that the design was so unreasonable that a reasonable person, aware of the relevant facts, would not use the product.[72]

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64. Charles C. Marvel, Annotation, *Strict Products Liability: Liability for Failure to Warn as Dependent on Defendant's Knowledge of Danger*, 33 A.L.R. 4th 371 (1984).

65. *Id.*

66. Normann v. Johns-Manville Corp., 593 A.2d 890, 894 (Pa. Super. Ct. 1991), *appeal denied*, 607 A.2d 255 (Pa. 1992).

67. N.C. GEN. STAT. § 99B-5(b) (1995).

68. *See* Bryant v. Adams, 116 N.C. App. 448, 464-67, 448 S.E.2d 832, 841-43 (reversing an order of summary judgment because there was a question of fact as to whether the danger presented by a trampoline was "open and obvious"), *disc. review denied*, 339 N.C. 736, 454 S.E.2d 647 (1994); *see also supra* notes 53-54 and accompanying text.

69. 2 FRUMER & FRIEDMAN, *supra* note 25, at § 12.04. This is also the position of the Restatement. *See* RESTATEMENT (SECOND) OF TORTS § 388 cmt. k (1965).

70. N.C. GEN. STAT. § 99B-6 (1995).

71. *Id.* § 99B-6(a)(1).

72. *Id.* § 99B-6(a)(2).

These two options represent versions of the two major tests that are typically used in cases involving design defects—the risk/utility test and the consumer expectation test.[73]

To aid courts in determining the outcome of the risk/utility test, section 99B-6 also sets out a non-exclusive seven factor test to be considered when assessing the reasonableness of the manufacturer.[74] The factors to be considered are for the most part standard risk/utility considerations found in many judicial and academic expositions.[75] They are essentially a gloss on the Learned Hand formula:[76] Liability de-

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73. For a thorough discussion of these tests, see 2 FRUMER & FRIEDMAN, *supra* note 25, at § 11.03[6]. North Carolina's test, like the well-known *Barker* test used in California, gives the plaintiff the option of proving one or the other. Under *Barker*, however, once the plaintiff has made out a prima facie case, the burden shifts to the defendant to prove that the product's utility outweighed the risk to consumers. *See* Barker v. Lull Engineering Co., 573 P.2d 443, 455-56 (Cal. 1978). The case represents California's landmark formulation of a test for design defect. The *Barker* court adopted a two-prong test combining a consumer expectations test with a risk/utility test. *Id.*

74. N.C. GEN. STAT. § 99B-6(b) (1995).

75. The seven factors set out in the 1995 amendments to Chapter 99B are as follows:

1. The nature and magnitude of the risks of harm associated with the design or formulation in light of the intended and reasonably foreseeable uses, modifications, or alterations of the product.
2. The likely awareness of product users, whether based on warnings, general knowledge, or otherwise, of those risks of harm.
3. The extent to which the design or formulation conformed to any applicable government standard that was in effect when the product left the control of its manufacturer.
4. The extent to which the labeling for a prescription or nonprescription drug approved by the United States Food and Drug Administration conformed to any applicable government or private standard that was in effect when the product left the control of its manufacturer.
5. The utility of the product, including the performance, safety, and other advantages associated with that design or formulation.
6. The technical, economic, and practical feasibility of using an alternative design or formulation at the time of manufacture.
7. The nature and magnitude of any foreseeable risks associated with the alternative design or formulation.

Id. Factors one and two consider the risks associated with the particular design and the product user's likely awareness of those risks. Factor five considers the utility of the product in light of the advantages of the design. Factors six and seven balance the feasibility of an alternative design against the risks of such a design. These are unremarkable balancing considerations that weigh the risks and utility of the current design and those of alternative designs. Factors three and four deviate from standard risk/utility analysis by evaluating the product in light of applicable government standards. Factor three generally takes into account conformity of design or formulation to such standards while factor four specifically addresses the extent to which the labeling of any FDA approved drug conforms to government or private standards. There are many variations of this risk/utility test. *See, e.g.*, John W. Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825, 837-38 (1973); *see also* 2 FRUMER & FRIEDMAN, *supra* note 25, at § 11.03[4] (indicating that several scholars have proposed similar lists of factors varying in number).

76. *See* United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947).

pends on whether the burden (B) of adequate precautions is less than the injury (L) multiplied by the probability of its occurrence (P) as stated in the formula $B < PL$.[77]

Next, the section decides the risk/utility question in favor of the manufacturer in cases in which the product cannot be made safe without compromising its utility.[78] The manufacturer will not be held liable in these cases provided that such risk is "recognized by the ordinary person with the ordinary knowledge common to the community."[79] In the case of prescription drugs, the "ordinary knowledge" requirement is replaced with an adequate warning or instruction requirement.[80] Finally, the section provides that nothing in it will preclude an action under section 99B-5 for inadequate warning or instruction.[81] Therefore, failure to satisfy the requirements of a design defect claim will not affect a claim for inadequate warning or instruction.

Like section 99B-5, section 99B-6 seems to be largely an emphatic reiteration that the doctrine of strict liability does not apply.[82] The amendment sets out a standard negligence analysis and refines it with two options, each of which specify what will and will not be considered a defect.[83] One option, risk/utility, allows the plaintiff to prove that an alternative design could have been adopted.[84] The other op-

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77. *Id.*

78. N.C. GEN. STAT. § 99B-6(c) (1995).

79. *Id.*

80. *Id.* § 99B-6(d).

81. *Id.* § 99B-6(e).

82. *See supra* notes 52-69 and accompanying text.

> Because strict liability is not imposed, a showing that such a defect exists will not alone result in liability. The manufacturer must have been negligent with respect to that defect, either in failing to exercise ordinary care in the design or the manufacture of the product, or in failing to discover the defect.

DAYE & MORRIS, *supra* note 35, at 454-55.

83. N.C. GEN. STAT. § 99B-6(a) (1995).

84. *Id.* § 99B-6(a)(1). Proof of the existence of a safer alternative design is one method of proving that the product as designed was defective. Some jurisdictions require that the plaintiff show a safer design that would have been practicable, *see* Wilson v. Piper Aircraft Corp., 579 P.2d 1287, 1287-88 (Or. 1978), while other courts reject such a requirement, *see* Couch v. Mine Safety Appliances Co., 728 P.2d 585, 590 (Wash. 1986), or make it an option among other methods of proof, *see* Anderson v. Hyster Co., 385 N.E.2d 690, 692 (Ill. 1979).

The 1979 version of Chapter 99B did not mention the question of alternative design, and the case law is for the most part silent. A 1995 Federal District Court case purporting to apply North Carolina law cited Boudreau v. Baughman, 322 N.C. 331, 345, 368 S.E.2d 849, 859 (1988), for the proposition that "[a]n alternative design does not translate into a legal duty in a product liability action, and an action is not maintainable merely because the design used was not the safest possible; however, evidence of alternative designs bears upon the question of defendant's reasonable care in designing the product." Edwards v.

tion, consumer expectations, allows the plaintiff to show that the product's design was "so unreasonable that a reasonable person, aware of the relevant facts, would not use or consume a product of this design."[85]

The "so unreasonable" language of this second option[86] seems to require that the plaintiff prove what amounts to recklessness or gross negligence. If a product were so unreasonable that no consumer, aware of the relevant facts, would use it, it follows that a manufacturer who likely *is* aware of the relevant facts acts recklessly by putting such a product on the market. Furthermore, if the manufacturer is *not* aware of such facts, such lack of awareness would seem to exceed ordinary negligence if the product's design is so unreasonable. This high standard for the plaintiff suggests that in most cases the only real option will be to prove a reasonable alternative design[87] under the first option.

It is instructive to compare North Carolina's "consumer expectations test," with its high "so unreasonable" standard, to the benchmark *Barker v. Lull Engineering*[88] test and to the Restatement (Second) of Torts.[89] The *Barker* court held that "a product may be found defective in design if the plaintiff establishes that the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner."[90] In

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Atro S.p.A., 891 F. Supp. 1074, 1080 n.7 (E.D.N.C. 1995). *Boudreau*, however was construing Florida law under the rule of *lex locus delecti* (the law of the place of the tort furnishes the standard of conduct). *Boudreau*, 322 N.C. at 335-36, 368 S.E.2d at 854. Florida law now seems to have been adopted in the Eastern District of North Carolina, at least for proof of alternative design in products liability cases.

Under the newly amended statute, a plaintiff in North Carolina must now prove failure to adopt an alternative reasonable design, determined by risk/utility considerations, N.C. GEN. STAT. § 99B-6(a)(1) (1995), or prove what seems to be a heightened form of negligence. *Id.* § 99B-6(a)(2) ("At the time the product left the control of the manufacturer, the design or formulation of the product was so unreasonable that a reasonable person, aware of the relevant facts, would not use or consume a product of this design."). At least one commentator has argued, however, that section 99B-6 has effectively imposed an alternative design defect requirement on consumers which has "tipped the [balance] in favor of manufacturers." *See* Wayne A. Logan, *New Developments in Design Defect Law: The Emergence of Reasonable Alternative Design*, CAMPBELL LAW OBSERVER, Dec. 1995, at 3, 12. This is because the statutory alternative to proving the existence of an alternative design conceivably covers only a narrow range of products. *Id.; see also infra* notes 88-105 and accompanying text.

85. N.C. GEN. STAT. § 99B-6(a)(2) (1995).

86. *Id.*

87. *See* Logan, *supra* note 84, at 10.

88. 573 P.2d 443 (Cal. 1978).

89. RESTATEMENT (SECOND) OF TORTS § 402A cmt. g (1965).

90. *Barker*, 573 P.2d 443, 455-56.

terms of the Restatement, two comments[91] are the origin of the consumer expectations test generally,[92] and the North Carolina test seems quite close to the Restatement formulation.[93] The differences among the three versions of the consumer expectations test appear to be of degree. The important difference between *Barker*, the Restatement formulations, and the North Carolina test is that while the first two turn upon the consumer's reasonable expectations of product safety, the North Carolina test's "so unreasonable" language seems to establish a bare minimum of safety that would be acceptable for a consumer to even consider buying the product.[94] Effectively, under the Restatement and *Barker*, a product is defective if it is more dangerous than a reasonable consumer would expect. Under North Carolina law the product must be so unreasonable that an informed consumer would not use it. In the former case the danger must be *unexpected*; in the latter it must be *intolerable*. Thus, the "consumer expectations" prong of the North Carolina test might better be characterized as threshold tolerability.

Although this standard of proof seems to weigh heavily against the plaintiff, it might also be seen as a concession, attempting to ameliorate the combined effect of the optional proof of an alternative design[95] and the exemption of products whose design cannot feasibly be changed.[96] This amendment basically adopts the Restatement position[97] which "creates an exception to the doctrine of strict liability in

91. "Defective condition. The rule stated in this Section applies only where the product is, at the time it leaves the seller's hands, in a condition not contemplated by the ultimate consumer, which will be unreasonably dangerous to him." RESTATEMENT (SECOND) OF TORTS § 402A cmt. g (1965). "Unreasonably Dangerous . . . The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics." *Id.* § 402A cmt. i.

92. 2 FRUMER & FRIEDMAN, *supra* note 25, at § 11.03[5].

93. The American Law Institute has also adopted a reasonable alternative design requirement in the RESTATEMENT OF THE LAW THIRD, RESTATEMENT OF THE LAW OF TORTS: PRODUCTS LIABILITY § 2(b) (Tentative Draft No. 2, 1995). Comment d suggests that only a very limited range of products would be exempt from this requirement and illustrates the point with the example of an exploding cigar. *Id.* § 2(b) cmt. d at 24; *see also* Logan, *supra* note 84, at 10-11 (commenting on the ALI position and concluding that it "marks a significant departure from its venerated strict liability position . . . . effectively renounc[ing] the ALI's traditional adherence to strict liability principles in favor of negligence . . . ."); *see generally* Marshall S. Shapo, *In Search of the Law of Products Liability: The ALI Restatement Project*, 48 VAND. L. REV. 631 (1995) (commenting on the Restatement (Third) project in the area of products liability).

94. *See supra* notes 84-87 and accompanying text.

95. N.C. GEN. STAT. § 99B-6(a)(1) (1995).

96. *Id.* § 99B-6(c).

97. RESTATEMENT (SECOND) OF TORTS § 402A cmt. k (1965) provides:

tort for certain products which are categorized as unavoidably unsafe."[98] Thus, between the two sections, an unreasonably dangerous product that could not be made differently without compromising its utility and desirability, and whose danger is recognized, would never subject the manufacturer to liability. This might theoretically exempt a whole class of what are potentially the most dangerous products: those that should not be manufactured at all.[99]

The "so unreasonable" standard seems to contemplate liability for a product whose inherent danger outweighs any utility that it might have. This standard seems to approach what has been termed " '[p]roduct category' liability"[100] which involves "the implementation of liability upon 'a discrete and limited number of product categories.' "[101] These categories encompass only products whose "utility . . . is so low and the risk of injury is so high as to warrant a conclusion that it was defective and should not have been marketed at all."[102] This concept has been embraced by a few cases but "it is not the law of any jurisdiction because of legislature intervention."[103] It is, however, included in the comments to the third Restatement which the North Carolina General Assembly appears to have paraphrased.[104]

Unavoidably unsafe products. There are some products which, in the present state of human knowledge, are quite incapable of being made safe for their intended and ordinary use. These are especially common in the field of drugs. . . . Such a product, properly prepared, and accompanied by proper directions and warning, is not defective, nor is it *unreasonably* dangerous. . . . The seller of such products, again and with the qualification that they are properly prepared and marketed, and proper warning is given, where the situation calls for it, is not to be held to strict liability for unfortunate consequences attending their use, merely because he has undertaken to supply the public with an apparently useful and desirable product, attended with a known but apparently reasonable risk.

98. 2 FRUMER & FRIEDMAN, *supra* note 25, at § 8.07.

99. *See infra* notes 102-03 and accompanying text. Such products would, of course still have to be "useful and desirable" to be considered "unavoidably unsafe" or manufacturers would simply refrain from producing them.

100. 2 FRUMER & FRIEDMAN, *supra* note 25, at § 11.03[8] (quoting James A. Henderson, Jr. & Aaron D. Twerski, *Closing the American Products Liability Frontier: The Rejection of Liability Without Defect*, 66 N.Y.U. L. REV. 1263, 1297 (1991)).

101. *Id.* (quoting James A. Henderson, Jr. & Aaron D. Twerski, *Closing the American Products Liability Frontier: The Rejection of Liability Without Defect*, 66 N.Y.U. L. REV. 1263, 1297 (1991)).

102. RESTATEMENT OF THE LAW THIRD, RESTATEMENT OF THE LAW OF TORTS: PRODUCTS LIABILTIY § 2(b) cmt. d at 24 (Tentative draft No. 2, 1995).

103. *Id.* Cases have dealt with above ground swimming pools with vinyl liners, O'Brien v. Muskin Corp., 463 A.2d 298, 306 (N.J. 1983), and cheap "Saturday Night Special" handguns, Kelley v. R.G. Industries, Inc., 497 A.2d 1143, 1158-59 (Md. 1985). To this list of possibilities one might add exploding cigars, RESTATEMENT (THIRD) OF TORTS § 2(b) cmt. d (Tentative Draft No. 2, 1995), lawn darts, and blow-guns, Logan, *supra* note 84, at 10.

104. *See* RESTATEMENT OF THE LAW THIRD, RESTATEMENT OF THE LAW OF TORTS: PRODUCTS LIABILITY § 2(b) cmt. d. (Tentative Draft No. 2, 1995). The comment is entitled

Ironically, it seems that North Carolina has adopted this concept by "legislat[ive] intervention."[105]

Aside from the three sections already discussed, the remaining amendments are largely technical rewordings, punctuation changes, and omissions of passages made redundant by other amendments. Two more substantive aspects of the amended law, however, are worth noting. First, section 99B-1.2 was added to ensure that nothing in the amended act would be construed to preclude an action based on breach of warranty.[106] This section appears to be unnecessary in light of section 99B-2 which sets out the sealed container defense to breach of *express warranty* and outlines who may bring suit for breach of *implied warranty*.[107] There may have been concern that because the 1995 amendments stressed negligence actions as opposed to strict liability, warranty actions would somehow be seen as precluded. Second, section 3 of the bill states that the act "shall not apply to product liability actions for injury to or the death of a person resulting from any silicone gel breast implant implanted prior to January 1, 1996."[108] This provision will have the effect of allowing suits involving breast implants to proceed under prior law even if the injury occurred after the effective date of the amendments as long as they were implanted before the effective date.[109] This appears to be a conces-

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Design Defects: possibility of manifestly unreasonable design, and describes product designs that are "defective and not reasonably safe because the extremely high degree of danger posed by its use or consumption so substantially outweighs its negligible utility that *no rational adult, fully aware of the relevant facts, would choose to use or consume the product.*" *Id.* (emphasis added). The language of N.C. GEN. STAT. § 99B-6(a)(2) is remarkably similar: "At the time the product left the control of the manufacturer, *the design or formulation of the product was so unreasonable that a reasonable person, aware of the relevant facts, would not use or consume a product of this design.*" N.C. GEN. STAT. § 99B-6(a)(2) (1995) (emphasis added).

105. That is to say, by adopting the 1995 amendments to the Products Liability Act, specifically N.C. GEN. STAT. § 99B-6 (1995).

106. N.C. GEN. STAT. § 99B-1.2 (1995).

107. *Id.* § 99B-2. For a discussion of express and implied warranty and Chapter 99B, see DAYE & MORRIS, *supra* note 35, at 459-72.

108. 1995 N.C. Sess. Laws 522 § 3.

109. Silicone breast implants have been the subject of thousands of lawsuits since women with the devices began to experience various unexplained illneses ascribed to leaking silicone from ruptured implants. *See, e.g.*, Michael D. Lemonick, *Special Report: Lawyers to the Rescue: Legal Action Helps Keep Drug Companies Honest, But It's a Crazy Way to Regulate an Industry*, TIME, Feb. 10, 1992, at 46; Joseph Nocera, *Fatal Litigation*, FORTUNE, Oct. 16, 1995, at 60; *Silicone Blues: Dow Corning Tries to Shore Up Its Sagging Image*, TIME, Feb. 24, 1992, at 65. This litigation eventually produced a $ 4.2 billion global settlement, Lindsey v. Dow Corning Corp., No. CV94-P-11558-S, 1994 U.S. Dist. LEXIS 12521 (N.D. Ala. Sept. 1, 1994), which was approved on September 1, 1994 and is reputed to be the largest product liability settlement in history. Sheila L. Burnbaum & J. Russell Jackson, *Products Liability*, NAT'L L.J., Sept. 19, 1994, at B4, B6. This is, however, an "opt

sion to the strong lobbying effort of activists in the General Assembly.[110]

Unlike some other tort reform legislation, such as the cap on punitive damages, the effect of the 1995 amendments to Chapter 99B is still unclear. The overwhelming message sent by the legislature and underscored throughout the amendments is that North Carolina is indubitably and emphatically a non-strict liability jurisdiction. If the plain language of section 99B-1.1 could in any way be misconstrued, the detailed exposition of the causes of action under a negligence theory in sections 99B-5 and 99B-6 should remove any doubt.[111] If doubt still remains, the clear inclusion of what are normally defenses to strict liability should be decisive.[112]

Potentially the greatest change wrought by the 1995 amendments is contained in section 99B-6, concerning alternative designs. Prior North Carolina cases were largely silent on the question of proving an alternative design,[113] and such proof would only represent one factor in determining negligence.[114] Although such proof now represents one of two options for proving a design defect, the other option appears to be of such limited application that proof of a reasonable alternative design remains as the only practicable option.[115] This may be a very burdensome and costly prospect since the average consumer is in a relatively weak position compared to the manufacturer when it comes to evaluating product design. The manufacturer, whose business it is to design products, is much better able to show the feasibility

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out" settlement which means that individual plaintiffs may choose not to settle and pursue their own suits. *See id.* Approximately 7,800 U.S. residents and 6,500 foreign claimants chose to opt out. *Id.* Dow Corning filed Chapter 11 bankruptcy on May 15, 1995. Andrew Blum, *A 'Nightmare' for Dow?*, NAT'L L.J., May 29, 1995, at A6. Although Dow is the principal defendant, there are several others including Bristol-Myers, Squibb Co., 3M, and Union Carbide Corp. *Id.* Representative Charles Neely, the sponsor of the tort reform package in North Carolina, is a partner at Raleigh's Maupin, Taylor, Ellis & Adams, which lists Dow Corning as a client. One might speculate that depriving Dow Corning of any benefit of the new law was a gesture designed to foreclose possible charges of conflict of interest.

110. *See* Eleanore J Hajian, *Legal Damages: Will Tort Reform Hinder Frivolous Lawsuits or Will it Reduce Consumers' Rights?*, DURHAM HERALD SUN, May 21, 1995, at E1. This may be seen as a concession in that North Carolina products liability law under the 1995 amendments, especially the section on alternative design, N.C. GEN. STAT. § 99B-6 seems to place a greater burden on the consumer than the previous law.

111. *See supra* notes 52-105 and accompanying text.

112. *See supra* notes 64-69 (discussing the "state of the art" defense typically employed in strict liability cases but based on a negligence theory).

113. *See supra* note 84 and accompanying text.

114. *Id.*

115. Except, perhaps, among devotees of lawn darts, blow guns and exploding cigars. *See supra* note 103.

or infeasibility of alternative designs. In this regard the *Barker* test, which shifts that burden to the manufacturer,[116] seems the more rational approach.

The General Assembly's perception that such "reform" was needed is puzzling. The original 1979 Act imposed a short six year statute of repose[117] for products liability cases. The defense of contributory negligence, part of the common law of North Carolina, is written into Chapter 99B.[118] This defense would presumably continue to bar recovery for any plaintiff who is even one percent negligent, even if strict liability were adopted. These considerations suggest that tort reform, at least in the context of products liability, seeks to "reform" what never went astray. North Carolina is a tort reformer's dream already.

One need not be a cynic to see that tort reform plays well to the electorate, few of whom have the ability to gauge the need for it or its effectiveness. Given that tort reform is a national movement,[119] it is understandable that state legislators would want to be a part of what their constituents applaud on the national news. The very nature of the tort reform movement gives a decided advantage to its advocates. The actual reforms are often technical and deal with abstruse legal concepts such as strict liability or the collateral source rule. This precludes the layman from making any informed assessment of proposed legislation.

In the context of strict products liability, popular support of its prohibition would seem at first to be counterintuitive. The theory of "loss spreading,"[120] which underlies the doctrine, would hold the manufacturer of a defective product liable despite fault or negligence to protect the "little guy" who is injured through contact with the product. The underlying rationale of loss spreading is that when injury occurs, someone pays. When no one in the chain of distribution has been negligent, absent strict liability, the person who pays is always

116. *See supra* notes 88-94 and accompanying text.

117. N.C. GEN. STAT. § 1-50 (1994). *See supra* note 33 and accompanying text.

118. *See supra* note 34 and accompanying text.

119. The national tort reform movement and all of the attendant controversy has been followed closely by Andrew Blum for over ten years in THE NATIONAL LAW JOURNAL. These articles are highly recommended for anyone interested in the general topic, with the caveat that Blum is clearly in the anti-tort reform camp. *See, e.g.*, Andrew Blum, *Tort Reform's Next Wave*, NAT'L L.J. Sept. 5, 1988, at 1; Andrew Blum, *The Hundred Years' (Tort) War*, NAT'L L.J., Oct. 15, 1990, at 1; *see also supra* note 2 and accompanying text.

120. *See* SHAPO, *supra* note 16, at § 7.05[7]; *see generally* GUIDO CALABRESI, THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS, *passim* (1970) (discussing loss allocation in the context of automobile accidents including a general discussion of loss spreading).

the injured consumer or her insurer. Strict liability, under the theory of loss spreading, shifts the burden to the party who can best attenuate it by spreading it to others. In the case of the manufacturer or seller, this means through insurance and ultimately by passing the cost on to the public.[121] The individual consumer, obviously the least capable of spreading the loss, is relieved of the burden.

Depending upon one's perspective, loss spreading is either ideal or grossly unfair. The "insurance crisis" argument that preceded the 1979 enactment of Chapter 99B basically claimed that the loss spreading theory did not hold up in practice.[122] The smaller manufacturers, it was claimed, were unable to successfully spread the loss because of the difficulty and expense of obtaining insurance.[123] The tort reform movement of which the 1995 amendments are part seems to be based less on the threat of a particular "crisis" than on a general perception that the tort compensation system has gone so far in favor of the plaintiff that society suffers an unjustified cost. In either case what is really being rejected is the theory of loss spreading. The newly amended Chapter 99B now insures that loss spreading will not spread into North Carolina.

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121. *See* Escola v. Coca-Cola Bottling Co., 150 P.2d 436, 440-441 (Cal. 1944) (Traynor, J., concurring in the judgment). Justice Traynor, who later wrote the seminal *Greenman* opinion, *see supra* note 23 and accompanying text, presaged that later formulation of strict liability in his concurrence in *Escola.* He elucidated the "loss spreading" basis for strict liability as follows:

> It is evident that the manufacturer can anticipate some hazards and guard against the recurrence of others, as the public cannot. Those who suffer injury from defective products are unprepared to meet its consequences. The cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business.

Id.

122. *See supra* notes 30-31 and accompanying text.

123. *See supra* notes 6-7 and 30-32 and accompanying text.