

9-1-1998

Survey of Developments in North Carolina Law and the Fourth Circuit, 1997

North Carolina Law Review

Follow this and additional works at: <http://scholarship.law.unc.edu/nclr>Part of the [Law Commons](#)

Recommended Citation

North Carolina Law Review, *Survey of Developments in North Carolina Law and the Fourth Circuit, 1997*, 76 N.C. L. REV. 2331 (1998).
Available at: <http://scholarship.law.unc.edu/nclr/vol76/iss6/6>

This Article is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Law Review by an authorized administrator of Carolina Law Scholarship Repository. For more information, please contact law_repository@unc.edu.

SURVEY

Deference Defiantly Denied: The Fourth Circuit Rejects NLRB Position on § 8(f) Pre-hire Agreements in *Industrial TurnAround Corp. v. NLRB*

In the celebrated opinion of *Marbury v. Madison*,¹ the United States Supreme Court announced that “[i]t is emphatically the province and duty of the judicial department, to say what the law is.”² It has been suggested, however, that this statement is only accurate if qualified as follows: “until and unless the agency charged with administering the law changes its mind.”³ This added proviso has not yet attained a revered status similar to the Court’s pronouncement in *Marbury*.⁴ Nonetheless, it has been fourteen years since the Supreme Court held in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.* (“*Chevron*”)⁵ that reasonable interpretations of ambiguous statutes by an agency charged with administering that

1. 5 U.S. (1 Cranch) 137 (1803).

2. *Id.* at 177.

3. *Mesa Verde Constr. Co. v. Northern Cal. Dist. Council of Laborers*, 861 F.2d 1124, 1146 (9th Cir. 1988) (en banc) (Kozinski, J., dissenting) (claiming that the majority’s opinion had effectively added the second phrase as a codicil to the famous quote from *Marbury*).

4. Compare Steven Breker-Cooper, *The Appointments Clause and the Removal Power: Theory and Seance*, 60 TENN. L. REV. 841, 843 (1993) (calling *Marbury* the “seminal case in American constitutional law, which is most often cited for its famed epigram”), and Sanford N. Claust-Ellenbogen, *Blank Checks: Restoring the Balance of Power in the Post-Chevron Era*, 32 B.C. L. REV. 757, 787 (1991) (stating that there is “nothing more fundamental to our understanding of the Constitution”), and Maxwell Stearns, *Mistretta Versus Marbury: The Foundations of Judicial Review*, 74 TEX. L. REV. 1281, 1281 (1996) (noting that “nearly every casebook on [constitutional law] begins with *Marbury v. Madison*”), with *Mesa Verde*, 861 F.2d at 1149 (Kozinski, J., dissenting) (observing that he “can only hope that the Court will have occasion for sober reflection on the wisdom of the approach taken by our court today,” where the Ninth Circuit deferred to an agency interpretation), and 1 KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., *ADMINISTRATIVE LAW TREATISE* § 3.3, at 112 (3d ed. 1994) (noting that understanding the doctrine of deference to agencies “requires acceptance of a reality courts have often denied”), and Rebecca Hanner White, *Time for a New Approach: Why the Judiciary Should Disregard the “Law of the Circuit” When Confronting Nonacquiescence by the National Labor Relations Board*, 69 N.C. L. REV. 639, 650 (1991) (noting that courts are reluctant to recognize the Supreme Court’s command that agencies “have a duty and the authority to say what the law is”).

5. 467 U.S. 837 (1984).

statute are entitled to deference by the courts.⁶ While *Chevron* has worked effectively to eliminate inconsistent interpretations of statutes between different courts,⁷ application of *Chevron* can be problematic when the policy of deference to agency interpretations conflicts with the principles of stare decisis.⁸ In such a situation, a court is faced with choosing between judicial precedent that interprets a statute in one way and a different agency interpretation of that same statute.⁹

A panel of the Fourth Circuit recently encountered such a conflict. In *Industrial TurnAround Corp. v. NLRB*,¹⁰ the panel reviewed an order of the National Labor Relations Board ("NLRB" or "Board") premised in part on the NLRB's interpretation of § 8(f) of the National Labor Relations Act (the "Act").¹¹ The NLRB's interpretation stated that collective bargaining agreements entered into under § 8(f) could not be unilaterally revoked by either party.¹² Although a majority of the circuit courts of appeal had accepted this interpretation,¹³ the Fourth Circuit rejected it, concluding that it was bound by prior Supreme Court and Fourth Circuit precedent.¹⁴ The court in *Industrial TurnAround* determined that § 8(f) agreements are voidable at will in the Fourth Circuit and remanded the case to the NLRB to revise its order accordingly.¹⁵

This Note first examines the history of *Industrial TurnAround* in

6. See *id.* at 842-43.

7. See 1 DAVIS & PIERCE, *supra* note 4, § 3.4, at 117-18. During the five years following *Chevron*, the number of petitions for writs of certiorari filed by the Solicitor General declined from sixty to thirty. See 1 *id.* § 3.4, at 118. Richard Stewart, while serving as Assistant Attorney General for Public Lands and Natural Resources, attributes this decline "primarily to the reduction in serious intercourt conflicts that *Chevron* has yielded." 1 *id.*

8. See Richard J. Pierce, Jr., *Reconciling Chevron and Stare Decisis*, 85 GEO. L.J. 2225, 2232-33 (1997); Ursula M. McDonnell, Comment, *Deference to NLRB Adjudicatory Decision Making: Has Judicial Review Become Meaningless?*, 58 U. CIN. L. REV. 653, 653 (1989).

9. See Pierce, *supra* note 8, at 2234-35.

10. 115 F.3d 248 (4th Cir. 1997).

11. 29 U.S.C. § 158(f) (1988). Section 8(f) permits collective bargaining agreements in the construction industry. See *id.*; *infra* notes 83-88 and accompanying text (describing the provisions of § 8(f)).

12. See *Industrial TurnAround*, 115 F.3d at 253.

13. See *infra* notes 163-64 and accompanying text.

14. See *Industrial TurnAround*, 115 F.3d at 254-55 (citing *Jim McNeff, Inc. v. Todd*, 461 U.S. 260 (1983); *Clark v. Ryan*, 818 F.2d 1102 (4th Cir. 1987)).

15. See *id.* at 255-56. Remand was necessary so that the NLRB could revise the remedy it had proposed for violations of the Act based on the incorrect interpretation of § 8(f). See *id.* at 255.

the NLRB and the Fourth Circuit.¹⁶ After exploring the dictates of *Chevron*, which requires deference to administrative agency decisions,¹⁷ the Note examines the history of § 8(f) and the NLRB's interpretation of that section.¹⁸ It then reviews the different approaches that the circuit courts of appeal have used to evaluate the NLRB's interpretations of § 8(f).¹⁹ The Note thereafter discusses the significance of *Industrial TurnAround* in light of this history.²⁰ The Note suggests that the Fourth Circuit's rejection of the NLRB's position is questionable and that the difficulties of its application may make the issue ripe for future review by the Supreme Court.²¹ Finally, from a broader perspective, the Note concludes that the outcome of *Industrial TurnAround* may be fueled by unrest among the courts over their role in the administrative state.²²

Industrial TurnAround Corporation ("ITAC") is an electrical construction firm in Virginia.²³ As a unionized employer, ITAC gave the National Electrical Contractors Association ("NECA") the power to negotiate collective bargaining agreements on its behalf.²⁴ When ITAC gave this authorization to NECA in 1990, NECA already had an agreement with the International Brotherhood of Electrical Workers, Local 666, AFL-CIO ("the Union"), pursuant to § 8(f) of the Act which allows such collective bargaining agreements in the construction industry.²⁵ By its terms, this agreement with the Union expired on August 31, 1992.²⁶ In November 1992, after the agreement had expired, the President of ITAC incorporated Electrical/Mechanical Services, Inc. ("EMSI") as a nonunion company to perform electrical construction work.²⁷ Thereafter, ITAC stopped bidding for new jobs and gradually transferred all of its construction work to EMSI.²⁸ ITAC eventually laid off its last

16. See *infra* notes 23-64 and accompanying text.

17. See *infra* notes 65-73 and accompanying text.

18. See *infra* notes 74-122 and accompanying text.

19. See *infra* notes 123-78 and accompanying text.

20. See *infra* notes 179-224 and accompanying text.

21. See *infra* notes 179-217 and accompanying text.

22. See *infra* notes 218-24 and accompanying text.

23. See *Industrial TurnAround*, 115 F.3d at 250. ITAC was incorporated in 1988 as a "design engineering and project management company," but it began to do electrical construction work in 1990. *Industrial TurnAround Corp.*, 321 N.L.R.B. 181, 184 (1996), *enforcement denied*, 115 F.3d 248 (4th Cir. 1997).

24. See *Industrial TurnAround*, 115 F.3d at 250.

25. See 29 U.S.C. § 158(f) (1988).

26. See *Industrial TurnAround*, 115 F.3d at 250.

27. See *id.*

28. See *id.*

union employees, who were then offered nonunion jobs by EMSI which they declined.²⁹ EMSI also informed other union workers that it was not currently hiring.³⁰

In January 1993, NECA signed a new collective bargaining agreement (the "1992-94 agreement") with the Union that was retroactive to the date of expiration of the prior agreement and was to last through August 31, 1994.³¹ On May 6, 1993, however, ITAC told both NECA and the Union via letter that it was revoking its agreements with them.³² As a result of these foregoing events, the Union filed charges with the NLRB on March 19 and September 20, 1993, against ITAC, "alleging that ITAC and EMSI were alter egos and that the companies had violated § 8(a)(1), (a)(3) and (a)(5) of the Act."³³ The Administrative Law Judge ("ALJ") held that there were multiple violations of the Act, including a violation of § 8(a)(5), because: (1) ITAC had created EMSI as an alter ego of ITAC; and (2) ITAC had wrongly repudiated the 1992-94 agreement.³⁴

29. *See id.*

30. *See id.* at 250-51.

31. *See id.* at 251.

32. *See id.*

33. *Id.* The cited sections describe "unfair labor practices" of employers. 29 U.S.C. §§ 158(a)(1), (a)(3), & (a)(5) (1988). Section 8(a)(1) of the Act covers interference, restraint, or coercion of the exercise of guaranteed rights of employees. *See id.* § 158(a)(1). Section 8(a)(3) makes it an unfair labor practice to discriminate "in regard to hire or tenure of employment or any term of condition of employment to encourage or discourage membership in any labor organization." *Id.* § 158(a)(3). Section 8(a)(5) includes the refusal "to bargain collectively with the representatives of his employees." *Id.* § 158(a)(5). Violations of these sections are subject to action by the NLRB and an NLRB order can be enforced by petition of the NLRB to a court of appeals. *See id.* § 160(a), (e).

Some observers might believe *Industrial TurnAround* provides an example of questionable employer tactics for dealing with unions. *Cf.* C.E.K. Indus. Mechanical Contractors v. NLRB, 921 F.2d 350, 353-55 (1st Cir. 1990) (upholding the NLRB's finding of alter-ego status between two employers); Z-BRO, Inc., 300 N.L.R.B. 87, 89-90 (1990) (finding that three companies were actually one entity where they all had "virtually the same name," the names were used interchangeably, and employers claimed that one of the three companies had ceased to exist). It should be pointed out, however, that ITAC and EMSI started these actions after the original NECA agreement expired in August 1992. *See Industrial TurnAround*, 115 F.3d at 250. Apparently, once the 1992-94 agreement went into effect retroactively, those actions became retroactively illegal. *See id.* at 252-53. If ITAC could have foreseen this possibility, perhaps they would have made clear to both NECA and the union, prior to the signing of the 1992-94 agreement, that they were withdrawing from any obligations they might have had.

34. *See Industrial TurnAround Corp.*, 321 N.L.R.B. 181, 188 (1996). ITAC's President, Sidney Harrison, was apparently told by his construction manager that he could start a nonunion company to save labor costs but that he could not own it. *See id.* at 184. Glenn Harrison, Sidney's wife, was installed as the sole shareholder and director of EMSI although she had no role in its management. *See id.* at 185. Furthermore, all the funds for

Thereafter, the NLRB issued an order adopting both the ALJ's findings of fact and recommended remedy.³⁵ Among other actions, the remedy required ITAC to pay lost wages and benefits to discharged union employees, to offer jobs to union employees who were denied employment, and to comply with the terms of the 1992-94 agreement.³⁶

After the NLRB issued its decision, ITAC appealed to the Fourth Circuit.³⁷ The NLRB in turn cross-petitioned for enforcement of its order.³⁸ Judge Williams wrote the opinion for the panel, which included Judge Luttig and Senior Judge Clarke.³⁹ The court began its analysis by presenting the proper standards of review.⁴⁰ First, the court noted that findings of fact are "'conclusive' if supported by 'substantial evidence on the record considered as a whole.'" ⁴¹ Second, the court observed that although questions of law are normally reviewed de novo, the "NLRB's interpretation of the Act is entitled to deference if it is reasonably defensible."⁴²

The court accepted the NLRB's finding that EMSI and ITAC were alter egos and were bound by the terms of the 1992-94 agreement.⁴³ The court, however, disposed of ITAC's claim that if it

this investment were provided by a payment from ITAC to Sidney. *See id.* After examining all the facts, the ALJ found that ITAC and EMSI had "'substantially identical' business purpose, operations, equipment, customers, management, supervision, and ownership," therefore meeting the test for a finding of alter egos. *Id.* at 187 (quoting Crawford Door Sales Co., 226 N.L.R.B. 1144, 1144 (1976)).

As to the repudiation of the 1992-94 agreement, the ALJ found that ITAC's letter of May 6, 1993, was the first notice that ITAC was withdrawing from NECA's 1992-94 agreement. *See id.* at 184. The ALJ also noted that because the agreement was effective by its terms through August 31, 1994, ITAC's obligations did not cease until that date. *See id.*

35. *See id.* at 181.

36. *See id.* at 182.

37. *See Industrial TurnAround*, 115 F.3d at 249. To be precise, both ITAC and EMSI filed an appeal of the NLRB's decision, but they were represented by the same counsel. *See* Opening Brief for Petitioners at 21, *Industrial TurnAround* (Nos. 96-1783 & 96-1926).

38. *See* Brief for the National Labor Relations Board at 1, *Industrial TurnAround* (Nos. 96-1783 & 96-1926). The NLRB has no individual power to enforce its decisions and must obtain a judicial decision if a party subject to an order refuses to comply. *See* 29 U.S.C. § 160(e), (f) (1988); White, *supra* note 4, at 642.

39. *See Industrial TurnAround*, 115 F.3d at 249-50. Judge Clark, a district judge for the Eastern District of Virginia, sat by designation. *See id.* at 249.

40. *See id.* at 251.

41. *Id.* (quoting 29 U.S.C.A. § 160(e) (West 1973)). This standard is the usual standard of review for factual findings of agency decisions as set forth in *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 493 (1951).

42. *Industrial TurnAround*, 115 F.3d at 251 (citing *Holly Farms Corp. v. NLRB*, 116 S. Ct. 1396, 1406 (1996)).

43. *See id.* at 252-53.

was bound by the agreement, the agreement was unenforceable under the Act because the bargaining unit improperly included supervisors.⁴⁴ The court noted that because ITAC's bargaining agent, NECA, had agreed to the inclusion of supervisors in the bargaining unit, ITAC could be bound by that voluntary agreement.⁴⁵ Based on these findings, the court agreed with the NLRB that ITAC's incorporation of EMSI followed by its refusal to employ union workers violated § 8(a)(1), (a)(3), and (a)(5) of the Act.⁴⁶

The Fourth Circuit also agreed with the NLRB's finding that ITAC had repudiated the letter of assent with NECA and the 1992-94 agreement with the Union on May 6, 1993.⁴⁷ The court noted that this repudiation served as a basis for the ALJ's conclusion that § 8(a)(5) had been violated and, therefore, was a factor in fashioning the proposed remedy.⁴⁸ The court next addressed the effect of the repudiation on the violations under § 8(a)(5) of the Act.⁴⁹ The court observed that the ALJ's conclusion was premised on the NLRB's decision in *John Deklewa & Sons, Inc.* ("Deklewa"),⁵⁰ which held that § 8(f) bargaining agreements could not be unilaterally revoked.⁵¹ However, Judge Williams pointed out that under the NLRB's interpretation of § 8(f) before *Deklewa*, such agreements could be terminated by either party at any time if the Union did not yet have

44. See *id.* at 253; Opening Brief for Petitioners at 8, *Industrial TurnAround* (Nos. 96-1783 & 96-1926). The Act provides that "no employer . . . shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law . . . relating to collective bargaining." 29 U.S.C. § 164(a) (1993). This decision to exclude supervisors from bargaining units allows employees to organize without interference with their overseers, whose interests may be more aligned with those of employers. See E.I. DuPont de Nemours & Co., 210 N.L.R.B. 395, 397 (1974). An employer's designation of employees as supervisors is not binding on a court. See Richard A. Kaminsky, *Overview of the Law, and the Basic Manufacturing Unit*, in APPROPRIATE UNITS FOR COLLECTIVE BARGAINING 1, 14-15 (Peter G. Nash & George P. Blake eds., 1979).

45. See *Industrial TurnAround*, 115 F.3d at 253. The court noted that the NLRB's position—that a voluntary agreement to include supervisors is enforceable—is a reasonably defensible interpretation of the Act. See *id.*

46. See *id.*

47. See *id.* It seems strange that May 6 was found to be the date of repudiation, because the union filed its first charges on March 19, 1993, which suggests that ITAC had already breached any agreement at that point. See *id.* at 251. Nevertheless, the notification in writing on May 6 was clear evidence of repudiation in the record for the court to use as a fixed date.

48. See *id.* at 253.

49. See *id.*

50. 282 N.L.R.B. 1375 (1987), *enforced sub nom.* International Ass'n of Bridge, Structural & Ornamental Iron Workers v. NLRB, 843 F.2d 770 (3d Cir. 1988).

51. See *Industrial TurnAround*, 115 F.3d at 253; *Deklewa*, 843 F.2d at 779-80.

majority status within the bargaining unit.⁵² She observed that this prior interpretation had been accepted first by the Supreme Court⁵³ and then later adopted by the Fourth Circuit.⁵⁴ Despite the court's recognition that several circuits have chosen to follow *Deklewa*,⁵⁵ the court held that *Deklewa* was not controlling in the Fourth Circuit and consequently, the ALJ had applied the wrong standard.⁵⁶ The court "emphasize[d] . . . that federal agencies, including the NLRB, are 'required to abide by the law of this Circuit . . . until and unless it is changed by this court or reversed by the Supreme Court of the United States.'"⁵⁷

The court then stated that because one panel of the circuit cannot overrule a prior panel decision, it could not apply *Deklewa* because *Deklewa* was in conflict with *Clark*.⁵⁸ Judge Williams observed that *Clark* "unequivocally held" that § 8(f) agreements could be revoked at any time, and that *Clark* was based on the Supreme Court's holding in *Jim McNeff, Inc. v. Todd* ("*McNeff*")⁵⁹ that such agreements are revocable before a union reaches majority

52. See *Industrial TurnAround*, 115 F.3d at 253-54 (citing R.J. Smith Constr. Co., 191 N.L.R.B. 693, 695 (1971), *enforcement denied sub nom.* Local No. 150, Int'l Union of Operating Eng'rs v. NLRB, 480 F.2d 1186 (D.C. Cir. 1973)). Majority status means that a majority of the employees in a bargaining unit have, at some point, voted to recognize a union. See 29 U.S.C. § 159 (1994).

53. See *Industrial TurnAround*, 115 F.3d at 254 (citing *Jim McNeff, Inc. v. Todd*, 461 U.S. 250, 269-70 (1983)).

54. See *id.* (citing *Clark v. Ryan*, 818 F.2d 1102, 1107 (4th Cir. 1987)).

55. See *id.* The court did not discuss the reasoning of the decisions in other circuits and relegated the citations of them to a footnote. See *id.* at 254 n.2.

56. See *id.* at 254. Judge Williams noted that "the ALJ (and the NLRB) apparently assumed that *Deklewa* was the controlling law of this Circuit." *Id.* The brief for the NLRB relied on *Deklewa* and also cited the decisions of other circuits that were in accord with its decision, but did not address or intimate in any way that *Deklewa* might not apply. See Brief for the National Labor Relations Board at 16-17, *Industrial TurnAround* (Nos. 96-1783 & 96-1926). Though not mentioned by the court, even ITAC did not challenge the rule of *Deklewa*. ITAC's brief cites *Deklewa* in support of some of its arguments. See Opening Brief for Petitioners at 12, 13-14, *Industrial TurnAround* (Nos. 96-1783 & 96-1926). Judge Williams, however, was probably aware of the lurking *Deklewa* issue. Three months before the *Industrial TurnAround* decision was issued, the Fourth Circuit handed down an unreported per curiam decision in *NLRB v. Baker*, Nos. 96-1377 & 96-1548, 1997 WL 5771 (4th Cir. Jan. 8, 1997), *cert. denied*, 118 S. Ct. 688 (1998). Judge Williams sat on that panel, which observed in a footnote that although it did not change the result of the case, *Clark* (and not *Deklewa*) was controlling. See 1997 WL 5771, at *9 n.3. Perhaps the NLRB's failure to note the possible conflict raised by *Clark* in turn raised the ire of the court.

57. *Industrial TurnAround*, 115 F.3d at 254 (quoting United States Dep't of Energy v. FLRA, 106 F.3d 1158, 1165 (4th Cir. 1997) (Luttig, J., concurring)).

58. See *id.*

59. 461 U.S. 260, 269-70 (1983).

status.⁶⁰ Furthermore, she observed that neither *Clark* nor *McNeff* mentioned deference to NLRB interpretations of the Act or the concept that the NLRB's *Deklewa* position was a defensible construction of the Act that could be changed.⁶¹ In support of this conclusion, the court noted that two prior panels in different circuits had refused to apply *Deklewa* because of conflicting circuit precedent.⁶² Proceeding to apply the pre-*Deklewa* interpretation of § 8(f) as approved in *Clark v. Ryan*, the court held that ITAC had properly repudiated the § 8(f) agreement on May 6, 1993.⁶³ Because the ALJ's remedy was based on a finding that this repudiation was improper, the court remanded the case so that the remedy could be revised to address only those violations that occurred before repudiation.⁶⁴

To analyze *Industrial TurnAround* properly, an understanding of the general role of courts regarding interpretations of agency-administered statutes is essential. The Supreme Court's 1984 decision in *Chevron* affirmed and explained the practice of deferential judicial review of such statutes.⁶⁵ *Chevron* set forth a two-step approach for judicial review of agency actions. First, a court must determine if Congress "has directly spoken to the precise question at issue."⁶⁶ If so, the inquiry ends, and the court and the agency involved must effectuate Congress's clear intent.⁶⁷ If the applicable statute does not speak to the precise issue, however, then the court must determine whether the agency's construction of the statute is permissible.⁶⁸

Chevron was based on the understanding that Congress cannot

60. *Industrial TurnAround*, 115 F.3d at 254.

61. *See id.*

62. *See id.* at 254-55 (citing *Local Union 48 Sheet Metal Workers v. S.L. Pappas & Co.*, 106 F.3d 970, 975 (11th Cir. 1997); *Mesa Verde Constr. Co. v. Northern Cal. Dist. Council of Laborers*, 820 F.2d 1006, 1013 (9th Cir.), *withdrawn*, 832 F.2d 1164 (9th Cir. 1987), *reheard en banc*, 861 F.2d 1124 (9th Cir. 1988)).

63. *See Industrial TurnAround*, 115 F.3d at 255.

64. *See id.*

65. *See Chevron U.S.A. Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837 (1984); *see also* 1 DAVIS & PIERCE, *supra* note 4, § 3.2, at 109-10 ("*Chevron* is one of the most important decisions in the history of administrative law."). Prior to *Chevron*, courts were unsure of the applicable standard of review. *See* 1 DAVIS & PIERCE, *supra* note 4, § 3.1, at 107-09.

66. *Chevron*, 467 U.S. at 842.

67. *See id.* at 842-43.

68. *See id.* at 843. This means that a court should "not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation." *Id.*

anticipate and provide for all issues that may arise under a statute.⁶⁹ The two-step test of *Chevron* allows Congress to delegate resolution of all disputes that may arise under a statute to an agency.⁷⁰ Courts have interpreted agency-administered statutes more consistently nationwide as a result of *Chevron*.⁷¹ In the area of labor relations, *Chevron* reaffirms the Court's prior command in *NLRB v. Hearst Publications*⁷² that lower courts should pay heed to the NLRB's policy choices.⁷³ In light of this review of *Chevron*, an examination of the long history of § 8(f)—the section of the Act at issue in *Industrial TurnAround*⁷⁴—is appropriate.

Section 8(f), enacted as part of the Labor-Management Reporting and Disclosure Act of 1959,⁷⁵ authorizes pre-hire collective bargaining agreements in the construction industry.⁷⁶ In 1935,

69. See 1 DAVIS & PIERCE, *supra* note 4, § 3.3, at 112 (noting a number of reasons—"inadequate expertise, inadequate time, inadequate foresight, or problems inherent in collective decisionmaking"—that cause Congress to leave some questions unanswered).

70. See 1 *id.* The *Chevron* Court thought it appropriate that the executive branch agencies make these policy decisions because they are more directly accountable to the people than are judges. See *Chevron*, 467 U.S. at 865-66.

71. See 1 DAVIS & PIERCE, *supra* note 4, § 3.4, at 117. This consistency is important because the only method of resolving conflicting circuit court decisions is through the Supreme Court, which has limited capacity to tackle such a task. See 1 *id.*; see also Peter L. Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1105 (1987) (noting that "the infrequency of Supreme Court review combines with the formal independence of each circuit's law from that of the other circuits to permit a gradual balkanization of federal law").

72. 322 U.S. 111 (1944).

73. See *id.* at 131 (noting that "where the question is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially, the reviewing court's function is limited"). The *Hearst* Court further stated that "the Board's determination . . . under this Act is to be accepted if it has 'warrant in the record' and a reasonable basis in law." *Id.* Commentators have suggested that *Chevron* is an adoption of the model set forth in *Hearst*. See Richard J. Pierce, Jr., *Chevron and Its Aftermath: Judicial Review of Agency Interpretations of Statutory Provisions*, 41 VAND. L. REV. 301, 311 (1988); Strauss, *supra* note 71, at 1120; White, *supra* note 4, at 655. In fact, there is some evidence that the Court did not think its *Chevron* holding was groundbreaking at all. See Robert V. Percival, *Environmental Law in the Supreme Court: Highlights from the Marshall Papers*, 23 ENVTL. L. REP. (Envtl. L. Inst.) 10,606, 10,613 (1993) (noting that the papers of Justice Thurgood Marshall "indicate that the decision was reached without any significant debate"). Nonetheless, *Chevron* is now the most cited decision in administrative law. Search of WESTLAW (Feb. 10, 1997) (yielding 7207 citations to *Chevron* in a Shepard's search); see also PETER L. STRAUSS ET AL., GELLHORN AND BYSE'S ADMINISTRATIVE LAW: CASES AND MATERIALS 620-21 (9th ed. 1995) (collecting "[s]oundbites" on the importance of *Chevron*).

74. See *Industrial TurnAround*, 115 F.3d at 252-55.

75. Pub. L. No. 86-257, 73 Stat. 519 (codified as amended at 29 U.S.C. § 158 (1988)).

76. See 29 U.S.C. § 158(f) (1988).

Congress passed the Wagner Act,⁷⁷ under which the NLRB did not assert jurisdiction over the construction industry because of the occasional nature of its employment relationships and because the industry was already substantially unionized and therefore did not need protection.⁷⁸ The NLRB eventually began to assert power over the construction industry,⁷⁹ which created problems because construction employers would customarily enter into bargaining agreements for future periods of one to three years and would apply these agreements to jobs not yet created.⁸⁰ This practice of entering into collective bargaining agreements regarding future employment did not mesh with the interpretation of the Wagner Act that a union can only make valid bargaining contracts once "a representative number of employees have been hired."⁸¹ Consequently, a series of NLRB decisions held that these pre-hire construction agreements were illegal and unenforceable.⁸²

In order to legitimate these pre-hire agreements, Congress enacted § 8(f).⁸³ Section 8(f) states in relevant part that it is not an

77. Wagner Act of 1935, ch. 372, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-168 (1988)). Enacted in response to a negative view of unions by the judiciary, the Wagner Act also served as protection for the right to organize. See Lee Modjeska, *The NLRB Litigational Processes: A Response to Chairman Dotson*, 23 WAKE FOREST L. REV. 399, 401 (1988).

78. See SENATE COMM. ON LABOR & PUB. WELFARE, LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959, S. REP. NO. 86-187, at 10 (1959), reprinted in 1959 U.S.C.C.A.N. 2318, 2344, and in 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959, at 397 (1959); see also Johns-Manville Corp., 61 N.L.R.B. 1, 2 (1945) (declining to exert jurisdiction over a construction company because "the policies of the Act will not be effectuated by the assumption of jurisdiction in this case"). In fact, the election procedures of the Act were designed with a stable work force in mind, unlike the situation of the construction industry. See Vincent J. Apruzzese, *The Construction Industry*, in APPROPRIATE UNITS FOR COLLECTIVE BARGAINING, *supra* note 44, at 105-06.

79. See, e.g., Local 74, United Bhd. of Carpenters & Joiners, 80 N.L.R.B. 533, 534 (1948) (exercising jurisdiction); Ozark Dam Constructors, 77 N.L.R.B. 1136, 1138 (1948) (stating that the NLRB's "abstention from exercising [its] jurisdiction in construction cases was a matter of administrative choice").

80. See S. REP. NO. 86-187, at 12, reprinted in 1959 U.S.C.C.A.N. at 2344.

81. *Id.* at 11, reprinted in 1959 U.S.C.C.A.N. at 2344. According to the Senate Report, these practices were followed so that an employer could determine its labor costs prior to estimating bids for contracts and also so that a ready supply of skilled labor would be available. See *id.* at 9-11, reprinted in 1959 U.S.C.C.A.N. at 2344-45.

82. See, e.g., Chicago Freight Car & Parts Co., 83 N.L.R.B. 1163, 1165 (1949) (holding that the agreement was invalid because it was entered into before an appropriate bargaining unit had been created); Daniel Hamm Drayage Co., 84 N.L.R.B. 458, 460 (1949) (refusing to allow pre-hire agreements as an exception for "general custom and practice in the construction industry").

83. See Labor-Management Report and Disclosure Act of 1959, Pub. L. No. 86-257, § 705, 73 Stat. 519 (currently National Labor Relations Act § 8(f) and codified at 29

unfair labor practice for an employer in the construction industry to enter into bargaining agreements "covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization . . . because (1) the majority status of such labor organization has not been established."⁸⁴ However, Congress did include a limit to the power of such agreements. The statute provides that "any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 9(c) or 9(e)."⁸⁵ Subsections 9(c) and 9(e) allow an employer to file a petition challenging the majority status of a union and allow an election to be conducted to determine majority status.⁸⁶ Absent this proviso, an employer in the construction industry could not challenge the majority status of a union without first waiting twelve months after a valid election.⁸⁷ On its face, the statute does not address whether pre-hire agreements are

U.S.C. § 158(f) (1988)). Although § 8(f) was not adopted until 1959, members of Congress had attempted to address the problems that § 8(f) addressed soon after they arose. During the debate of § 8(f), then-Senator John F. Kennedy noted that the section was substantially similar to a bill first introduced in 1951 and a later bill adopted by the Senate in 1954. See 1 NLRB, *supra* note 78, at 1070.

84. 29 U.S.C. § 158(f) (1988). The full text of the statute is as follows:

It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in section 8(a) of this Act [subsec. (a) of this section] as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 9 of this Act [29 U.S.C. § 159] prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: *Provided*, That nothing in this subsection shall set aside the final proviso to section 8(a)(3) of this Act [subsec. (a)(3) of this section]: *Provided further*, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 9(c) or 9(e) [codified at 29 U.S.C.S. § 159(c) or (e)].

Id. (alteration in original).

85. *Id.*

86. See *id.* § 159(c), (e).

87. See *id.* § 159(c)(3).

enforceable.⁸⁸

Under its first interpretation of § 8(f), the NLRB did not allow employers to challenge the majority status of a union covered by a pre-hire agreement, thereby prohibiting an employer from freely repudiating a pre-hire agreement.⁸⁹ In 1971, however, the NLRB held that such agreements were subject to unilateral repudiation in *R.J. Smith Construction Co.*⁹⁰ In this case, the NLRB noted that the proviso of § 8(f) explicitly allows the majority status of a union to be tested at any point after employees have been hired.⁹¹ The NLRB reasoned that because such a test could occur at any time, "it would be anomalous, indeed, to hold that Section 8(f) prohibits examination of those questions in the litigation of refusal-to-bargain charges."⁹² This decision allowed an employer to challenge majority status of a union in order to rebut charges of unfair labor practices from violation of a § 8(f) agreement.⁹³

This voidable-at-will interpretation of § 8(f) did not meet with immediate success in the courts. In fact, the D.C. Circuit denied enforcement of *R.J. Smith* because it believed that Congress's

88. See *id.* § 158(f).

89. See *Bricklayers Local No. 3*, 162 N.L.R.B. 476, 477-79 (1966), *enforced*, 405 F.2d 469 (9th Cir. 1968); *Oilfield Maintenance Co.*, 142 N.L.R.B. 1384, 1387 & n.10 (1963).

90. 191 N.L.R.B. 693 (1971), *enforcement denied sub nom.* Local 150, Int'l Union of Operating Eng'rs v. NLRB, 480 F.2d 1186 (D.C. Cir. 1973). In *R.J. Smith*, for the first seven months after a § 8(f) agreement was signed, the employer failed to pay the wage levels specified in the contract or contribute to employee welfare funds. See *id.* at 693. The employer then raised wages, but still not up to the contract rate. See *id.* The employer also fired the two existing union members and then later rehired them at the contract wages while withholding those contract wages from all nonunion employees. See *id.* The union complained that the refusal to bargain and the various wage changes without notice were unfair labor practices under the Act. See *id.* The trial examiner rejected these claims primarily because she found that the union had never achieved majority representation of the company's employees during the time that the bargaining agreement had been in effect. See *id.*

91. See *id.* at 694.

92. *Id.* Also, in *Ruttman Construction Co.*, 191 N.L.R.B. 701 (1971), a companion case to *R.J. Smith*, the NLRB stated that a § 8(f) agreement is a "preliminary step that contemplates further action for the development of a full bargaining relationship." *Id.* at 702.

93. Board Members Fanning and Brown dissented from the decision. See *R.J. Smith*, 191 N.L.R.B. at 695 (Fanning, M. & Brown, M., dissenting). They noted that by "declining to find that a rejection of such agreement is a refusal to bargain, our colleagues are saying that Congress permitted such pre-hire contracts without intending them to have any effect." *Id.* (Fanning, M. & Brown, M., dissenting). The dissenters also questioned how the interpretation would advance the Act's goal of promoting industrial peace and stability, and they could discern no congressional intent to modify the requirements of good-faith bargaining by adoption of § 8(f). See *id.* at 696 (Fanning, M. & Brown M., dissenting).

purpose could not be to legitimate pre-hire agreements and also make them voidable-at-will.⁹⁴ The D.C. Circuit reasoned that Congress would not pass a statute allowing minority pre-hire agreements while allowing them to be unenforceable.⁹⁵ Yet despite such arguments, the NLRB maintained its stance in its 1975 decision in *Iron Workers Local 103* ("*Higdon*"),⁹⁶ which was again rejected by the D.C. Circuit.⁹⁷ This time, however, the Supreme Court granted certiorari⁹⁸ and upheld the NLRB interpretation.⁹⁹

In *Higdon*, the Supreme Court noted that the NLRB's determination of the various claims represented a "defensible construction of the statute and [was] entitled to considerable deference."¹⁰⁰ The Court also recognized that while lower courts "may prefer a different application of the relevant sections[,] . . . '[t]he function of striking that balance to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review.'"¹⁰¹ In response to the claim that the NLRB's decisions in *Higdon* and *R.J. Smith* represented a break from the NLRB's earlier interpretation of § 8(f), the Court noted that an agency "is not disqualified from changing its mind," and that when an agency changes its position, a court cannot

94. See Local No. 150, Int'l Union of Operating Eng'rs v. NLRB, 480 F.2d 1186, 1190-91 (D.C. Cir. 1973).

95. See *id.* at 1190. Judge Winter, who wrote the panel opinion, stated that "we cannot conceive of such an exercise in futility on the part of Congress as to validate a contract with a union having minority status, but to permit its abrogation because of the union's minority status." *Id.*

96. *Iron Workers Local 103* (*Higdon Contracting Co.*), 216 N.L.R.B. 45, 46 (1975), *enforcement denied*, 535 F.2d 87 (D.C. Cir. 1976), *rev'd and remanded sub nom.* NLRB v. Local Union No. 103, Int'l Ass'n of Bridge, Structural & Ornamental Iron Workers, 434 U.S. 335 (1978).

97. See Local Union No. 103, Int'l Ass'n of Bridge, Structural & Ornamental Iron Workers v. NLRB, 535 F.2d 87, 90 (D.C. Cir. 1976), *rev'd and remanded sub nom.*, 434 U.S. 335 (1978). Disposing of the case, the D.C. Circuit noted that "[i]t is clear enough that the Board was—and is—unhappy with this court's opinion in [*R.J. Smith*]." *Id.* at 88. However, the court noted that although the NLRB had not appealed or sought en banc review of that decision, it was requesting its overruling in the instant case. See *id.*

98. See NLRB v. Local Union No. 103, Int'l Ass'n of Bridge, Structural & Ornamental Iron Workers, 429 U.S. 1089 (1977).

99. See NLRB v. Local Union No. 103, Int'l Ass'n of Bridge, Structural & Ornamental Iron Workers, 434 U.S. 335, 341 (1978). Justice White authored the majority opinion, see *id.* at 336, while Justice Stewart wrote a dissent in which Justices Blackmun and Stevens joined. See *id.* at 352 (Stewart, J., dissenting).

100. *Id.* at 350.

101. *Id.* (quoting NLRB v. Truck Drivers Local Union No. 449, Int'l Bhd. of Teamsters, 353 U.S. 87, 96 (1957)).

review statutory constructions de novo.¹⁰² Finally, with regard to the Court's view on administrative deference, the Court "concluded that the Board's construction of the Act, although perhaps not the only tenable one, is an acceptable reading of the statutory language and a reasonable implementation of the purposes of the relevant statutory sections."¹⁰³

The Supreme Court commented on the interpretation of § 8(f) again in *Jim McNeff, Inc. v. Todd* ("*McNeff*").¹⁰⁴ The issue before the Court in *McNeff* was whether monetary obligations owed under a § 8(f) agreement before it was revoked could be enforced under the Labor-Management Relations Act.¹⁰⁵ The Court first reaffirmed its holding in *Higdon*, noting that *Higdon* approved the NLRB's determination that pre-hire agreements are voidable until a union obtains majority support.¹⁰⁶ Thereafter, the tone of the opinion became more authoritative on the interpretation of § 8(f). The Court referred to its "fidelity to Congress'[s] intent that pre-hire agreements be voluntary—and voidable,"¹⁰⁷ and the "undoubted right to repudiate a pre-hire agreement before the union attains majority support."¹⁰⁸ Later in the opinion, the Court noted that, until the union establishes majority status, § 8(f) pre-hire agreements remain subject to repudiation.¹⁰⁹ Despite the limited, but binding effect of pre-hire agreements, the Court noted that it was illogical to claim that a party to such agreements can obtain the benefits of them and then refuse to pay for them.¹¹⁰

Following the Supreme Court decisions in *Higdon* and *McNeff*, the Fourth Circuit addressed the voidable interpretation of § 8(f) in *Clark v. Ryan*.¹¹¹ The case arose in an attempt by a union to recover

102. *Id.* at 351.

103. *Id.* at 341. While the majority's opinion seemed to give considerable deference to the NLRB's view, the dissent was not inclined to do the same. *See id.* at 353 (Stewart, J., dissenting). Justice Stewart suggested that "[w]hen an employer in the construction industry does choose to enter a § 8(f) pre-hire agreement, there is nothing in the provisions or policies of national labor law that allows the employer, or the Board, to dismiss the agreement as a nullity." *Id.* (Stewart, J., dissenting).

104. 461 U.S. 260 (1983).

105. *See id.* at 262. The provision at issue was § 301 of the Labor-Management Relations Act, 29 U.S.C. § 185 (1993).

106. *See McNeff*, 461 U.S. at 269 (referring to and quoting *Higdon*, 434 U.S. at 341).

107. *Id.*

108. *Id.* at 270.

109. *See id.* at 271.

110. *See id.* Chief Justice Burger observed that "[h]aving had the music, [the employer] must pay the piper." *Id.*

111. 818 F.2d 1102 (4th Cir. 1987). Judge Wilkinson wrote the majority opinion, which Judge Ervin joined. *See id.* at 1103. Judge Wilkins wrote an opinion concurring in part

unpaid trust fund contributions that the employer was to make for nonunion employees.¹¹² The court referenced both *Higdon* and *McNeff* but cited only *McNeff* for the proposition that pre-hire agreements could be ended at any time so long as the union has not attained majority representation status.¹¹³ The court, however, observed that it could not tell from the record (1) if the employer was in the construction industry and subject to § 8(f); or (2) when repudiation of such an agreement would have occurred.¹¹⁴ Therefore, it remanded the case for further findings.¹¹⁵

While the NLRB interpretation of § 8(f) was consistent for sixteen years after the 1971 decision in *R.J. Smith*, the NLRB's 1987 decision in *Deklewa* marked an about-face. In *Deklewa*, the NLRB expressly overruled *R.J. Smith* and held that § 8(f) agreements are enforceable.¹¹⁶ The NLRB found three flaws with the interpretation of § 8(f) under *R.J. Smith*: (1) that it "does not fully square with either 8(f)'s legislative history or that section's actual wording";¹¹⁷ (2)

and dissenting in part. See *id.* at 1107 (Wilkins, J., concurring in part and dissenting in part).

112. See *id.* at 1104.

113. See *id.* at 1107 (citing *McNeff*, 461 U.S. at 271).

114. See *id.*

115. See *id.* Judge Wilkins concurred in the decision to remand to determine whether the agreement in issue was a § 8(f) agreement and when repudiation in fact occurred. See *id.* (Wilkins, J., concurring in part and dissenting in part). The dissenting part of his opinion only addressed whether the agreement clearly required the employer to make trust fund payments for both union and nonunion employees. See *id.* at 1107-08 (Wilkins, J., concurring in part and dissenting in part). For a discussion of the result of *Clark* on remand, see *infra* notes 191-96 and accompanying text.

116. See *John Deklewa & Sons, Inc.*, 282 N.L.R.B. 1375, 1377, enforced *sub nom.*, *International Ass'n of Bridge, Structural & Ornamental Iron Workers v. NLRB*, 843 F.2d 770 (3d Cir. 1988). The complete reversal of the NLRB's position is evidenced by its statement that "[w]e now find ourselves in fundamental agreement with the commonsensical pre-*Higdon* view expressed by the District of Columbia Circuit, in denying enforcement to *R.J. Smith* . . . , that Congress intended to permit 8(f) bargaining representatives to enforce their contracts." *Id.* at 1387-88.

Interestingly, the Fourth Circuit's endorsement of the voidable-at-will interpretation of § 8(f) in *Clark* was actually handed down almost three months after the NLRB decided *Deklewa*. Compare *Deklewa*, 282 N.L.R.B. at 1375 (decided Feb. 20, 1987), with *Clark*, 818 F.2d at 1102 (decided May 15, 1987). Apparently, the Union in *Clark* could not raise *Deklewa*, as oral argument occurred in *Clark* in December 1986. See *Clark*, 818 F.2d at 1102.

117. *Deklewa*, 232 N.L.R.B. at 1380. The NLRB noted that § 8(f) "specifically sanctioned the established industry practices that the NLRB had previously found unlawful." *Id.* (referring to the fact that § 8(f) allows pre-hire agreements and also approves other bargaining customs of the construction industry). However, the NLRB noted that the proviso to § 8(f) allowing tests of majority status was meant to protect the free choice of workers. See *id.* at 1380-81. Looking at the analysis of *R.J. Smith*, the NLRB commented that the "lynchpin" of the brief reasoning in that case was that the

that it "inadequately serves the fundamental statutory objectives of employee free choice and labor relations stability";¹¹⁸ and (3) that "frustration of statutory policies is increased because of ... administrative and litigational difficulties."¹¹⁹ The NLRB did not see its new interpretation as inconsistent with the Supreme Court decisions in *Higdon* or *McNeff*.¹²⁰ It quoted the Court's language in *Higdon* that "the previous interpretation was 'acceptable' yet 'perhaps not the only tenable one.'"¹²¹ The NLRB also noted that the new interpretation would more successfully accomplish Congress's intent to stabilize the construction industry and protect employee choice.¹²²

The Third Circuit heard the appeal of *Deklewa* and upheld the new interpretation of § 8(f).¹²³ The court's analysis began with the

proviso of § 8(f) meant that litigation of refusal to bargain charges was another allowable method of testing majority status. See *id.* at 1381 (citing *R.J. Smith Constr. Co.*, 191 N.L.R.B. 693, 694 (1971)). But the NLRB saw two crucial problems with the current interpretation of § 8(f) as determined in *R.J. Smith*: (1) nowhere in the legislative history or the Act itself are § 8(f) agreements suggested to be unenforceable or voidable, and (2) Congress's desire to allow voluntary pre-hire agreements did not mean that "either party to the agreement is unfettered in its right 'voluntarily' to repudiate the agreement." *Id.* at 1381.

Member Stephens concurred in the judgment of the majority in *Deklewa*, but did not agree with the tenor of the NLRB's view of the legislative history. See *id.* at 1391 (Stephens, M., concurring). After reviewing the congressional deliberations, he argued that "there is no evidence that Congress ever directly confronted and consciously resolved" the issue of whether a failure to follow a pre-hire agreement could be enforceable under the Act as an unfair labor practice. *Id.* at 1392 (Stephens, M., concurring).

118. *Id.* at 1380. As to free choice, the NLRB commented that "[a] rule granting unilateral repudiation rights to an employer who voluntarily enters into a collective bargaining agreement is not a necessary predicate for advancement of the employee free choice principles embodied in the ... proviso." *Id.* at 1382.

119. *Id.* at 1380. For example, the NLRB cited the administrative difficulty of trying to determine whether a union had achieved majority status at some point in the past. See *id.* at 1383. The progeny of *R.J. Smith Construction Co.*, 191 N.L.R.B. 701 (1971), developed the doctrine of conversion. See *Deklewa*, 282 N.L.R.B. at 1378. If a union was able to show that, at some point, it had gained majority support in a unit, a § 8(f) agreement would convert into a § 9(a) agreement—meaning that it had become non-voidable like any other collective bargaining agreement outside the construction industry. See *id.* at 1378-79. According to the NLRB, attempts to make such a determination were made difficult by "serious practical problems with the reliability and relevance of evidence purporting to establish majority status and with the protraction of litigation." *Id.* at 1383.

120. See *Deklewa*, 282 N.L.R.B. at 1388.

121. *Id.* (quoting *NLRB v. Local Union No. 103, Int'l Ass'n of Bridge, Structural & Ornamental Iron Workers*, 434 U.S. 335, 341 (1978)).

122. See *id.*

123. See *International Ass'n of Bridge, Structural & Ornamental Iron Workers v. NLRB* ("Deklewa"), 843 F.2d 770, 780-81 (3d Cir. 1988). The Supreme Court later

premise that its job was to decide if the NLRB's interpretation was reasonable.¹²⁴ First, the court rejected the employer's argument that *Higdon* and *McNeff* represented a definitive interpretation of § 8(f).¹²⁵ The court quoted the deferential sections of *Higdon*,¹²⁶ and although it noted that *McNeff* did not make its deference so clear, the court reasoned that the case was simply relying on *Higdon* and factually dealt only with obligations of a § 8(f) agreement before repudiation.¹²⁷ Second, the court concluded that the new interpretation of § 8(f) was reasonable after a review of the legislative history and text of the Act.¹²⁸

Under the reasoning of the Third Circuit, it would seem likely that other circuits also would adopt *Deklewa*. However, before the Third Circuit decision was handed down, a panel of the Ninth Circuit rejected this new interpretation of § 8(f) in *Mesa Verde Construction Co. v. Northern California District Council*.¹²⁹ The panel stated that if the Ninth Circuit had not yet addressed the proper interpretation of § 8(f), it would adopt the NLRB's interpretation if reasonable.¹³⁰ However, it noted that *Deklewa* conflicted with prior Ninth Circuit decisions allowing an employer to repudiate § 8(f) agreements before a union attains majority support.¹³¹ The court stated that under the Ninth Circuit decision in *Royal Development Co. v. NLRB*,¹³² "we are not permitted to overrule prior panels' interpretations of the Act, even with intervening NLRB case law," and observed that an en banc decision would be necessary to adopt *Deklewa*.¹³³

denied a petition of certiorari. See *International Ass'n of Bridge, Structural & Ornamental Iron Workers v. NLRB*, 488 U.S. 889 (1988). The Third Circuit opinion also decided that *Deklewa* could be applied retroactively. See *Deklewa*, 843 F.2d at 780-81.

124. See *Deklewa*, 843 F.2d at 775.

125. See *id.* at 776.

126. See *id.* (quoting *Higdon*, 434 U.S. at 341, 350).

127. See *id.*

128. See *id.* at 779.

129. 820 F.2d 1006 (9th Cir.), *withdrawn*, 832 F.2d 1164 (9th Cir. 1987), *reheard en banc*, 861 F.2d 1124 (9th Cir. 1988). The unions brought *Deklewa* to the attention of the court after oral arguments and argued that the employer in that case would still be bound to its pre-hire agreement. See *id.* at 1012.

For treatments of *Mesa Verde*, see Martha Allard, Note, *Constitutional Law—A Struggle Between the Presumption of Correctness Afforded Statutory Precedents and Deference to Federal Agencies*, 13 W. NEW ENG. L. REV. 189, 202-23 (1991); James M. Wilton, Note, *Changed Interpretation of Section 8(f) of the National Labor Relations Act: Mesa Verde Construction Co. v. Northern California District Council of Laborers*, 31 B.C. L. REV. 114, 114-28 (1989).

130. See *Mesa Verde*, 820 F.2d at 1013.

131. See *id.*

132. 703 F.2d 363 (9th Cir. 1983).

133. *Mesa Verde*, 820 F.2d at 1013 (citing *Royal Dev. Co.*, 703 F.2d at 369). Judge

Accepting the panel's invitation for en banc review, the Ninth Circuit proceeded to adopt *Deklewa*.¹³⁴ The court determined that the prior Supreme Court cases had only accepted the NLRB's prior interpretation of § 8(f) as reasonable and proceeded to determine if the new interpretation was also reasonable.¹³⁵ In similar fashion to the Third Circuit's approach in *Deklewa*, the court recounted the legislative history of § 8(f) and the purposes of the Act to find the new interpretation reasonable.¹³⁶

The en banc court also had to address the panel's view that it could not adopt *Deklewa* because it conflicted with other circuit precedents to which panels must adhere under *Royal Development*.¹³⁷ If *Higdon* and *McNeff* could be explained as only exhibiting deference to the NLRB's view, the court reasoned that it would be "anomalous" to give other circuit court decisions greater deference than that accorded to Supreme Court decisions.¹³⁸ Therefore, the en banc court held that if prior precedent represents "deferential review of NLRB interpretations of labor law, and do not decide that a particular interpretation of statute is the only reasonable interpretation . . . [.] subsequent panels of this court are free to adopt new and reasonable NLRB decisions without the requirement of en banc review."¹³⁹

In support of its decision, the en banc court noted that strict adherence to the theory of *Royal Development* applied by the panel raised four issues.¹⁴⁰ First, strict adherence prevents panels from according the NLRB the deference it is due.¹⁴¹ Second, it interferes

Noonan filed a concurrence emphasizing that en banc review should be undertaken in order to adopt *Deklewa*. See *id.* (Noonan, J., concurring).

134. See *Mesa Verde Constr. Co. v. Northern Cal. Dist. Council*, 861 F.2d 1124, 1126 (9th Cir. 1988) (en banc).

135. See *id.* at 1129-31.

136. See *id.* at 1131-34. The court concluded that the legislative history of § 8(f) supported *Deklewa*'s non-repudiation rule as opposed to the rule of *R.J. Smith*, which allows unilateral repudiation of § 8(f) agreements. See *id.* at 1131.

137. See *id.* at 1134.

138. See *id.*

139. *Id.* at 1134-35. The court noted that prior panels have adopted changing NLRB interpretations in other areas without feeling restrained by prior precedents. See *id.* at 1135. Compare *NLRB v. Brooks Cameras, Inc.*, 691 F.2d 912, 919 (9th Cir. 1982) (adopting the NLRB's "all-the-circumstances" test for deciding if an interrogation violated the Act), with *J.M. Tanaka Constr., Inc. v. NLRB*, 675 F.2d 1029, 1037 (9th Cir. 1982) (adopting the NLRB's rule that interrogations are per-se violations of the Act), and *Hotel Employees & Restaurant Employees Union, Local 11 v. NLRB*, 760 F.2d 1006, 1009 (9th Cir. 1985) (re-adopting the NLRB's use of the "all-the-circumstances" test).

140. See *Mesa Verde*, 861 F.2d at 1135-36.

141. See *id.* at 1135.

with the NLRB's ability to apply the same policies nationwide.¹⁴² Third, it would increase the ambiguity of what law the courts will apply in cases in which the NLRB interpretation has changed, thereby inviting unnecessary appeals and delays.¹⁴³ Fourth, the court noted that the limited availability of en banc review should not be wasted in such an inefficient manner.¹⁴⁴

Four justices dissented from the majority opinion. Judge Wallace, writing alone, was convinced that *Higdon* and *McNeff* formed an authoritative interpretation of § 8(f); therefore, the proper analysis in this case should end at the first step of the *Chevron* test.¹⁴⁵ Judge Hug, whose dissent was joined by two judges,¹⁴⁶ did not agree that the issue was so clear but reached the same result.¹⁴⁷ He believed that *Higdon* and *McNeff* represented a definitive construction of § 8(f), although the Supreme Court may have given some level of deference to the NLRB's view in making its decision.¹⁴⁸ Judge Hug noted that the question was still one of pure statutory interpretation for a court to decide and was to be accorded the respect of stare decisis, even if in reaching the outcome the court deferred to an agency interpretation.¹⁴⁹

Judge Kozinski, who joined Judge Hug's dissent, also wrote separately.¹⁵⁰ His dissent dealt with the broader issue of the role of

142. See *id.* at 1135-36.

143. See *id.* at 1136. The en banc court noted that under the panel's reading of *Royal Development Co.*, a panel would always apply old precedent and have to wait for an en banc decision to change the outcome. See *id.*

144. See *id.*

145. See *id.* at 1137 (Wallace, J., dissenting); see also *supra* notes 65-73 and accompanying text (describing the two-step test of *Chevron*). Judge Wallace noted that it was unclear exactly what the Supreme Court meant by the prior cases. See *Mesa Verde*, 861 F.2d at 1137 (Wallace, J., dissenting). However, his analysis of this issue did not probe deeply: Judge Wallace simply noted that the prior Supreme Court decisions were "conclusive[] and authoritative[]." *Id.* (Wallace, J., dissenting).

146. See *Mesa Verde*, 861 F.2d at 1137 (Hug, J., dissenting).

147. See *id.* at 1138 (Hug, J., dissenting).

148. See *id.* (Hug, J., dissenting).

149. See *id.* at 1140 (Hug, J., dissenting). Judge Hug noted the numerous references in *McNeff* to the voidable nature of § 8(f) agreements. See *id.* at 1143-44 (Hug, J., dissenting) (citing *Jim McNeff, Inc. v. NLRB*, 461 U.S. 260, 267-71 (1983)). As to the plain statement in *Higdon* that the NLRB's view was acceptable, "although perhaps not the only tenable one," *NLRB v. Local Union No. 103, Int'l Ass'n of Bridge, Structural & Ornamental Iron Workers*, 434 U.S. 335, 341 (1978) (Wilkins, J., concurring in part and dissenting in part), Judge Hug said this represented deference of the Supreme Court before it decided to impose its own interpretation of § 8(f). See *Mesa Verde*, 861 F.2d at 1143 (Hug, J., dissenting).

150. See *Mesa Verde*, 861 F.2d at 1146 (Kozinski, J., dissenting) (joined by Judge Brunetti).

the judiciary and the wisdom of *Chevron* deference. Seeing the majority's decision as representing a shift of power from the judicial branch to the executive branch,¹⁵¹ he believed that agencies would change positions more often than courts and subject the interpretation of laws to "shift[s] in the political winds."¹⁵²

Despite the strong views of the dissenters, the *Mesa Verde* en banc court reached the same result as the Third Circuit in *Deklewa* and adopted the new interpretation of § 8(f).¹⁵³ Shortly thereafter, a number of other circuits followed its lead. In *NLRB v. W.L. Miller Co.*,¹⁵⁴ the Eighth Circuit easily deferred to the NLRB's new interpretation and determined that *Higdon* and *McNeff* did not bar such a result.¹⁵⁵ The Seventh Circuit reached a similar outcome in *NLRB v. Bufco Corp.*,¹⁵⁶ as did the First Circuit in *C.E.K. Industrial Mechanical Contractors, Inc. v. NLRB*.¹⁵⁷ In addition, the Fifth Circuit assumed, but did not decide, that *Deklewa* was the law because it held that *Deklewa* should not apply retroactively.¹⁵⁸

151. See *id.* (Kozinski, J., dissenting); see also *supra* note 4 and accompanying text (quoting Judge Kozinski's suggestion that the majority had tortured the reasoning of *Marbury v. Madison*).

152. *Mesa Verde*, 861 F.2d at 1147 (Kozinski, J., dissenting). He also commented that "agencies can change their outlook as often and easily as a chameleon changes its color." *Id.* at 1146 (Kozinski, J., dissenting).

153. See *id.* at 1126.

154. 871 F.2d 745 (8th Cir. 1989).

155. See *id.* at 748.

156. 899 F.2d 608, 609 (7th Cir. 1990).

157. 921 F.2d 350, 357 (1st Cir. 1990).

158. See *Union Bhd. of Carpenters & Joiners Local Union 953 v. Mar-Len, Inc.*, 906 F.2d 200, 203 (5th Cir. 1990). The Fifth Circuit noted that prior panels of the circuit had upheld the prior interpretation of § 8(f), but because the adoption of *Deklewa* was not briefed or argued before the court, it thought that the "close, complex issues" did not need to be reached. *Id.* at 203 & n.2. The Fifth Circuit also failed to reach the issue in *NLRB v. Catalytic Industrial Maintenance Co.*, 964 F.2d 513, 521 n.11 (5th Cir. 1992), noting again that the issue had not been briefed or argued before the court.

Regarding retroactive application of *Deklewa*, the circuits that have adopted *Deklewa* have split on the issue. Compare *NLRB v. Viola Indus.-Elevator Div., Inc.*, 979 F.2d 1384, 1396-97 (10th Cir. 1992) (applying retroactively), *NLRB v. Bufco Corp.*, 899 F.2d 608, 611-12 (7th Cir. 1990) (same), *NLRB v. Miller Co.*, 871 F.2d 745, 748-50 (8th Cir. 1989) (same), and *Deklewa*, 843 F.2d 770, 780-81 (3d Cir. 1988) (same), with *C.E.K. Indus. Mechanical Contractors, Inc. v. NLRB*, 921 F.2d 350, 358 (1st Cir. 1990) (denying retroactive effect), *Mesa Verde Constr. v. Northern California Dist. Council*, 895 F.2d 516, 519 (9th Cir. 1990) (same), and *Mar-Len*, 900 F.2d at 203 (same). See also Howard Douglas Fineman, Note, *The Retroactive Application of Deklewa: Inequitable and Unjust Results for Construction Industry Employers*, 8 HOFSTRA LAB. L.J. 417, 474-88 (1991) (arguing that retroactive application produces manifestly unjust results). The Eighth Circuit's decision in *W.L. Miller Co.* spent more effort considering whether *Deklewa* should be applied retroactively than whether *Deklewa* was applicable. See *W.L. Miller Co.*, 871 F.2d at 748.

Finally, in 1992 the Tenth Circuit, in *NLRB v. Viola Industries-Elevator Division, Inc.*,¹⁵⁹ also adopted *Deklewa*,¹⁶⁰ although it issued its opinion en banc.¹⁶¹ The Tenth Circuit similarly interpreted *Higdon* and *McNeff* as only deferring to the NLRB's prior § 8(f) position.¹⁶² This decision brought the number of circuits that had addressed *Deklewa* to seven, with no rejections.¹⁶³ Furthermore, although the D.C., Second, and Sixth Circuits have not explicitly adopted *Deklewa*, references to it in the opinions of those circuits provide a strong inference that they assume *Deklewa* is good law.¹⁶⁴

In the face of this widespread acceptance, the Eleventh Circuit rejected *Deklewa* in February 1997 in *Local Union 48 Sheet Metal Workers v. S.L. Pappas & Co. ("Pappas")*.¹⁶⁵ Echoing the initial panel decision in *Mesa Verde*,¹⁶⁶ the court decided that the "prior

159. 979 F.2d 1384 (10th Cir. 1992).

160. See *id.* at 1394-95.

161. See *id.* at 1388. The panel that first heard the case never issued an opinion. See *id.* at 1386. Instead, it was reheard en banc primarily because the court wanted to ensure a proper reading of *Higdon* and *McNeff*. See *id.* Judge Baldock, the lone dissenter, discussed the same policy concerns over the proper role of the judiciary in statutory interpretation that Judge Kozinski highlighted in *Mesa Verde*. See *id.* at 1397 (Baldock, J., dissenting) (citing *Mesa Verde Constr. Co. v. Northern Cal. Dist. Council*, 861 F.2d 1124, 1146-49 (9th Cir. 1988) (en banc) (Kozinski, J., dissenting)); *supra* notes 150-52 (discussing Judge Kozinski's dissent). The *Viola* case is also discussed in Pierce, *supra* note 8, at 2256, and Phillip F. Smith, Jr., Note, *Administrative Law Survey*, 71 DENV. U. L. REV. 801, 802-11 (1994).

162. See *Viola*, 979 F.2d at 1395.

163. See *id.* at 1394-95; *Mar-Len*, 906 F.2d at 203; *C.E.K.*, 921 F.2d at 357; *Bufco*, 899 F.2d at 609; *W.L. Miller Co.*, 871 F.2d at 748; *Mesa Verde*, 861 F.2d at 1126; *International Ass'n of Bridge, Structural & Ornamental Iron Workers v. NLRB*, 843 F.2d 770, 780-81 (3d Cir. 1988).

164. The D.C. Circuit seems to have implicitly accepted *Deklewa*, although it has never explicitly decided the issue. See *Bentson Contracting Co. v. NLRB*, 941 F.2d 1262, 1269 (D.C. Cir. 1991) (citing *Deklewa* and recognizing the NLRB's current law regarding § 8(f) bargaining agreements); *Corson and Gruman Co. v. NLRB*, 899 F.2d 47, 49-50 (D.C. Cir. 1990) (holding that the union was barred from raising *Deklewa* on appeal because it never raised it before the NLRB). The Second Circuit has only cited to *Deklewa* once—noting its existence but holding that it was inapplicable to the case before it because the § 8(f) agreements at issue existed under the pre-*Deklewa* interpretation. See *Benson v. Brower's Moving & Storage, Inc.*, 907 F.2d 310, 315 & n.3 (2d Cir. 1990). In the Sixth Circuit, one case appeared to assume that *Deklewa* applied, and it was relied on without discussion. See *Sheet Metal Workers Int'l Ass'n Local 110 Pension Trust Fund v. Dane Sheet Metal, Inc.*, 932 F.2d 578, 581-82 (6th Cir. 1991) ("[C]urrent [Board] doctrine makes pre-hire agreements binding in accordance with their terms."). Also, in *Fox Painting Co. v. NLRB*, 919 F.2d 53 (6th Cir. 1990), the Sixth Circuit upheld the NLRB's decision not to apply *Deklewa* retroactively when an appellate court had already determined liability. See *id.* at 56.

165. 106 F.3d 970, 975, *reh'g denied*, 114 F.3d 1204 (11th Cir. 1997).

166. See *Mesa Verde Constr. Co. v. Northern Cal. Dist. Council of Laborers*, 820 F.2d 1006, 1013 (9th Cir. 1987), *withdrawn*, 832 F.2d 1164 (9th Cir. 1987), *reheard en banc*, 861

panel rule" forbade application of *Deklewa*.¹⁶⁷ The court held that because a prior Eleventh Circuit decision had adopted *McNeff*,¹⁶⁸ and because "[t]he law in this circuit is emphatic that 'only a decision by this court sitting *en banc* or the United States Supreme Court can overrule a prior panel decision,'" "¹⁶⁹ it was bound by the prior precedent.¹⁷⁰ The court did not mention *Chevron* or deference to agency interpretations, nor did it address the reasoning of the other circuits that had reached different results.¹⁷¹ It simply concluded that because the court must follow prior precedents, it need not address the applicability of *Deklewa* in the circuit.¹⁷²

In light of the history of § 8(f) and how *Deklewa* has fared in the courts of appeals,¹⁷³ *Industrial TurnAround* raises a number of interesting issues. First, it is arguable that the Fourth Circuit's result was incorrect, in light of the overwhelming contrary, but not binding,¹⁷⁴ authority in other circuits.¹⁷⁵ Second, *Industrial TurnAround* (and *Pappas*), will make it difficult for the NLRB to apply the Act consistently nationwide.¹⁷⁶ In fact, based on these two concerns, the § 8(f) issue is one that the Supreme Court may decide to address in the future.¹⁷⁷ Finally, *Industrial TurnAround* may reflect discontent with the deference required by *Chevron* and the role of the judiciary in such a scheme.¹⁷⁸

The correctness of the result in *Industrial TurnAround* turns on a proper reading of *Clark v. Ryan*,¹⁷⁹ the Fourth Circuit case that applied the *R.J. Smith* interpretation of § 8(f).¹⁸⁰ Under the first step

F.2d 1124 (9th Cir. 1988); *supra* notes 129-33 and accompanying text.

167. See *Pappas*, 106 F.3d at 975.

168. See *id.* (citing *Plumbers & Pipefitters Local Union 72 v. John Payne Co.*, 850 F.2d 1535, 1541 (11th Cir. 1988)).

169. *Id.* (quoting *United States v. Woodard*, 938 F.2d 1255, 1258 (11th Cir. 1991) (quoting *United States v. Machado*, 804 F.2d 1537, 1543 (11th Cir. 1986))).

170. See *id.*

171. Notably, the court did not address the fact that the *Mesa Verde en banc* court had rejected such a reading of the prior panel rule. See *Mesa Verde*, 861 F.2d at 1134-36.

172. See *Pappas*, 106 F.3d at 975.

173. See *supra* notes 123-72 and accompanying text.

174. See Allan D. Vestal, *Relitigation by Federal Agencies: Conflict, Concurrence and Synthesis of Judicial Policies*, 55 N.C. L. REV. 123, 162-63 & n.246 (1976) (noting that conflicts between circuit courts develop because decisions of one circuit are not thought to bind other circuits).

175. See *infra* notes 179-98 and accompanying text.

176. See *infra* notes 199-210 and accompanying text.

177. See *infra* notes 211-17 and accompanying text.

178. See *infra* notes 218-22 and accompanying text.

179. 818 F.2d 1102 (4th Cir. 1987).

180. See *id.* at 1106-07; see also *supra* notes 111-15 (discussing *Clark*).

of *Chevron*, if *Clark* adopted the interpretation of § 8(f) as compelled by the plain meaning of the statute, a court would have no choice but to follow *Clark*.¹⁸¹ But on the other hand, if *Clark* merely deferred to a reasonable interpretation of the statute, the approach of the *Mesa Verde* court and other circuit courts suggests that the *Deklewa* interpretation should be given deference.¹⁸² This deference would not conflict with the prior panel decision rule if the prior precedent only holds that the interpretation it faced was a reasonable one.¹⁸³

The view that *Clark* spoke to § 8(f) definitively is not without merit. The *Clark* opinion does not mention deference, and it quotes the more authoritative-sounding language of *McNeff*.¹⁸⁴ Furthermore, there is no hint in the *Clark* opinion that *McNeff* and *Higdon* were based on deference, as other circuits have reasoned.¹⁸⁵ *Clark* appears merely to accept *McNeff* and *Higdon* as the law.¹⁸⁶ As a result, the *Industrial TurnAround* court reasonably could have felt restrained by *Clark*, even if the reasoning of *Clark* was flawed.¹⁸⁷

A stronger argument can be made, however, that *Clark* is not a bar to the adoption of *Deklewa*. Simply put, if *Higdon* was a demonstration of deference, and *McNeff* was simply derivative of *Higdon*,¹⁸⁸ it could follow that *Clark* was derivative of both of those decisions.¹⁸⁹ In this light, *Clark* never explicitly decided that the pre-

181. See *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984); see also *Mesa Verde Constr. Co. v. Northern Cal. Dist. Council of Laborers*, 861 F.2d 1124, 1136 (9th Cir. 1988) (en banc) (holding that precedent is binding on a panel only if it held that the prior agency interpretation is the only possible interpretation).

182. See *NLRB v. Viola Indus.-Elevator Div., Inc.*, 979 F.2d 1384, 1394 (10th Cir. 1992) (en banc); *Mesa Verde*, 861 F.2d at 1136. In *Mesa Verde*, the Ninth Circuit noted that prior precedent exhibiting deference to agency interpretation does not bar adoption of a new interpretation. See *Mesa Verde*, 861 F.2d at 1136; see also *supra* notes 129-53 and accompanying text (discussing *Mesa Verde*).

183. See *Mesa Verde*, 861 F.2d at 1136.

184. See *Clark*, 818 F.2d at 1107 (quoting *Jim McNeff, Inc. v. Todd*, 461 U.S. 260, 271 (1983)).

185. See, e.g., *C.E.K. Indus. Contractors, Inc. v. NLRB*, 921 F.2d 350, 357 (1st Cir. 1990) (rejecting the contention that the Supreme Court had adopted the *R.J. Smith* rule as its own); *International Ass'n of Bridge, Structural & Ornamental Iron Workers v. NLRB*, 843 F.2d 770, 776 (3d Cir. 1988) (same).

186. See *supra* note 113 and accompanying text.

187. Cf. *Mesa Verde Constr. Co. v. Northern Cal. Dist. Council of Laborers*, 820 F.2d 1006 (9th Cir.) (Noonan, J., concurring), *withdrawn*, 832 F.2d 1164 (9th Cir. 1987), *reheard en banc*, 861 F.2d 1124 (9th Cir. 1988). Judge Noonan felt constrained by prior Ninth Circuit precedent but urged the en banc court "to correct this law." *Id.* at 1013 (Noonan, J., concurring).

188. See *supra* notes 94-110 and accompanying text.

189. Cf. *NLRB v. Bufo Corp.*, 899 F.2d 608, 610 (7th Cir. 1990) (noting that the Seventh Circuit had applied the *R.J. Smith* interpretation of § 8(f) in a prior case but

Deklewa interpretation of § 8(f) was the only reasonable one; therefore, it would not bar adoption of *Deklewa*.¹⁹⁰ Serendipitous events have made it clear that this interpretation of *Clark* is quite tenable. In *Clark*, the Fourth Circuit remanded the case to the district court to determine if the agreement at issue was a § 8(f) agreement and when it was revoked.¹⁹¹ On remand, District Judge Kiser noted in an unpublished opinion that he thought he had received "a straightforward contract interpretation case."¹⁹² However, he found that the NLRB's new ruling in *Deklewa* "complicate[d] matters."¹⁹³ At that time, the Third Circuit had already enforced *Deklewa*, applying it retroactively, and the Seventh Circuit had likewise followed suit.¹⁹⁴ Judge Kiser then decided that the *Deklewa* interpretation of § 8(f) should apply retroactively.¹⁹⁵ Though his discussion was brief, he relied on the "well-reasoned opinions from the Third and Seventh Circuits, as well as this Court's natural deference to the NLRB concerning matters within its particular purview."¹⁹⁶ Because the case apparently never made it past this point, the Fourth Circuit never addressed it again.

While this unpublished opinion is not binding on any court, it is interesting for two reasons. First, it demonstrates that one judge who addressed the exact issue did not consider the Fourth Circuit's *Clark*

accepting *Deklewa* (citing *International Ass'n of Bridge, Structural & Ornamental Iron Workers v. Higdon Constr. Co.*, 739 F.2d 280 (7th Cir. 1984) ("*Higdon II*")). The court reached this result even though the prior circuit decision clearly said that "[p]rehire agreements such as the one here, while valid under § 8(f), are voidable until the union reaches majority status." *Higdon II*, 739 F.2d at 282. The *Bufco* court recognized that nothing in that decision "constituted more than our agreement that it was an acceptable reading of the Act." *Bufco*, 899 F.2d at 610 n.5.

190. See Jahan Sharifi, Comment, *Precedents Construing Statutes Administered by Federal Agencies After the Chevron Decision: What Gives?*, 60 U. CHI. L. REV. 223, 228-29 (1993). Sharifi argues that when a court looks at a pre-*Chevron* decision to decide if it should be regarded as precedent after *Chevron*, it could look to "1) presence of language suggesting that the court believed it was effectuating congressional intent, and 2) absence of language that indicates deference to the relevant agency." *Id.* at 237-38. Under this approach, Sharifi notes that the *Mesa Verde* court was able to parse the language of *McNeff*. See *id.* at 238. Of course, *Clark* was decided after *Chevron*, but the same type of test could apply to post-*Chevron* decisions which plainly should have implicated *Chevron* analysis.

191. See *Clark*, 818 F.2d at 1107.

192. *Clark v. Ryan*, Civ. A. No. 83-852-R., 1989 WL 517501, at *1 (W.D. Va. Sept. 6, 1989) (unpublished memorandum opinion).

193. *Id.* Judge Kiser admonished the parties for "utterly fail[ing] to provide any guidance." *Id.*

194. See *id.* at *2.

195. See *id.* at *3.

196. *Id.* at *4. Judge Kiser noted that because the submitted briefs were not helpful, he had "the unpleasant task of determining the correct application of *Deklewa*." *Id.*

decision to bar application of *Deklewa*. Second, it raises the ironic point that even the actual litigants in *Clark* were not subject to the rule by which the court felt bound in *Industrial TurnAround*.¹⁹⁷ Therefore, in light of the results that other circuits have reached, in addition to the odd history of *Clark* itself, a strong case can be made that *Clark* did not definitely construe § 8(f), and that the result of *Industrial TurnAround* is incorrect.¹⁹⁸

Correctness aside, *Industrial TurnAround* (and *Pappas* in the Eleventh Circuit) might make it difficult for the NLRB to apply the Act consistently nationwide. If the NLRB has to apply varying interpretations of § 8(f) in different circuits, the Act's "goal of promoting a uniform national labor policy would be undermined."¹⁹⁹ It is unclear whether the NLRB could even attempt such a strategy. The venue provisions of the Act allow the aggrieved party of a NLRB action to seek review either in the circuit where the case arose, any circuit where it resides or conducts business, or in the D.C. Circuit.²⁰⁰ Therefore, at times, the NLRB will not know what law to apply.²⁰¹ In the past, the absurdity of such a task has led the NLRB to follow a policy of "nonacquiescence" from circuit decisions with which it does not agree.²⁰² Nonacquiescence means that the NLRB could decide to continue to defend the *Deklewa* rule before circuits

197. Furthermore, Judge Kiser is not the only district judge who thought *Deklewa* would control in the Fourth Circuit. In *Trustees of the National Automatic Sprinkler Industry Pension Fund v. American Automatic Fire Protection*, 680 F. Supp. 731 (D. Md. 1988), then-District Judge Motz (who is now on the Fourth Circuit) recognized *Deklewa* but declined to apply it retroactively. See *id.* at 734-35. More recently, in *Local Union No. 666, International Brotherhood of Electrical Workers v. C & C Electrical Service Inc.*, 896 F. Supp. 574 (E.D. Va. 1995), the court found *Deklewa* controlling in light of the submitted briefs, oral argument, and independent research. See *id.* at 576. The court specifically noted that *Clark* no longer applied. See *id.*

198. Similarly, the Eleventh Circuit is arguably not bound by its prior panel decision in *Plumbers & Pipefitters Local Union 72 v. John Payne Co.*, 850 F.2d 1535 (11th Cir. 1988). The *John Payne* case does not contain language suggesting that *R.J. Smith* was the only possible interpretation of § 8(f)—it merely cites to other authorities such as *Higdon*. See *id.* at 1539-40.

199. White, *supra* note 4, at 665. Professor White suggests that this rule would allow areas of the country to "compete for industry on the basis of more hospitable circuit law." *Id.*

200. See 29 U.S.C. § 160(f) (1992).

201. See White, *supra* note 4, at 649 (discussing *Arvin Automotive*, 285 N.L.R.B. 753, 757 (1987) (noting that the NLRB could not know if the Eleventh Circuit would review the order)). Professor White notes that aggrieved parties could shop for a circuit with favorable law in order to prevail on appeal. See *id.* at 679.

202. See *id.* at 639-40. This policy has been followed by the NLRB for almost 50 years. See *id.* at 646.

that have rejected it.²⁰³ An example of this occurred when the NLRB defended the *R.J. Smith* interpretation of § 8(f) before the D.C. Circuit in *Higdon* when the D.C. Circuit had already rejected that interpretation.²⁰⁴ Similarly, perhaps the NLRB's proposed judgment after remand of *Industrial TurnAround* demonstrates its unhappiness with the outcome in the Fourth Circuit. The proposed judgment is identical to the prior judgment, except that the date of repudiation was changed to May 6, 1993, to reflect the Fourth Circuit's holding.²⁰⁵ While recognizing the authority of the Fourth Circuit, this judgment would leave ITAC subject to the original remedy.

Industrial TurnAround is a case ripe for nonacquiescence by the NLRB. Following oral argument, the court ordered that the NLRB explain its position on its obligation to follow the decisions of the circuit.²⁰⁶ In the NLRB's response, the Acting Solicitor defended the policy of relitigating issues in circuits with adverse precedent.²⁰⁷ The response noted that the NLRB's decisions can be reviewed by multiple circuits and that acquiescence to circuit decisions is only feasible for an agency that knows which circuit will be reviewing its decision.²⁰⁸ It recognized that under the reviewing scheme of the Act, "[s]erious disagreements over important issues of law and policy are an inevitable feature" of the relationship between the NLRB and the judiciary which will create conflict until resolved by a Supreme Court decision.²⁰⁹ Therefore, it appears that *Industrial TurnAround* will not affect the NLRB's position on § 8(f) in future cases in the Fourth Circuit.²¹⁰ But it also would seem doubtful that the NLRB would

203. See *id.*

204. See *Local Union No. 103, Int'l Ass'n of Bridge, Structural, & Ornamental Workers v. NLRB ("Higdon")*, 535 F.2d 87, 89 (D.C. Cir. 1976), *rev'd and remanded sub nom.*, 434 U.S. 335 (1978). Typically, when this situation arises, the NLRB will follow a circuit's decision for an individual case, but will give it no broader effect. See *White*, *supra* note 4, at 642.

205. See *Petitioner's Objection to NLRB's Proposed Judgment at 1, Industrial TurnAround* (Nos. 96-1783 & 96-1926).

206. See Letter from Jeffrey D. Wedekind, Acting Solicitor, National Labor Relations Board, to Patricia S. Connor, Clerk, United States Court of Appeals for the Fourth Circuit 1-2 (Feb. 6, 1997) (on file with the *North Carolina Law Review*). This order apparently was in follow-up to oral argument. See *id.* at 1 (noting that at oral argument, "Judge Luttig questioned the Board's counsel at length concerning the extent to which the Board's decisions are based on decisions of the [Circuit]").

207. See *id.* at 12.

208. See *id.* at 17. The response notes that an agency that knows where its decisions will be reviewed is in the same position as a district court, which is bound by circuit precedents. See *id.*

209. *Id.* at 18.

210. The response to the Fourth Circuit did point out that the NLRB's policy of nonacquiescence "is no way disrespectful to the courts of appeals." *Id.*

petition the Fourth Circuit for enforcement of a *Deklewa* issue after *Industrial TurnAround*.

Because *Industrial TurnAround* and *Pappas* have created a sharp circuit split on the applicability of *Deklewa*, this issue is one the Supreme Court could address in the future.²¹¹ If either *Industrial TurnAround* or *Pappas* reaches the Supreme Court, it would provide the Court an additional opportunity to demonstrate the proper application of *Chevron* to the interpretation of § 8(f).²¹² The Court also could end the debate over the correct interpretation of *Higdon* and *McNeff*. Recent Supreme Court precedent suggests that *Industrial TurnAround* would be overturned. In *Brown v. Pro Football, Inc.*,²¹³ for example, the Supreme Court noted that the NLRB has "primary responsibility for policing the collective bargaining processes."²¹⁴ In *Brown*, the Court wanted to avoid "a web of detailed rules spun by many different nonexpert antitrust judges and juries" in favor of "a set of labor rules enforced by a single expert administrative body."²¹⁵ According to one commentator, *Brown* is an indication of "strong support" for *Chevron* deference.²¹⁶ Deference to the NLRB, based on a desire for a single administrator of a coherent body of labor law, appears to be equally desirable in the context of *Industrial TurnAround*. Considering that a majority of the circuit courts addressing the issue have determined that adoption of the NLRB's interpretation of § 8(f) is not barred by prior precedent, coupled with *Brown*'s recent affirmations of *Chevron* deference by the Supreme Court, it appears that if the Supreme Court addressed the issue, it would likely adopt *Deklewa* without having to overrule *Higdon* or *McNeff*.²¹⁷

211. One of the Supreme Court's criteria for granting certiorari is the existence of a conflict between the circuit courts of appeals. See SUP. CT. R. 10. In addition, when such a conflict occurs in regard to a federal agency policy of general importance, and the government's position has not prevailed in a recent decision, the Solicitor General is apt to request, and likely to receive, a grant of certiorari from the Supreme Court. See Arthur D. Hellman, *By Precedent Unbound: The Nature and Extent of Resolved Intercircuit Conflicts*, 56 U. PITT. L. REV. 693, 746 (1995).

212. Neither side has sought a writ of certiorari in *Industrial TurnAround*. The case might reach the Supreme Court after rulings in the compliance phase of the case, but this is a remote possibility.

213. 116 S. Ct. 2116 (1996).

214. *Id.* at 2121.

215. *Id.* at 2123.

216. KENNETH CULP DAVIS & RICHARD L. PIERCE, JR., *ADMINISTRATIVE LAW TREATISE* § 3.4, at 30 (3d ed. Supp. 1997).

217. The contrast between the deferential language of *Higdon* and the "we giveth the law" language of *McNeff* is odd. Compare NLRB v. Local Union No. 103, Int'l Ass'n of Bridge, Structural & Ornamental Iron Workers, 434 U.S. 335, 341 (1978) (characterizing

Finally, *Industrial TurnAround* reflects the discontent of courts with the world of *Chevron* deference and the role of the judiciary in such a scheme. While the final interpretation of § 8(f) may not keep judges awake at night, a suggestion that "federal judges should plan to take a long holiday and observe from afar as the body of federal law develops without their meaningful input" does not sound especially palatable.²¹⁸ Of course, the accepted and traditional role of the judicial branch under the Constitution has been to "say what the law is."²¹⁹ Because the special rule of deference to agencies dictated by *Chevron* has been viewed by some as usurping the traditional role of the judiciary,²²⁰ it is not surprising that judges may, at times, prefer to construe a prior precedent as a definitive interpretation of a statute instead of an example of deference. While the courts of appeal may typically still adhere to *Chevron*,²²¹ *Industrial TurnAround* may serve as a reminder that not all judges are content

the *R.J. Smith* interpretation of § 8(f) as reasonable "although perhaps not the only tenable" interpretation), with *Jim McNeff, Inc. v. Todd*, 461 U.S. 260, 270 (1983) (recognizing the "undoubted right to repudiate a pre-hire agreement"). One might suspect that Chief Justice Burger, who wrote the opinion in *McNeff*, was trying to back away from the deferential language of *Higdon*. Chief Justice Burger revealed some discontent with deference to agencies in other opinions. See, e.g., *Charles D. Bonanno Linen Serv., Inc. v. NLRB*, 454 U.S. 404, 423 (1982) (Burger, C.J., dissenting) ("The Court's deferral to the Board's conclusion that its rules advance the national labor policy . . . represents just the kind of uncritical judicial rubberstamping we have often condemned."); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 451-53 (1975) (Burger, C.J., concurring in part and dissenting in part) (noting that in a Title VII action dealing with criteria for validating employment tests, deference to agency guidelines was improper because Congress did not refer to them in legislative history). To the extent that *McNeff's* language is inconsistent with allowing deference to the NLRB over interpretations of § 8(f), the Court may want to clarify what *McNeff* held. If the NLRB's failure to seek certiorari in *Industrial TurnAround* can be interpreted to mean anything, it may suggest that adoption of *Deklewa* by the Supreme Court is not a foregone conclusion.

218. *Mesa Verde Constr. Co. v. Northern Cal. Dist. Council of Laborers*, 861 F.2d 1124, 1149 (9th Cir. 1988) (en banc) (Kozinski, J., dissenting).

219. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

220. See Claust-Ellenbogen, *supra* note 4, at 759, 783; see also Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 456 (1989) ("The danger of *Chevron's* song lies in its apparent obliviousness to the fundamental alterations it makes in our constitutional conception of the administrative state."); Abner J. Mikva, *How Should the Courts Treat Administrative Agencies?*, 36 AM. U. L. REV. 1, 7 (1986) (suggesting that *Chevron* could lead to an erosion of the duty "to ensure that the law is obeyed by all, including the agencies"); Abner J. Mikva, *Tribute: The Real Judge Bazelon*, 82 GEO. L.J. 1, 4 (1993) (suggesting that former Chief Judge Bazelon of the D.C. Circuit would have disliked *Chevron* because he "believed that judicial review was an absolutely essential safeguard to bureaucratic excesses").

221. See DAVIS & PIERCE, *supra* note 216, § 3.6, at 70 (noting that a highly deferential approach to agency decisions "still seems to be the norm in circuit court decisionmaking").

with that state of affairs.²²²

In conclusion, *Industrial TurnAround* demonstrates the tension that results from balancing stare decisis against a policy of deference to interpretations of agency-administered statutes. Because *Industrial TurnAround* may cause inconsistent nationwide application of collective bargaining statutes, it should be scrutinized carefully if it returns to an appellate court. Until that occurs, the Fourth Circuit is now in a distinct minority that permits unions and employers to repudiate pre-hire collective bargaining agreements unilaterally. Because agencies can change their interpretation of statutes, and because courts must also uphold their "duty to say what the law is,"²²³ conflicts between agencies and the Fourth Circuit are now more likely to occur as a result of *Industrial TurnAround*.²²⁴

J. MITCHELL ARMBRUSTER

222. Judge Williams, who authored the opinion in *Industrial TurnAround*, appears to be among those who are unhappy. She filed a concurring opinion in *Case Farms, Inc. v. NLRB*, 128 F.3d 841 (4th Cir. 1997), which enforced an NLRB order certifying a union election. See *id.* at 849-50 (Williams, J. concurring). Though Judge Williams agreed with the result, she took issue with the NLRB's use of a prior NLRB order as precedent without citation to any decisions of the Fourth Circuit. See *id.* at 850 (Williams, J., concurring). She admonished that the "Board is not free . . . to automatically assume that its decisions, whether enforced or not, are the law in this Circuit." *Id.* (Williams, J., concurring) (citing *Industrial TurnAround*, 115 F.3d at 254). In *Glenmark Assocs., Inc. v. N.L.R.B.*, 1998 WL 324522, Nos. 97-1403, 97-1404, 97-1514 & 97-1515, at *1 (4th Cir. June 19, 1998), Judge Williams noted the existence of questionable Board positions in recent cases. See *id.* at *6 n.8. She warned the Board to "reconsider its single-minded pursuit of its policy goals without regard for the supervisory role of the Third Branch." *Id.* Judge Luttig, also on the *Industrial TurnAround* court, has voiced displeasure with agency assertions of the power to interpret statutes. See *United States Dep't of Energy v. FLRA*, 106 F.3d 1158, 1166 (4th Cir. 1997) (Luttig, J., concurring in judgment) ("I, as a judge of this Court, am bound by the prior decisions of this Court. I am not free, as the agency believes it is, to conduct myself unconstrained by law."). See also *Exxel/Atmos, Inc. v. NLRB*, Nos. 97-1417 & 97-1418, 1998 WL 336523, at *7 (D.C. Cir. June 26, 1998) (Sentelle, J., concurring) ("The time has long since come for the [NLRB] to recognize not only the constraints of precedent, but its statutory and constitutional duty to obey the law as interpreted by the courts.").

223. *Marbury*, 5 U.S. at 177.

224. The conflict over the interpretation of § 8(f) between the Fourth Circuit and the NLRB may dissipate, however, if the NLRB decides to change its position again. See *NLRB Considers Pre-hire Policy*, ENGINEERING NEWS-REC., Nov. 25, 1996, at 16 (describing "[a] quiet struggle" at the Board over whether *Deklewa* should be overturned).

State v. Lea: Attempt Plus Felony-Murder Does Not Equal Attempted Felony Murder

Under the felony-murder rule, a defendant who kills another during the commission of a felony is guilty of murder.¹ The rule operates to confer upon a defendant the consequences of a murder conviction regardless of the defendant's mental state during the commission of the crime.² Highly criticized for forsaking the dependent relationship between criminal liability and moral culpability that characterizes the rest of criminal law,³ the felony-murder rule nonetheless has managed to endure as an effectual force in American criminal law.⁴ Though the rule still retains much of its force and efficacy, over time, increasing limitations have curtailed its application.⁵

1. See, e.g., JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 31.06, at 479 (2d ed. 1995). For North Carolina's version of the felony-murder rule, see North Carolina General Statutes § 14-17, which makes any murder "committed in the perpetration or attempted perpetration of any arson, rape, or a sex offense, robbery, kidnapping, burglary, or other felony committed or attempted with the use of a deadly weapon" murder in the first degree. N.C. GEN. STAT. § 14-17 (Supp. 1997).

2. See DRESSLER, *supra* note 1, § 31.06, at 479; *infra* note 57 and accompanying text.

3. See Nelson E. Roth & Scott E. Sundby, *The Felony-Murder Rule: A Doctrine at Constitutional Crossroads*, 70 CORNELL L. REV. 446, 452 (1985) ("[T]he punishment of a killing as murder where subjective culpability is lacking clashes with modern definitions of murder."); James J. Tomkovicz, *The Endurance of the Felony-Murder Rule: A Study of the Forces that Shape Our Criminal Law*, 51 WASH. & LEE L. REV. 1429, 1437 (1994) ("[I]t is the widely accepted view today that criminal liability must rest on proof of a recognized level of mental fault for every essential element of an offense."). See *infra* notes 57-59 and accompanying text (citing further support).

4. Only four states have completely abolished the felony-murder rule. See HAW. REV. STAT. § 707-701, 707-701.5 (Repl. 1993); KY. REV. STAT. ANN. § 507.020(1)(a) (Michie 1990); *People v. Aaron*, 299 N.W.2d 304, 326 (Mich. 1980); *State v. Harrison*, 564 P.2d 1321, 1324 (N.M. 1977). Criticism of the rule has come from both the scholarly community, see, e.g., Roth & Sundby, *supra* note 3, at 446 ("Perhaps the most that can be said for the rule is that it provides commentators with an extreme example that makes it easy to illustrate the injustice of various legal propositions."), and the courts, see, e.g., *People v. Lee*, 234 Cal. Rptr. 3d 1214, 1221 (Ct. App. 1991) (describing felony murder as a "highly artificial concept"); *People v. Aaron*, 299 N.W.2d 304, 314 (Mich. 1980) (describing the operation of the rule as having no "sound principle"); *State v. Price*, 726 P.2d 857, 859 (N.M. Ct. App. 1986) (observing that "felony murder is not a popular doctrine").

5. See, e.g., WAYNE R. LAFAYE & AUSTIN W. SCOTT, JR., CRIMINAL LAW § 7.5, at 622-25 (2d ed. 1986) (discussing limitations placed on the rule including narrowing the list of felonies that can trigger the rule, requiring a closer causal relationship between the felony and the ensuing death, mandating a closer temporal relationship between the felony and the commission of the killing, and adding an independent felony limitation).

In a recent North Carolina Court of Appeals case, *State v. Lea*,⁶ North Carolina carved out another important limitation in this state's felony-murder doctrine.⁷ In *Lea*, the defendants were involved in a high-speed chase with another car.⁸ One of the defendants fired shots at the other car, causing it to swerve into oncoming traffic.⁹ As a result, the car collided with an oncoming car, injuring three people.¹⁰ The defendant Colon, who had fired the shots, was convicted of three counts of attempted first-degree murder based on a theory of attempted felony murder.¹¹ A necessary element of attempted murder is the specific intent to kill.¹² However, proceeding under the felony-murder theory, the prosecution in *Lea* gained the conviction without having to prove that the defendant intended to kill the victims.¹³ The court of appeals reversed the conviction, holding that attempted felony murder would require a defendant to intend to commit an unintentional act, which was not logically possible.¹⁴

This Note discusses the facts of *Lea* and the court of appeals' resolution of the felony-murder issue in the case.¹⁵ The Note then provides a brief overview of the two relevant concepts of law, felony murder and criminal attempt, focusing on the development of these two concepts in North Carolina law.¹⁶ Following this overview, the Note merges the two concepts, considering North Carolina's resolution of the attempted felony-murder issue as well as the resolution of this issue in other states.¹⁷ The Note concludes by arguing that the court's ruling was a rational and appropriate limitation on the felony-murder rule.¹⁸

On the evening of February 24, 1995, Shawn Massey and Christopher Overman drove to the Scottish Inn Motel in Burlington,

6. 126 N.C. App. 440, 485 S.E.2d 874 (1997).

7. See *id.* at 450, 485 S.E.2d at 880.

8. See *id.* at 443, 485 S.E.2d at 876.

9. See *id.*

10. See *id.*

11. See *id.* at 444, 485 S.E.2d at 876. The felony of discharging a firearm into occupied property served as the basis of the attempted felony murder charge. See *id.*

12. See *Lea*, 126 N.C. App. at 449, 485 S.E.2d at 880.

13. See *id.* at 444, 485 S.E.2d at 876.

14. See *id.* at 450, 485 S.E.2d at 880.

15. See *infra* notes 19-45 and accompanying text.

16. See *infra* notes 46-100 and accompanying text (felony murder); *infra* notes 101-34 and accompanying text (criminal attempt).

17. See *infra* notes 135-93 and accompanying text.

18. See *infra* notes 194-97 and accompanying text.

North Carolina, to visit some friends.¹⁹ Upon leaving the motel a few hours later, the two young men encountered the defendants, Orlando Lea and Lacy Colon, in the motel parking lot.²⁰ An argument ensued among the four men.²¹ The parties exchanged heated words, including racial slurs, but no violence occurred at that time.²² According to Massey, defendant Colon told him in parting, "I'm going to see you again and I'm going to kill you."²³

On the following afternoon, Overman and Massey drove Overman's black Chevrolet Nova to a car wash.²⁴ Upon leaving the car wash, the two met Lea and Colon in a white Ford Mustang.²⁵ The Mustang began following the Nova.²⁶ A high-speed chase ensued that led eventually onto a four-lane highway where Lea and Colon were able to catch up to Massey and Overman.²⁷ While still traveling at a high rate of speed, Lea and Colon pulled the Mustang alongside the Nova and defendant Lea began yelling and shaking his fist out of the window at Massey and Overman.²⁸ Defendant Colon then raised himself out of the passenger-side window and, leaning across the roof of the Mustang, fired five shots at the passenger compartment of the Nova.²⁹ Afraid he would be shot, Overman ducked down in the seat while applying the brakes.³⁰ The Nova swerved into oncoming traffic where it collided with a vehicle driven by Beatrice Ward.³¹ Overman, Massey, and Ward all suffered injuries in the collision,³² but none of the three was actually wounded by a bullet.³³

At the joint trial of the two defendants, Colon testified that he had fired shots at Overman's car in self defense.³⁴ He stated that Overman swerved his vehicle threateningly toward Lea's car and that he shot at the car to prevent his car from being run off the road.³⁵

19. See State-Appellee's Brief at 3, *Lea* (No. COA96-229).

20. See *Lea*, 126 N.C. App. at 443, 485 S.E.2d at 876.

21. See *id.*

22. See *id.*

23. *Id.*

24. See *id.*

25. See *id.*

26. See *id.*

27. See *id.*

28. See *id.* at 440, 443 S.E.2d at 876.

29. See *id.*

30. See *id.*

31. See *id.*

32. See *id.*; *Drive-By Shooting Leads to Collision, Serious Injury*, GREENSBORO NEWS & REC., Feb. 27, 1995, at B2.

33. See *Lea*, 126 N.C. App. at 443, 485 S.E.2d at 876.

34. See *id.*

35. See *id.*

Colon also testified that he aimed only at the vehicle itself and not at the occupants.³⁶

The Alamance County Superior Court found Colon guilty of, among other things, three counts of attempted first-degree felony murder.³⁷ The trial judge had instructed the jury that they could find Colon guilty of attempted first-degree murder either on the basis of malice, premeditation, and deliberation, or under the felony-murder rule, or both.³⁸ On the verdict form, the jury responded affirmatively to the felony-murder charge but failed to give an answer as to whether or not it found the defendant guilty on the basis of premeditation and deliberation.³⁹

On appeal, the North Carolina Court of Appeals vacated Colon's conviction for attempted felony murder, holding that the offense does not exist under North Carolina law.⁴⁰ The court declared that the crime of attempted felony murder is a "logical impossibility" because a person cannot intend to commit an unintentional crime.⁴¹ Intent is not an element of felony murder; the State may convict a person of murder under the rule simply by showing that a death occurred during the course of a felony.⁴² However, to convict a person of criminal attempt, the State must show that the person specifically intended to commit the crime

36. *See id.*

37. *See id.* at 444, 485 S.E.2d at 876. Colon also was found guilty of two counts of assault with a deadly weapon with intent to kill. *See id.* Lea was convicted of three counts of attempted second-degree murder, two counts of assault with a deadly weapon, one count of assault with a deadly weapon inflicting serious injury, and one count of discharging a firearm into occupied property. *See id.*

38. *See id.* at 451, 485 S.E.2d at 880.

39. *See id.* at 452, 485 S.E.2d at 881. The jury form first asked whether the defendant was guilty of attempted first-degree murder. *See id.* at 451, 485 S.E.2d at 881. If an answer of "yes" was given to this question, the form posed two further questions. *See id.* First, it asked whether the defendant was guilty of "first degree murder on the basis of malice, premeditation and deliberation." *Id.* The jury left this question blank. *See id.* Second, the form asked whether the defendant was guilty of "attempted first degree murder under the first degree felony murder rule." *Id.* The jury answered "yes" to this question. *See id.*

40. *See id.* at 450, 485 S.E.2d at 880. Although the court of appeals overturned the felony murder conviction, Colon was not acquitted of the attempted murder charge at that time. *See id.* Because the jury had not answered "yes" or "no" to whether the defendant was guilty of attempted first-degree murder on the basis of premeditation and deliberation, the court could not determine whether the jury had considered this question. *See id.* at 452, 485 S.E.2d at 881. On remand, the court stated that Colon could be retried for attempted murder under this alternate theory. *See id.* at 453, 485 S.E.2d at 882.

41. *See id.* at 450, 485 S.E.2d at 880.

42. *See id.* at 449, 485 S.E.2d at 880.

charged.⁴³ Therefore, attempted felony murder would require the State to prove that a defendant specifically intended to commit an unintentional crime.⁴⁴ According to the court of appeals, such crime cannot exist.⁴⁵

The current North Carolina first-degree murder statute defines felony murder as "a murder which shall be . . . committed in the perpetration or attempted perpetration of any arson, rape, or a sex offense, robbery, kidnapping, burglary, or other felony committed or attempted with the use of a deadly weapon."⁴⁶ While traditional first-degree murder involves the unlawful killing of another with malice aforethought,⁴⁷ premeditation and deliberation are not necessary elements of felony murder.⁴⁸ The State is also not required to prove that the defendant intended to cause death.⁴⁹ To secure a conviction, the State must only prove that the defendant intended to commit the underlying felony.⁵⁰

Proponents of the felony-murder rule offer several arguments in its defense. As a matter of theory, proponents contend that the rule is justified on the basis of constructive malice, also known as the transferred intent doctrine.⁵¹ This doctrine asserts that the intent to

43. *See id.*

44. *See id.* at 450, 485 S.E.2d at 880.

45. *See id.*

46. N.C. GEN. STAT. § 14-17 (Supp. 1997). The first-degree murder statute also includes murders that "shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate, and premeditated killing." *Id.* First-degree murder is classified as a Class A felony, punishable by the death penalty or life imprisonment. *See id.*

47. *See id.*; LAFAVE & SCOTT, *supra* note 5, § 7.5, at 622; Kevin Cole, *Killings During Crime: Toward a Discriminating Theory of Strict Liability*, 28 AM. CRIM. L. REV. 73, 74 (1991).

48. *See State v. Richardson*, 341 N.C. 658, 666, 462 S.E.2d 492, 498 (1995); *State v. Johnson*, 317 N.C. 193, 202, 344 S.E.2d 775, 781 (1986); *State v. Wall*, 304 N.C. 609, 613, 286 S.E.2d 68, 71 (1982) (citing *State v. Swift*, 290 N.C. 383, 407, 226 S.E.2d 652, 669 (1972)).

49. *See State v. Avery*, 315 N.C. 1, 29, 337 S.E.2d 786, 802 (1985); *State v. Thompson*, 280 N.C. 202, 213, 185 S.E.2d 666, 673-74 (1972). To qualify for a felony murder conviction, the killing may be, but is not required to be, intentional. *See State v. Gibbs*, 335 N.C. 1, 51, 436 S.E.2d 321, 350 (1993); *State v. Shrader*, 290 N.C. 253, 261, 225 S.E.2d 522, 528 (1976).

50. *See Richardson*, 341 N.C. at 666-67, 462 S.E.2d at 498.

51. *See Commonwealth v. Matchett*, 436 N.E.2d 400, 407 (Mass. 1982) ("The effect of the felony-murder rule is to substitute the intent to commit the underlying felony for the malice aforethought required for murder."); *People v. Gladman*, 359 N.E.2d 420, 422 (N.Y. 1976) ("By operation of law, the intent necessary to sustain a murder conviction is inferred from the intent to commit a specific, serious, felonious act, even though the defendant, in truth, may not have intended to kill"); *Wooden v. Commonwealth*, 284 S.E.2d 811, 814 (Va. 1981) (stating that "[m]alice inheres in the doing of a wrongful act

commit the felony is imputed as the malice necessary for common-law murder.⁵² Supporters also assert policy arguments in support of the felony-murder rule. First, proponents argue that the possibility of a murder conviction deters persons from entering into dangerous criminal ventures when it is foreseeable that death could ensue.⁵³ Second, proponents argue that felony murder is justified by the principle that felonies which result in death should be punished more severely than felonies which do not result in death.⁵⁴ Third,

intentionally or without just cause or excuse, or as a result of ill will' " (quoting *Dawkins v. Commonwealth*, 41 S.E.2d 500, 503 (Va. 1947)); Roth & Sundby, *supra* note 3, at 455 (describing the doctrines as closely related and observing that both are frequently used in support of felony murder liability).

52. See *State v. Gardner*, 315 N.C. 444, 457, 340 S.E.2d 701, 710 (1986) (stating that in felony murder the malice from an intended felony is transferred to the unintended homicide, and "[a]s a result of the fictional transfer, the homicide is deemed committed with malice"). The transferred intent and constructive malice rationales have been criticized as a basis for the felony-murder rule. See LAFAVE & SCOTT, *supra* note 5, § 7.5, at 622 n.2 (characterizing the notion of constructive malice as "pure fiction" and urging that felony murder be recognized as a category of murder separate from intent-to-kill murder); Roth & Sundby, *supra* note 3, at 453-57 (criticizing both the transferred intent and constructive malice rationales).

53. See *United States v. Tham*, 118 F.3d 1501, 1509 (11th Cir. 1997) (noting felony murder's policy rationale of deterring the commission of certain dangerous felonies); *United States v. Martinez*, 16 F.3d 202, 207 (7th Cir. 1994) (stating that "liability for felony murder . . . serves the practical function of deterring felons from using lethal weaponry, more broadly from committing the kind of felony in which someone is likely to be . . . injured (and hence possibly killed), by punishing them severely should death result—to anyone"); *State v. Hoang*, 755 P.2d 7, 8 (Kan. 1988) (stating that "[t]he purpose of the felony murder doctrine is to deter all those engaged in felonies from killing negligently or accidentally") (citing *State v. Brantley*, 691 P.2d 26, 28 (1984)); *Richardson*, 341 N.C. at 666, 462 S.E.2d at 498 (noting that "[t]he felony murder rule was promulgated to deter even accidental killings"); DRESSLER, *supra* note 1, § 31.06[B][2], at 480 (describing deterrence as the most common defense of the felony-murder rule); Tomkovicz, *supra* note 3, at 1449 (distinguishing the two strains of the deterrence argument: the threat of murder liability discourages the commission of the felony itself and encourages greater care during the performance of the felony).

Opponents of felony murder contend that the deterrence argument is logically flawed and not supported by empirical evidence. See *id.* at 1448-58, 1460 (referring to the "deterrence delusion"). These critics contend that there is no statistical proof that felony murder liability deters the commission of serious crimes. See Roth & Sundby, *supra* note 3, at 452. They also argue that punishing a person for an act the person did not intend to commit cannot deter future conduct. See *id.* The North Carolina Supreme Court has stated that proper attempts at deterrence should focus on " 'the harm intended by the criminal rather than at the greater harm possibly flowing from his act which was neither intended nor desired by him.' " *State v. Bonner*, 330 N.C. 536, 546, 411 S.E.2d 598, 603-04 (1992) (quoting Norval Morris, *The Felon's Responsibility for Lethal Acts of Others*, 105 U. PA. L. REV. 50, 67 (1956)). This view led the court to forbid the use of the felony-murder rule against a defendant when someone other than the defendant or the defendant's co-felon commits a killing. See *id.* at 545, 411 S.E.2d at 603; *infra* notes 89-98 and accompanying text.

54. See DRESSLER, *supra* note 1, § 31.06[B][3], at 481 (observing that the criminal

proponents argue that the availability of felony murder assists the prosecution in those cases where circumstances make it difficult to prove intent.⁵⁵

Despite these arguments in favor of the felony-murder rule, it has faced heavy criticism.⁵⁶ The primary criticism is that the rule punishes the defendant without regard to the defendant's individual culpability.⁵⁷ Removing intent as an element of the crime, in essence, "establish[es] a per se rule of accountability for deaths occurring during the commission of felonies."⁵⁸ Whether the defendant acts

involved in a felony causing death has a greater debt to pay to society); Michelle S. Simon, *Whose Crime is it Anyway? Liability for the Lethal Acts of Nonparticipants in the Felony*, 71 U. DET. MERCY L. REV. 223, 225 (1994) (stating that the viability of the rule "reflects the societal judgment that a felony resulting in a death, even if that death was not intended, should be punished more severely than a felony not resulting in a death").

55. See DRESSLER, *supra* note 1, § 31.06[B][5], at 482. The prosecutor does not have to prove that the defendant intended to kill the victim or that the felon was aware that his conduct was extremely dangerous to human life. See *id.* at 483. Instead, the prosecutor must show only that the defendant committed the felony and that the death occurred during its commission. See *id.* The easing of the prosecutor's burden in proving the State's case produces a greater number of convictions and promotes politically desirable law and order. See Tomkovicz, *supra* note 3, at 1463 (stating that the felony-murder rule is viewed by some as "harsh, tough, and designed to protect us against those who introduce unwarranted and unnecessary threats of death into our daily lives").

56. See *Head v. State*, 443 N.E.2d 44, 48-49 (Ind. 1982); see also *State v. Branson*, 487 N.W.2d 880, 882 (Minn. 1992) (noting that "the rule has been severely criticized for its mechanical operation, penalogical purposes, and its intrinsic unfairness"); Roth & Sundby, *supra* note 3, at 446 (observing that "[c]riticism of the rule constitutes a lexicon of everything that scholars and jurists can find wrong with a legal doctrine").

57. See *People v. Washington*, 402 P.2d 130, 134 (Cal. 1965) (noting that the felony-murder rule has faced criticism because "in almost all the cases in which it is applied it is unnecessary and . . . erodes the relation between criminal liability and moral culpability"); *People v. Aaron*, 299 N.W.2d 304, 334 (Mich. 1980) (Ryan, J., concurring in part, dissenting in part) (noting that felony murder fails "to correlate, to any degree, criminal liability with moral culpability" and that "[i]t permits one to be punished for a killing, usually with the most severe penalty in the law, without requiring proof of any mental state with respect to the killing"); Roth & Sundby, *supra* note 3, at 452 ("[T]he punishment of a killing as murder where subjective culpability is lacking clashes with modern definitions of murder."); Tomkovicz, *supra* note 3, at 1435-38 (arguing that felony murder is inconsistent with contemporary principles of culpability and fault, such as the principle that the actor must possess the requisite mens rea for the offense charged).

Outside the felony murder context, homicide is punished according to the degree of mental fault of the defendant. See *id.* at 1437-38. For example, the unintentional killing of another without malice through a negligent act or omission may constitute involuntary manslaughter, see *State v. McCoy*, 122 N.C. App. 482, 485, 470 S.E.2d 542, 544 (1996), the killing of another with malice but without specific intent to kill constitutes second-degree murder, see N.C. GEN. STAT. § 14-17 (Supp. 1997), and the killing of another with premeditation and deliberation constitutes first-degree murder, see *id.* On the other hand, under felony murder, even an accidental death committed with no intent is punished as first-degree murder. See Tomkovicz, *supra* note 3, at 1438-39.

58. *State v. Bell*, 338 N.C. 363, 386, 450 S.E.2d 710, 723 (1994); see also *State v. Price*,

with specific intent to kill the victim, with reckless indifference toward the victim, or accidentally kills the victim, all defendants receive the same punishment.⁵⁹ Coupled with accomplice liability,⁶⁰ the rule can lead to arbitrary and even bizarre results.⁶¹

Despite these criticisms, some form of the felony-murder rule remains in forty-six states.⁶² However, most states, including North Carolina, have limited the application of the rule.⁶³ The following section discusses the development of the felony-murder rule and some limits placed on the rule by the legislature and courts of North Carolina.⁶⁴

726 P.2d 857, 859 (N.M. Ct. App. 1986) (describing the felony-murder doctrine as result-oriented); Roth & Sundby, *supra* note 3, at 457-60 (criticizing the strict liability nature of felony murder).

59. See *State v. Thompson*, 280 N.C. 202, 213, 185 S.E.2d 666, 674 (1972).

60. Accomplice liability involves the placement of criminal responsibility on persons who are party to a crime for acts committed by a principal in the perpetration of the crime. See LAFAVE & SCOTT, *supra* note 5, §§ 6.7-6.9, at 576-602.

61. See *People v. Washington*, 402 P.2d 130, 134 (Cal. 1965) (providing the example that if two persons rob a store and then flee in opposite directions and the owner of the store follows and kills one felon, the other felon could be guilty of murder under the felony-murder rule); *People v. Powell*, 561 N.Y.S.2d 837, 837 (App. Div. 1990) (sustaining the defendant's murder conviction even though the defendant served only as the lookout during a burglary and took no part in the killing); *Commonwealth v. Bolish*, 138 A.2d 447, 449 (Pa. 1958) (sustaining first degree murder conviction for the death of the defendant's accomplice in an arson fire set by that accomplice); Richard W. Garnett, Note, *Depravity Thrice Removed: Using the "Heinous, Cruel, or Depraved" Factor to Aggravate Convictions of Nontriggerman Accomplices in Capital Cases*, 103 YALE L.J. 2471, 2473 ("[T]he nontriggerman convicted of felony murder is *three times removed* from the locus of blame: the killing is murder by reason of the felony murder rule, the defendant is responsible for the killing under accomplice liability principles, and he faces the executioner because of the manner in which another person killed.").

62. Only four states have abandoned the rule altogether. See HAW. REV. STAT. § 707-701, 707-701.5 (Repl. 1993) (eliminating the felony-murder rule); KY. REV. STAT. ANN. § 507.020(1)(a) (Michie 1990) (same); *People v. Aaron*, 299 N.W.2d 304, 326 (Mich. 1980) (same); *State v. Harrison*, 564 P.2d 1321, 1324 (N.M. 1977) (adopting the "natural and probable consequences" test for lesser-degree felonies). Commentators have marveled at the irrepressibility of the felony-murder doctrine. See Cole, *supra* note 47, at 74 (noting that the rule has proved "quite durable"); Simon, *supra* note 54, at 225 ("The felony-murder doctrine, although much maligned, is still a frequently used theory of liability.").

63. See *Head v. State*, 443 N.E.2d 44, 49 (Ind. 1982) (noting several limitations placed on the felony-murder rule by various states including reducing the degree of murder and punishment, requiring mens rea beyond the intent to commit the underlying offense, restricting applicability to deaths caused by the perpetrator of the underlying felony, limiting application to only certain felonies, and requiring that the decedent be someone other than a co-felon); LAFAVE & SCOTT, *supra* note 5, § 7.5, at 623-25 (observing limitations placed on the common-law felony-murder rule); Tomkovicz, *supra* note 3, at 1467 (stating that "[a]n unlimited felony-murder rule . . . is *not* the law of our land").

64. Professor Tomkovicz has argued that, while most commentators believe limitations on the felony-murder rule evidence a distaste for the rule and foreshadow the

The felony-murder rule is a product of English common law.⁶⁵ While the rule's exact origins are unclear,⁶⁶ by the eighteenth century it was well-established in England that a killing committed during the course of a felony constituted murder.⁶⁷ Justifications for the development of the common-law rule are also ambiguous.⁶⁸ One suggested justification is that it enabled the punishment of attempted felonies during the course of which death ensued.⁶⁹ At common law, attempts of felonies were punished as misdemeanors, while felonies themselves were punished by death.⁷⁰ The felony-murder rule allowed the courts to punish unsuccessful or incomplete felonies to the same extent as successful felonies.⁷¹

rule's imminent abolition, limitations on the rule have removed its rough edges and thus have legitimized the rule and ensured its continued survival. See Tomkovicz, *supra* note 3, at 1465-66.

65. See ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW § 2.1, at 61-63 (2d ed. 1986). Under the common-law rule of felony murder, a person who causes death during the commission or attempted commission of a felony is guilty of murder, regardless of her intent. See DRESSLER, *supra* note 1, § 31.06[A], at 479.

66. See Roth & Sundby, *supra* note 3, at 449 (discussing three possible historical sources of the rule); Tomkovicz, *supra* note 3, at 1442 (noting that commentators have attributed the origin of the felony-murder rule to a variety of sources).

67. See LAFAVE & SCOTT, *supra* note 5, § 7.5, at 622; PERKINS & BOYCE, *supra* note 65, § 2.1, at 62; see also Tomkovicz, *supra* note 3, at 1442-48 (providing a brief overview of the rule's ambiguous origins).

68. See Roth & Sundby, *supra* note 3, at 448 (noting that the purpose of the rule at common law is vague); Tomkovicz, *supra* note 3, at 1445 (stating that the felony-murder rule is not a rule "with either solid, ancient ancestry or unimpeachably logical underpinnings").

69. See Roth & Sundby, *supra* note 3, at 450.

70. See *id.* At common law, only those crimes that involved inherent moral wrong (*mala in se*), were considered felonies. See Tomkovicz, *supra* note 3, at 1445-46. Therefore, only a small number of acts could actually serve as the basis of a felony-murder charge. See *id.* at 1446 (stating that "the typical effect of the rule was to brand as murderers only those who had performed seriously immoral acts of a life-threatening nature").

71. See Roth & Sundby, *supra* note 3, at 450. Professors Roth and Sundby have contended that, if the punishment of attempted felonies was the justification of the common-law felony-murder rule, this justification no longer has merit under modern statutory schemes that punish attempted crimes severely. See *id.*; see, e.g., N.C. GEN. STAT. § 14-2.5 (Supp. 1997) (punishing an attempt to commit a felony under the classification that is lower than that of the offense which the offender attempted to commit). Also, since at common law all felonies were punishable by death, the imposition of the felony-murder rule would not have violated principles of culpability. See *Redline v. Commonwealth*, 137 A.2d 472, 476 (Pa. 1958) (noting that a possible explanation for the origin of the doctrine is that "at early common law many crimes, including practically all, if not all, felonies were punishable by death so that it was of no particular moment whether the condemned was hanged for the initial felony or for the death accidentally resulting from the felony"); Tomkovicz, *supra* note 3, at 1451 (observing that when the felony-murder rule originally arose, problems of culpability would not have existed). Today, the commission of a felony is not considered a sufficient crime to warrant death.

While felony murder eventually was abolished in England,⁷² the doctrine was imported to the United States where it continues to thrive.⁷³ In North Carolina, the felony-murder rule was a common-law rule⁷⁴ until it was codified by the General Assembly in 1893.⁷⁵ This murder statute provided that the defendant could be convicted of felony murder for a homicide that occurred during the commission of "arson, rape, robbery, and burglary, or other felony."⁷⁶

One of the first limitations placed on felony murder in North Carolina involved interpretation of the statutory phrase "or other

Therefore, placing first-degree murder liability on a person who participates in, for example, a robbery risks punishing persons in excess of their culpability.

72. See English Homicide Act, 1957, 5 & 6 Eliz. 2, ch. 11, § 1.

73. See LAFAYE & SCOTT, *supra* note 5, § 7.5, at 641 ("[T]here is reason to believe that the felony-murder doctrine will continue to exist . . . for many years to come."); Tomkovicz, *supra* note 3, at 1458-79 (offering four explanations for the survival of the felony-murder rule in the United States: historical roots of the rule, political support for the doctrine, limitations on the rule that diminish the rule's especially egregious applications, and popular understandings of culpability that differ from scholarly understandings).

74. Under the common law of North Carolina, a killing committed in the perpetration or attempted perpetration of a felony constituted murder. See *State v. Covington*, 117 N.C. 834, 865, 23 S.E. 337, 353 (1895). The codification of felony murder, see Act of Feb. 11, 1893, ch. 85, 1893 N.C. Sess. Laws 76, 76-77 (codified as amended at N.C. GEN. STAT. § 14-17 (Supp. 1997)), did not provide a new definition of felony murder but simply included this type of homicide in the category of first-degree murder. See *State v. Banks*, 143 N.C. 652, 656, 57 S.E. 174, 176 (1907).

75. In 1893, when the General Assembly divided murder into two degrees, felony murder was placed in the first degree. See Act of Feb. 11, 1893, ch. 85, 1893 N.C. Sess. Laws 76, 76-77 (codified as amended at N.C. GEN. STAT. § 14-17 (Supp. 1997)); *State v. Davis*, 305 N.C. 400, 422, 290 S.E.2d 574, 588 (1982); *State v. Streeton*, 231 N.C. 301, 305, 56 S.E.2d 649, 652 (1949). At common law, murder had not been distinguished according to degrees. See *Streeton*, 231 N.C. at 304, 56 S.E.2d at 652. Rather, any unlawful killing of another with malice aforethought constituted murder. See *id.* The 1893 statute singled out murders committed by more heinous means of perpetration and classified them as first degree. See Act of Feb. 11, 1893, ch. 85, 1893 N.C. Sess. Laws 76, 76-77 (1893) (codified as amended at N.C. GEN. STAT. § 14-17 (Supp. 1997)); *Streeton*, 231 N.C. at 305, 56 S.E.2d at 652. All other murders constituted second degree murder. See Act of Feb. 11, 1893, ch. 85, 1893 N.C. Sess. Laws 76, 76-77; *Streeton*, 231 N.C. at 305, 56 S.E.2d at 652. Murder in the first degree was punishable by death while murder in the second degree was punishable by imprisonment. See Act of Feb. 11, 1893, ch. 85, 1893 N.C. Sess. Laws 76, 76-77 (codified as amended at N.C. GEN. STAT. § 14-17 (Supp. 1997)); *State v. Dalton*, 178 N.C. 779, 783, 101 S.E. 548, 549-50 (1919).

76. See Act of Feb. 11, 1893, ch. 85, 1893 N.C. Sess. Laws 76, 76-77 (1893) (codified as amended at N.C. GEN. STAT. § 14-17 (Supp. 1997)). Prior to 1893, any intentional and unlawful killing of a human being with malice aforethought, express or implied, constituted murder punishable by death. See *Streeton*, 231 N.C. at 304, 56 S.E.2d at 652. The murders included in the first-degree category were divided into three basic groups: (1) murders perpetrated by means of poison, lying in wait, imprisonment, starving, or torture, (2) premeditated murder, and (3) killings occurring in the commission of certain specified felonies "or other felony." See *Davis*, 305 N.C. at 423, 290 S.E.2d at 588.

felony," so as to limit the acts which could serve as the foundation of a felony-murder conviction.⁷⁷ In 1972, in *State v. Thompson*,⁷⁸ the North Carolina Supreme Court interpreted "other felony" to include felonies that create a "substantial foreseeable human risk and actually result[] in the loss of life."⁷⁹ This inferred limitation ensured that murder liability could attach only to sufficiently violent acts involving the potential for loss of life.⁸⁰ The *Thompson* decision was superseded by statute in 1977 when the General Assembly amended the felony-murder statute by striking the phrase "or other felony" in favor of "or other felony committed or attempted with the use of a deadly weapon."⁸¹

77. A majority of states limit the felonies that can serve as the basis of a felony-murder conviction to a specifically enumerated group. See Tomkovicz, *supra* note 3, at 1467. In *State v. Thompson*, 280 N.C. 202, 185 S.E.2d 666 (1972), the defendant was charged with killing the victim during a felonious breaking and entering and felonious larceny. See *id.* at 204, 185 S.E.2d 668. According to the court, a homicide was first-degree murder if it occurred during the perpetration of one of the four enumerated felonies or during "any other felony inherently dangerous to human life." *Id.* at 209, 185 S.E.2d at 671. The category of felonies which created a "substantial foreseeable human risk" that death could ensue included, but was not limited to, felonies that were "inherently dangerous to life." *Id.* at 211, 185 S.E.2d at 672. Quoting Professor Perkins, the court said,

"One who is perpetrating a felony which seems not of itself to involve any element of human risk, may resort to a dangerous method of committing it If the dangerous force thus used results in death, the crime is murder just as much as if the danger was inherent in the very nature of the felony itself."

Id. at 211-12, 185 S.E.2d at 672-73 (quoting ROLLIN M. PERKINS, CRIMINAL LAW 34 (1957)). In *Thompson*, breaking into a house while armed with a pistol created "a substantial foreseeable human risk[]." *Id.* at 212, 185 S.E.2d at 673.

78. 280 N.C. 202, 185 S.E.2d 666 (1972).

79. *Id.* at 211, 185 S.E.2d at 672. For a list of felonies that have been held to be inherently dangerous to life, see *State v. Swift*, 290 N.C. 383, 408, 226 S.E.2d 652, 669 (1976) (listing breaking, entering, and larceny; robbery; escape from prison; kidnapping; and arson). See also Erwin S. Barbre, Annotation, *What Felonies are Inherently or Foreseeably Dangerous to Human Life for Purposes of Felony-Murder Doctrine*, 50 A.L.R.3d 397 (1973) (providing an overview of felonies considered by courts to be inherently or foreseeably dangerous to human life for purposes of the felony-murder rule); PERKINS & BOYCE, *supra* note 65, § 1, at 63 (noting that the felonies usually included in this category are arson, rape, robbery, and burglary).

80. This limitation, adopted by several states, often is described as the "inherently dangerous felony" limitation. See DRESSLER, *supra* note 1, § 31.06[C][1], at 483-84; LAFAVE & SCOTT, *supra* note 5, § 7.5, at 623-25; PERKINS & BOYCE, *supra* note 65, § 2.1(c), at 65-66.

81. Act of May 19, 1977, ch. 406, § 1, 1977 N.C. Sess. Laws 407, 407 (codified as amended at N.C. GEN. STAT. § 14-17 (Supp. 1997)). By virtue of the amendment, a felony could serve as the basis of a felony murder conviction only if the felony is specified in the statute or the felony was committed or attempted with the use of a deadly weapon. See *State v. Davis*, 305 N.C. 400, 423-24, 290 S.E.2d 574, 588 (1982).

In *State v. Fields*, 315 N.C. 191, 337 S.E.2d 518 (1985), the supreme court held that this statute does not mandate that the crime actually be committed by the physical use of

The court also has limited felony murder by requiring a temporal relationship between the felony and the killing.⁸² If the killing is to be included under the felony-murder rule, there cannot be a break in the chain of events leading from the initial felony to the act causing death, so that the homicide is part of a series of incidents that form one continuous transaction.⁸³ Under this approach, it is immaterial whether the killing occurs before or after the commission of the felony, but the two must be part of the same sequence of events.⁸⁴

In *State v. Thomas*,⁸⁵ the state supreme court further limited the reach of the felony-murder rule when it held that there are lesser included offenses to first-degree murder even when first-degree murder is prosecuted and submitted to the jury solely under a theory of felony murder.⁸⁶ The court indicated that second-degree murder,

a weapon. See *id.* at 199, 337 S.E.2d at 523. Rather, the court held that mere possession of a deadly weapon involves a psychological use that is within the purview of the statute. See *id.* For a detailed discussion of the *Fields* case, see Elizabeth Kelly, Note, *State v. Fields: Felony Murder and Psychological Use of a Deadly Weapon*, 65 N.C. L. REV. 1220 (1987).

82. See, e.g., *State v. Tucker*, 347 N.C. 235, 240, 490 S.E.2d 559, 562-63 (1997); *State v. Hutchins*, 303 N.C. 321, 345, 279 S.E.2d 788, 803 (1981); *Thompson*, 280 N.C. at 212, 185 S.E.2d at 673. For example, in *Hutchins*, police officers were called to investigate a domestic disturbance at the home of the defendant. See *Hutchins*, 303 N.C. at 327, 279 S.E.2d at 793. Two officers who arrived in separate vehicles at the defendant's home were each shot and killed by the defendant. See *id.* In the police chase which followed, the defendant shot and killed a third police officer. See *id.* at 328-29, 279 S.E.2d at 794. The defendant was found guilty of two counts of first-degree murder on the basis of felony murder for the deaths of the second and third officers. See *id.* at 345, 279 S.E.2d at 803. The killing of the first officer served as the underlying felony for the felony-murder charge for the latter two deaths. See *id.* The court determined that the action beginning with the killing of the first officer and culminating with the killing of the third constituted an unbroken chain of events. See *id.*

83. See *State v. Gibbs*, 335 N.C. 1, 51-52, 436 S.E.2d 321, 350 (1993) (recognizing that there must be an unbroken chain of events); *State v. Handy*, 331 N.C. 515, 529, 419 S.E.2d 545, 552-53 (1992) (upholding felony-murder conviction where taking of property and killing were found by jury to be part of "one continuous chain of events"); *State v. Thomas*, 329 N.C. 423, 434, 407 S.E.2d 141, 150 (1991) (supporting felony-murder liability on evidence that the sexual act forming the basis for felony murder "was committed during a continuous transaction that began when the victim was alive"); *State v. Shrader*, 290 N.C. 253, 261, 225 S.E.2d 522, 528 (1976) (finding that the defendant's kidnapping and subsequent shooting of the victim constituted "an unbroken chain of events").

84. See *Handy*, 331 N.C. at 529, 419 S.E.2d at 552-53 (1992) (holding in regards to a robbery that the temporal order of the killing and the taking of the property was immaterial as long as the theft and killing were "aspects of a single transaction"). In addition, the intent to commit the felony can be formed before or after the killing. See *id.*; *State v. Faison*, 330 N.C. 347, 359, 411 S.E.2d 143, 150 (1991).

85. 325 N.C. 583, 386 S.E.2d 555 (1989).

86. See *id.* at 591, 386 S.E.2d at 559-60. According to the court, the jury must be instructed as to a lesser-included offense when (1) all the essential elements of the lesser-included offense are contained in the indictment for the greater offense and (2) there is

voluntary manslaughter, and involuntary manslaughter could each constitute lesser-included offenses if supported by the indictment and evidence.⁸⁷ While this holding did not limit the scope of the felony-murder rule, it offered the possibility that fewer persons would be convicted of felony murder by providing juries an alternative to first-degree murder liability.⁸⁸

One of the most unsettled areas of the relatively stable felony-murder rule concerns whether the rule should be used to convict a felon of murder for deaths caused by a non-felon.⁸⁹ This issue arises most often in situations where a person resisting the felony, such as the victim or a police officer, causes the death of either a felon or an innocent bystander.⁹⁰ State courts are divided over whether the felony-murder rule should be applied in this circumstance,⁹¹ but all

evidence to support a conviction of the lesser-included offense. *See id.* at 590, 386 S.E.2d at 559.

87. *See id.* at 591-94, 386 S.E.2d at 559-61. Allowing the jury to convict the defendant of some lesser offense removes the burden on the jury to decide between the extremes of either a first-degree murder conviction or absolute acquittal. *See id.* at 599, 386 S.E.2d at 564. In reaching its holding, the *Thomas* court acknowledged the United States Supreme Court's observation in *Beck v. Alabama*, 447 U.S. 625 (1980), that instructing as to lesser-included offenses benefits both the prosecution and defense. *See id.* at 644-45; *Thomas*, 325 N.C. at 599, 386 S.E.2d at 564. The rule helps the prosecution when its proof is weak on an element of the larger offense, and the defendant is benefited because the jury is offered "a less drastic alternative than the choice between conviction of the offense charged and acquittal." *Thomas*, 325 N.C. at 599, 386 S.E.2d at 564 (quoting *Beck*, 447 U.S. at 633). For a discussion of the *Thomas* case, see David George Hester, Note, *State v. Thomas: The North Carolina Supreme Court Determines That There Are Lesser Included Offenses of Felony Murder*, 68 N.C. L. REV. 1127 (1990).

88. *See Hester, supra* note 87, at 1143.

89. *See infra* note 91 and accompanying text (noting a split among the jurisdictions regarding whether felony-murder liability vests in this situation).

90. *See DRESSLER, supra* note 1, § 31.06[C][4], at 487-88 (discussing killings perpetrated by non-felons).

91. The majority of states considering this issue have found no felony-murder liability when a non-felon commits the killing. *See People v. Washington*, 402 P.2d 130, 134 (Cal. 1965) (co-felon killed by robbery victim); *Alvarez v. District Court*, 525 P.2d 1131, 1132 (Colo. 1974) (en banc) (victim mistaken for robber and shot by police); *Weick v. State*, 420 A.2d 159, 162 (Del. 1980) (co-felon killed by robbery victim); *State v. Crane*, 279 S.E.2d 695, 696 (Ga. 1981) (accomplice killed by burglarized homeowner); *State v. Garner*, 115 So. 2d 855, 864 (La. 1959) (bar patron accidentally killed bystander while defending bystander against assault); *Campbell v. State*, 444 A.2d 1034, 1042 (Md. 1982) (no felony murder where co-felon is killed by victim or police); *Commonwealth v. Balliro*, 209 N.E.2d 308, 314 (Mass. 1965) (police officer accidentally shot bystander); *State v. Branson*, 487 N.W.2d 880, 885 (Minn. 1992) (bystander killed by shot fired by someone in group adverse to the defendant); *Sheriff of Clark County v. Hicks*, 506 P.2d 766, 768 (Nev. 1973) (victim of attempted murder killed co-felon); *Jackson v. State*, 589 P.2d 1052, 1053 (N.M. 1979) (victim of robbery killed co-felon); *State v. Jones*, 859 P.2d 514, 515 (Okla. Crim. App. 1993) (express language of felony-murder statute precludes prosecution when death is caused by one other than defendant or accomplices);

courts considering the issue generally have chosen to follow either of two theories of felony-murder liability: agency theory or proximate cause theory.⁹² Under the agency theory of felony murder, either the defendant or an accomplice must cause the death of the victim if the defendant is to be liable for felony murder.⁹³ Other states have

Commonwealth v. Redline, 137 A.2d 472, 483 (Pa. 1958) (co-felon shot by police); State v. Severs, 759 S.W.2d 935, 938 (Tenn. Crim. App. 1988) (co-perpetrator of crime killed by victim); State v. Hansen, 734 P.2d 421, 427 (Utah 1986) (accomplice killed by opponent of felony); Wooden v. Commonwealth, 284 S.E.2d 811, 816 (Va. 1981) (robbery victim shot accomplice).

A minority of states have extended felony-murder liability to killings within the course of the felony not caused by the defendant or an accomplice. See State v. Lucas, 794 P.2d 1353, 1357 (Ariz. Ct. App. 1990) (shooting of co-felon by victim); Mikenas v. State, 367 So. 2d 606, 609 (Fla. 1978) (per curiam) (killing of defendant co-felon by police officer during robbery); People v. Lowery, 687 N.E.2d 973, 975-76 (Ill. 1997) (killing of a bystander by robbery victim); State v. Baker, 607 S.W.2d 153, 156 (Mo. 1980) (en banc) (killing of defendant's accomplice by intended robbery victim); State v. Martin, 573 A.2d 1359, 1373 (N.J. 1990) (stating in dicta that legislature adopted proximate cause theory); People v. Hernandez, 624 N.E.2d 661, 665 (N.Y. 1993) (stating that defendants could be convicted of murder even though police officer was shot by a fellow officer); State v. Chambers, 373 N.E.2d 393, 395 (Ohio Ct. App. 1977) (finding that the legislature intended to adopt proximate cause theory of criminal liability); Miers v. State, 251 S.W.2d 404, 408 (Tex. Crim. App. 1952) (involving a victim attempting to thwart felon accidentally killing himself); State v. Oimen, 516 N.W.2d 399, 404 (Wis. 1994) (involving a victim killing the defendant's co-felon).

92. See Erwin S. Barbre, Annotation, *Criminal Liability Where Act of Killing Is Done by One Resisting Felony or Other Unlawful Act Committed by Defendant*, 56 A.L.R.3d 239, 242 (1974). See generally DRESSLER, *supra* note 1, § 31.06[C][4][b],[c], at 487-89 (examining the rationales underlying agency and proximate cause theory); LAFAYE & SCOTT, *supra* note 5, § 7.5, at 628-32 (same); David Crump & Susan Waite Crump, *In Defense of the Felony Murder Doctrine*, 8 HARV. J.L. & PUB. POL'Y 359, 383-87 (1985) (same); Simon, *supra* note 54, at 241-47 (same); Paul J. Arougheti, Note, *Imposing Homicide Liability on Gun Battle Participants for the Deaths of Innocent Bystanders*, 27 COLUM. J.L. & SOC. PROBS. 467, 489-99 (1994) (discussing the alternate theories and advocating the use of agency theory); Michael J. Roman, Comment, "Once More Unto the Breach Dear Friends, Once More": A Call to Re-Evaluate the Felony-Murder Doctrine in Wisconsin in Wake of State v. Oimen and State v. Rivera, 77 MARQ. L. REV. 785, 809-10 (1994) (same).

93. Several rationales have been extended in favor of the agency theory. First, it is argued that when a non-felon commits the killing, the felony-murder concept of constructive malice fails. See Wooden, 284 S.E.2d at 815. When a nonparticipant commits the killing, no malice can be imputed to him because he is not acting with felonious intent. See *id.* Therefore, no person in the causal chain has both the requisite mens rea and culpability for the actus reus. See *id.* Second, supporters of agency theory argue that felony-murder liability was intended to apply only to killings committed in furtherance of the felony. See Weick, 420 A.2d at 162; Campbell, 444 A.2d at 1038-39; Redline, 137 A.2d at 476; Simon, *supra* note 54, at 241-42. When a person ancillary to the crime commits the killing, the killing cannot serve as the basis of a felony-murder conviction. See Commonwealth v. Campbell, 89 Mass. 541, 544-45 (7 Allen 1863). Third, it is argued that punishing the felon for killings committed by non-participants discriminates among felons not on the basis of their own conduct, but on the fortuitous responsiveness of their victim. See Washington, 402 P.2d at 133; Campbell, 444 A.2d at

applied the felony-murder rule more broadly, choosing to follow a proximate cause theory of felony murder that holds the defendant and accomplices liable for any death that is proximately related to the commission of the felony, regardless of who actually killed the decedent.⁹⁴

The North Carolina Supreme Court considered this issue in *State v. Bonner*,⁹⁵ where a security guard of a restaurant shot and killed two of the four armed felons attempting to rob a restaurant.⁹⁶ The two robbers who survived the shoot-out were subsequently charged with and convicted of first-degree murder for the deaths of their two accomplices.⁹⁷ The Court joined the majority of states following the agency theory by holding that "the doctrine of felony murder does not extend to a killing, although growing out of the commission of the felony, if directly attributable to the act of one other than the defendant or those associated with him in the unlawful enterprise."⁹⁸

In sum, the North Carolina legislature and courts have over the past years, as other states, narrowed in certain respects the application of the felony-murder rule. This has been accomplished through proscribing the felonies that can serve as the basis of a felony-murder charge, requiring a temporal connection between the felony and the resulting death, requiring an instruction concerning lesser-included offenses, and holding that the felon or his co-felon must be responsible for the killing, have narrowed the application of the felony-murder rule in North Carolina.⁹⁹ Despite these limitations, however, around its periphery, the rule remains a viable part of the state's homicide law.¹⁰⁰ The following section examines the concept of criminal attempt in North Carolina, the second legal

1041. Because the felon has no control over the victim's response, punishing the defendant for the victim's act serves as no deterrent. See *Washington*, 402 P.2d at 133; DRESSLER, *supra* note 1, § 31.06[C][4], at 488.

94. Courts that have followed proximate cause theory have concluded that when a person engages in a felony, the likelihood of resistance is foreseeable to the extent that the person should bear responsibility for the results of acts of resistance. See *Chambers*, 373 N.E.2d at 397; *Johnson v. State*, 386 P.2d 336, 340 (Okla. Crim. App. 1963). These jurisdictions also have contended that broad application of the felony-murder rule in this instance does lead to deterrence by discouraging felons from entering upon violent crimes where it is reasonably foreseeable that death could ensue. See *United States v. Martinez*, 16 F.3d 202, 207 (7th Cir. 1994); *People v. Lord*, 532 N.E.2d 711, 719 (Ill. App. Ct. 1988).

95. 330 N.C. 536, 411 S.E.2d 598 (1992).

96. See *id.* at 537, 411 S.E.2d at 598.

97. See *id.*

98. *Id.* at 544-45, 411 S.E.2d at 603 (quoting *State v. Canola*, 374 A.2d 20, 23 (N.J. 1977) (citations omitted)).

99. See *supra* notes 77-98 and accompanying text.

100. See *State v. Richardson*, 341 N.C. 658, 666, 462 S.E.2d 492, 498 (1995).

component underlying attempted felony murder.

The existence of attempt as a distinct, substantive crime is a relatively modern development in the common law.¹⁰¹ Not until the early nineteenth century did English courts accept that a person could be punished for the mere attempt to commit a crime.¹⁰² At common law, attempt consisted of two elements, "an intent to do an act or bring about certain consequences which would in law amount to a crime . . . and . . . an act in furtherance of that intent which . . . goes beyond mere preparation."¹⁰³ Whether a person attempted to commit a felony or a misdemeanor, the crime of attempt was punished at common law as a misdemeanor.¹⁰⁴

The primary rationale for punishing attempts is not to deter the commission of completed crimes, but to subject to corrective action persons who have sufficiently manifested their dangerousness.¹⁰⁵ Even if a person's attempt does not succeed, by attempting the criminal action, the person has manifested an imminent threat to the community.¹⁰⁶ Punishment is warranted to prevent the repetition of the criminal conduct.¹⁰⁷ Such punishment also gives law enforcement

101. See LAFAVE & SCOTT, *supra* note 5, § 6.2, at 495; Ira P. Robbins, *Double Inchoate Crimes*, 26 HARV. J. ON LEGIS. 1, 9 (1989).

102. See LAFAVE & SCOTT, *supra* note 5, § 6.2, at 496-97. Before the development of attempt as a distinct crime, the primary way to punish conduct that preceded a criminal offense was through the use of assault and burglary. See *id.* Under the ancient common law, an attempt to do harm was not an offense. See *id.* at 495 n.2.

103. *Id.* at 495.

104. See DRESSLER, *supra* note 1, § 27.02, at 348; LAFAVE & SCOTT, *supra* note 5, § 6.2, at 497; PERKINS & BOYCE, *supra* note 65, § 3, at 611.

105. See MODEL PENAL CODE § 5 cmt., at 294 (1985) ("General deterrence is at most a minor function to be served in fashioning provisions of the penal law addressed to . . . inchoate crimes; that burden is discharged upon the whole by the law dealing with the substantive offenses."); DRESSLER, *supra* note 1, § 27.04[A][1], at 355-56 (discussing utilitarian and retributivist justifications for the punishment of criminal attempts); Robbins, *supra* note 101, at 12 ("The threat posed by the sanction for an attempt is unlikely to deter a person willing to risk the penalty for the object crime."). There are generally two rationales concerning the punishment of criminal attempt. See Kyle S. Brodie, *The Obviously Impossible Attempt: A Proposed Revision to the Model Penal Code*, 15 N. ILL. U. L. REV. 237, 242 (1995). The subjectivist approach focuses on the actor; punishing attempt seeks to counter the actor's ability to further commit offenses. See *id.* The objectivist approach, on the other hand, focuses on the punishment of the dangerous acts themselves. See *id.*

106. See MODEL PENAL CODE § 5 cmt., at 294 (1985) (noting that "[c]onduct designed to cause or culminate in the commission of a crime obviously yields an indication that the actor is disposed towards such activity, not alone on this occasion but on others"); DRESSLER, *supra* note 1, § 27.04[A][1], at 355; LAFAVE & SCOTT, *supra* note 5, § 6.2, at 499 (observing that "in some circumstances a person whose criminal scheme has miscarried on a particular occasion may present a greater continuing danger than the person who succeeded").

107. See DRESSLER, *supra* note 1, § 27.04[A][1], at 355; see also LAFAVE & SCOTT,

officers a legal basis to intervene and prevent the completion of crimes.¹⁰⁸ A final rationale in support of criminalizing attempt is that a person whose attempt fails may be as morally culpable as a person whose attempt succeeds.¹⁰⁹ In other words, a person should not escape punishment simply because he is a bad shot.¹¹⁰

The mental state required for the crime of attempt is a specific intent to commit a certain offense.¹¹¹ As one commentator has stated: "The word 'attempt' means to try; it implies an effort to bring about a desired result. Hence an attempt to commit any crime requires a specific intent to commit that particular offense."¹¹² When

supra note 5, § 6.2, at 499 (noting that prosecution for attempt places rehabilitative and restraint measures upon the criminal that ultimately serve to protect the public).

108. See LAFAYE & SCOTT, *supra* note 5, § 6.2, at 498-99 (noting that attempt law provides police with an opportunity to take preventative action before the defendant comes close to committing the intended crime); Robbins, *supra* note 101, at 7 (observing that punishing attempt provides the police with a means to prevent the consummation of substantive offenses).

109. See DRESSLER, *supra* note 1, § 27.04[A][2], at 355-56; LAFAYE & SCOTT, *supra* note 5, § 6.2, at 499. Professors LaFave and Scott have demonstrated this point using the example of four persons, A, B, C, and D, who all set out to murder their respective enemies. A succeeds, but the others fail: B's aim is bad, C's gun misfires, and D is intercepted by the police just as she is about to fire her gun. While A is liable for a greater offense than the other three, the other three will still be culpable of some wrong. See LAFAYE & SCOTT, *supra* note 5, § 6.2, at 499.

110. See DRESSLER, *supra* note 1, § 27.04[A][2], at 356.

111. See LAFAYE & SCOTT, *supra* note 5, § 6.2, at 500; PERKINS & BOYCE, *supra* note 65, § 6.3, at 637; CHARLES E. TORCIA, 4 WHARTON'S CRIMINAL LAW § 741, at 565 (14th ed. 1981); Robbins, *supra* note 101, at 8; Mark E. Roszkowski & Ralph Brubaker, *Attempted Monopolization: Reuniting a Doctrine Divorced from Its Criminal Law Roots and the Policy of the Sherman Act*, 73 MARQ. L. REV. 355, 391 (1990). Modern criminal law generally identifies four levels of mental culpability: purpose, knowledge, recklessness, and negligence. See Paul H. Robinson, *A Functional Analysis of Criminal Law*, 88 NW. U. L. REV. 857, 860 (1994). While the commission of the criminal act is taking place, the actor may possess any of the four levels of mens rea. See *id.* at 863. For example, during the commission of murder, the actor may be acting with (1) the desire or specific intent to cause death (purpose); (2) the practical certainty that his conduct will cause death (knowledge); (3) the awareness of a substantial risk that his conduct will cause death (recklessness); or (4) a lack of awareness at a time when he should be aware of a substantial risk that his conduct will cause death (negligence). See *id.* However, when engaging in acts of future conduct, the only state of mind that it is possible for the actor to possess is purpose. See *id.* at 864. It is not possible to commit attempt recklessly or negligently. See *id.* at 864-65. For example, when one attempts to open a door, one specifically intends (purpose) for this act to occur. While the fashion in which one goes about the opening may be reckless or negligent, the act of engaging in the attempt can occur only with purpose. This implies that if a person did not specifically intend for a certain criminal event to occur, the person cannot be convicted for the criminal attempt of the offense. See, e.g., *State v. Weaver*, 123 N.C. App. 276, 285, 473 S.E.2d 362, 368 (1996) (holding that the intent necessary to sustain a conviction for criminal attempt is specific intent).

112. Rollin M. Perkins, *Criminal Attempt and Related Problems*, 2 UCLA L. REV. 319,

a person endeavors to commit some act, the person must necessarily intend for the act to occur.¹¹³

Another commentator contends that, besides the etymological rationale supporting attempt as a specific intent offense, the intent requirement makes "penal sense" because it "is founded on the heightened dangerousness of intentional wrongdoers."¹¹⁴ A person who intends to commit an offense but fails or is caused to discontinue in the action is an on-going danger to the community because the person is likely to try to commit the crime again.¹¹⁵ It therefore makes sense to punish such persons who intend to commit crimes and who act in furtherance of their intent.¹¹⁶ On the other hand, persons who act recklessly or negligently may not be an on-going threat.¹¹⁷ For example, a person who drives recklessly could be convicted of voluntary manslaughter if the person's driving causes an accident.¹¹⁸ But the incident of driving dangerously, in and of itself, is not a sufficient basis to convict the person of attempted murder.¹¹⁹ Therefore, recklessness is not sufficient to support a charge of attempt.¹²⁰

In North Carolina, the crime of attempt remains a common-law offense.¹²¹ Since at least 1891, "it has been the law of this jurisdiction that '[u]pon the trial of any indictment the prisoner may be convicted of the crime charged therein . . . or of an attempt to commit the crime so charged.'"¹²² Under North Carolina's system of structured sentencing,¹²³ an attempt to commit a felony or misdemeanor is

340 (1955); see also Robinson, *supra* note 111, at 864 (stating that "[m]ost prominently, attempt liability requires that the actor must intend, must have the 'purpose,' to engage in the conduct constituting the offense" (citing MODEL PENAL CODE § 5.01(1)(c))).

113. See PERKINS & BOYCE, *supra* note 65, § 6.3, at 637 n.42. The Model Penal Code commentary states that for criminal attempt "the general principle is . . . that the actor must affirmatively desire to engage in the conduct or to cause the result that will constitute the principal offense." MODEL PENAL CODE § 5.01 cmt., at 301 (1985).

114. DRESSLER, *supra* note 1, § 27.05[B][2], at 359.

115. See *id.* at 359-60.

116. See *id.*

117. See *id.*

118. See *id.*

119. See *id.*

120. See *id.*

121. See NORTH CAROLINA CRIMES: A GUIDEBOOK ON THE ELEMENTS OF CRIME 29 (Thomas H. Thornburg ed., 4th ed. 1995). Although North Carolina has not codified a definition of attempt, most states have made criminal attempt part of their statutory scheme. See Robbins, *supra* note 101, at 10.

122. State v. Collins, 334 N.C. 54, 59, 431 S.E.2d 188, 191 (1993) (quoting N.C. GEN. STAT. § 15-170 (1983)).

123. Passed in North Carolina in 1993, see Act of July 24, 1993, ch. 53, 1993 N.C. Sess. Laws 2298 (codified at N.C. GEN. STAT. §§ 15A-1340.10 to -1340.23 (1997)), structured

punishable under the next lower classification as the offense attempted, unless the statute specifically states a different classification.¹²⁴

Criminal attempt in North Carolina consists of three elements: (1) the intent to commit the substantive offense and (2) an overt act done for that purpose which goes beyond mere preparation, (3) but falls short of the completed offense.¹²⁵ These elements are demonstrated in the context of attempted murder in *State v. Collins*,¹²⁶ in which the defendant was convicted of first-degree murder for shooting the victim in the chest with a rifle.¹²⁷ The victim did not die until a month following the shooting, but evidence suggested that the victim's death resulted from causes unrelated to the shooting.¹²⁸ The supreme court held that the trial court had erred in not offering the jury an instruction concerning attempted murder.¹²⁹ Because substantial evidence existed in support of each element of attempted murder—the defendant intended to kill the victim, he shot the victim in the chest for that purpose, and the actions of the defendant fell short of the completed offense of

sentencing mandates the sentences that judges can issue according to the seriousness of the crime and the defendant's past criminal record. See Ronald F. Wright & Susan A. Ellis, *A Progress Report on the North Carolina Sentencing and Policy Advisory Committee*, 28 WAKE FOREST L. REV. 421, 436-37 (1993). The system is intended to promote consistency and predictability in sentencing. See *id.* at 437.

124. See N.C. GEN. STAT. § 14-2.5 (Supp. 1997). For example, an attempt to commit a Class C felony would be punishable as a Class D felony. See *id.* For a few offenses, the defining statute provides that an attempt is to be punished as if the offense had been actually committed. For example, under § 14-87, armed robbery is classified as a Class D felony and attempted robbery is also classified as a Class D felony. See N.C. GEN. STAT. § 14-87 (1993). Before being superseded by structured sentencing, absent a statutory direction to the contrary, an attempt to commit a felony constituted a misdemeanor. See *State v. Hageman*, 307 N.C. 1, 8, 296 S.E.2d 433, 438 (1982). However, certain misdemeanors could be punishable as Class H felonies if the misdemeanor was "infamous, done in secrecy and malice, or with deceit and intent to defraud." N.C. GEN. STAT. § 14-3(b) (1997).

125. See *State v. Miller*, 344 N.C. 658, 667, 477 S.E.2d 915, 921 (1996). Criminal attempt requires specific intent. See *Lea*, 126 N.C. App. at 449, 485 S.E.2d at 880. The requirement of an "overt act" necessitates that

"the act must reach far enough towards the accomplishment of the desired result to amount to the commencement of the consummation. It must not be merely preparatory [W]hile it need not be the last proximate act . . . it must approach sufficiently near to it to stand either as the first or some subsequent step in a direct movement towards the commission of the offense."

State v. Price, 280 N.C. 154, 158, 184 S.E.2d 866, 869 (1971) (quoting *State v. Parker*, 224 N.C. 524, 525-26, 31 S.E.2d 531, 531-32 (1944)).

126. 334 N.C. 54, 431 S.E.2d 188 (1993).

127. See *id.* at 56-57, 431 S.E.2d at 190.

128. See *id.* at 57, 431 S.E.2d at 190.

129. See *id.* at 60, 431 S.E.2d at 192.

murder—the defendant was entitled to a charge concerning the lesser-included offense.¹³⁰

North Carolina and other state courts¹³¹ have emphasized that a showing of specific intent to commit the substantive offense is necessary in order to sustain a criminal attempt conviction.¹³² In *Collins*, the court alluded to this requirement by noting that the defendant shot the victim *for the purpose* of murdering the victim.¹³³ Although a North Carolina court has never directly addressed the question, presumably if the defendant shot the victim accidentally or through reckless behavior, the defendant could not be convicted of attempted murder because the defendant would not have had the specific intent to murder the victim.¹³⁴ Because an actor must specifically intend to bring about the death of his victim in order to commit attempted murder, an issue arises as to whether the commission of a felony alone can provide the basis for an attempted murder conviction. The next section of this Note considers this issue.

At first glance, attempted felony murder appears to be an acceptable union of two criminal law concepts: attempt and felony

130. See *id.* at 61, 431 S.E.2d at 192.

131. See, e.g., *People v. Patterson*, 257 Cal. Rptr. 407, 409 (Ct. App. 1989) (holding that a defendant cannot be convicted of attempted murder absent a finding of specific intent to kill); *People v. Burress*, 505 N.Y.S.2d 272, 273 (App. Div. 1986) (“[T]here can be no attempt to commit a crime that does not involve a specific intent.”); *State v. Kimbrough*, 924 S.W.2d 888, 890 (Tenn. 1996) (“The nature of an attempt . . . is that it requires a specific intent.”).

132. See, e.g., *State v. Weaver*, 123 N.C. App. 276, 285, 473 S.E.2d 362, 368 (1996); *State v. Brayboy*, 105 N.C. App. 370, 374, 413 S.E.2d 590, 593 (1992); *State v. Rushing*, 61 N.C. App. 62, 67, 300 S.E.2d 445, 449 (1983).

133. See *Collins*, 334 N.C. at 60, 431 S.E.2d at 192.

134. See *Robinson*, *supra* note 111, at 890-91 (criticizing the elevation of culpability required for attempt over that necessary to commit the substantive offense). *Robinson* offers the following example:

Assume an actor places a bomb in a Selective Service office knowing it will kill the persons therein. He does not want to kill such persons—his object is only to destroy the building—but he knows that when he pushes the detonator the people are practically certain to be killed. If he is caught by police after the explosion causes deaths, he will be liable for murder. If he is caught just before he presses the detonator, he will not be liable for attempted murder. He will not be liable even though the prosecution can prove beyond a reasonable doubt that it was his purpose to engage in the conduct constituting the offense, pushing the detonator, and can prove that he has the culpability required for murder, knowledge that his conduct is practically certain to cause deaths. He may be liable for other offenses but will escape liability for attempted murder because it is not his conscious object to cause death.

Id. at 891; see also *State v. Robinson*, 883 P.2d 764, 768 (Kan. 1994) (“One cannot intend to commit an accidental, negligent, or reckless homicide. The specific intent to commit a crime is a more culpable mental state than negligence or recklessness.”).

murder.¹³⁵ A defendant is guilty of felony murder if she participates in a felony during which a death occurs.¹³⁶ If the defendant purposely carries out an overt act that falls short of the completed criminal offense, she is guilty of criminal attempt.¹³⁷ Thus, if during the course of a felony, an overt act occurs that could have caused death, the defendant is guilty of attempted felony murder. Because the event that could have caused death occurred during the commission of a felony, the felony-murder rule makes the person responsible for attempted murder.¹³⁸ However, as the court in *Lea* demonstrated, the combination of attempt and felony murder does not produce a separate crime but, rather, no crime at all.¹³⁹

The analysis of the attempted felony-murder issue in *Lea* is simple and straightforward. The court first laid out the elements of felony murder and the elements of attempted murder.¹⁴⁰ The court noted that the crime of felony murder does not require that the defendant intended to kill.¹⁴¹ Rather, the State must show only that the defendant intended to commit the underlying felony.¹⁴² While a felony-murder conviction does not require proof of intent to murder, the court emphasized that criminal attempt does require "proof that the defendant *specifically intended* to commit the crime that he is charged with attempting."¹⁴³ The court noted that "[a]lthough a murder may be committed without an intent to kill, attempt to commit murder requires a specific intent to kill."¹⁴⁴ Hence, the crime of attempted felony murder is logically impossible in that it

135. In instructing the jury as to attempted felony murder, the court in *State v. Darby*, 491 A.2d 733 (N.J. Super. Ct. App. Div. 1984), said that the trial judge "read to the jury the statutory definitions of criminal attempt and felony murder and then undertook to weave those definitions together." *Id.* at 735 (citations omitted).

136. See N.C. GEN. STAT. § 14-17 (Supp. 1997).

137. See *State v. Miller*, 344 N.C. 658, 677, 477 S.E.2d 915, 921 (1996).

138. The theoretical issue here concerns whether felony murder's constructive malice device could vitiate the criminal mental element of attempt as it vitiated the mental element of murder. See J. Rafael Rodriguez, *Attempted Felony Murder—An Improbable Legal Fiction Meets Its Demise*, FLA. B.J., Oct. 1995, at 63, 64.

139. See *Lea*, 126 N.C. App. at 449-50, 485 S.E.2d at 879-80. The defendant could still be charged with attempted murder, however. See *id.* at 453, 485 S.E.2d at 882.

140. See *id.* at 449-50, 485 S.E.2d at 879-80. In *State v. Collins*, 334 N.C. 54, 431 S.E.2d 188 (1993), the North Carolina Supreme Court held that attempted first-degree murder is a crime in North Carolina. See *id.* at 59, 431 S.E.2d 191. For the purposes of punishment, attempted first-degree murder is classified as a Class B2 felony. See N.C. GEN. STAT. § 14-2.5 (Supp. 1997).

141. See *Lea*, 126 N.C. App. at 449, 485 S.E.2d at 879.

142. See *id.*

143. *Id.* (citing *State v. McAlister*, 59 N.C. App. 58, 60, 295 S.E.2d 501, 502 (1982)).

144. *Id.* at 449-50, 485 S.E.2d at 880 (quoting *Braxton v. United States*, 500 U.S. 344, 351 (1991)).

would require the defendant to intend an unintentional result.¹⁴⁵

The court of appeals in *Lea* used reasoning previously relied on by thirteen other states which similarly have held that attempted felony murder is not a crime.¹⁴⁶ Some states have intimated that attempted felony murder extends the felony-murder doctrine beyond its intended goals.¹⁴⁷ These states contend that felony murder was intended to be used only when death occurs.¹⁴⁸ If no death occurs, the doctrine has no applicability.¹⁴⁹ For example, in *State v. Robinson*,¹⁵⁰ the Kansas Supreme Court overturned a conviction for attempted felony murder when a robbery victim was shot several times at close range by the defendant but did not die.¹⁵¹ The court noted that the legislative rationale behind the state's felony-murder rule was to deter foreseeable deaths that occur during an inherently

145. See *id.* If the defendant did, in fact, intend to kill the victim, but the crime did not come to fruition, the defendant could be charged with attempted murder. See *Collins*, 334 N.C. at 59, 431 S.E.2d at 191 (1993). On the other hand, if the defendant did not intend to kill the victim, there can be no charge of attempt. See *id.*

146. Of the 19 states that have considered this issue, 18 states, including North Carolina, have held that attempted felony murder is not a crime. See *People v. Patterson*, 257 Cal. Rptr. 407, 409 (Ct. App. 1989); *People v. Meyer*, 952 P.2d 774, 775-76 (Colo. Ct. App. 1998); *State v. Gray*, 654 So. 2d 552, 552-53 (Fla. 1995); *State v. Pratt*, 873 P.2d 800, 812 (Idaho 1993); *People v. Viser*, 343 N.E.2d 903, 910 (Ill. 1975); *Head v. State*, 443 N.E.2d 44, 50 (Ind. 1982); *State v. Robinson*, 883 P.2d 764, 767 (Kan. 1994); *State v. Allen*, 571 So.2d 758, 761 (La. Ct. App. 1990) (per curiam); *Bruce v. State*, 566 A.2d 103, 106 (Md. 1989); *State v. Darby*, 491 A.2d 733, 736 (N.J. Super. Ct. App. Div. 1984); *State v. Price*, 726 P.2d 857, 860 (N.M. Ct. App. 1986); *People v. Burress*, 505 N.Y.S.2d 272, 273 (App. Div. 1986); *Commonwealth v. Griffin*, 456 A.2d 171, 178 (Pa. Super. Ct. 1983); *State v. Kimbrough*, 924 S.W.2d 888, 892 (Tenn. 1996); *State v. Bell*, 785 P.2d 390, 393 (Utah 1989); *Goodson v. Commonwealth*, 467 S.E.2d 848, 856 (Va. Ct. App. 1998); *State v. Briggs*, 579 N.W.2d 783, 786 (Wis. Ct. App. 1998). *Lea* cited 15 cases in support of its holding. See *Lea*, 126 N.C. App. at 450, 485 S.E.2d at 880. Actually, only 13 of these 15 states had at the time of *Lea* directly addressed the felony murder issue. However, the two other states, in slightly different circumstances, employed similar logic to dismiss convictions. See *State v. Dahlstrom*, 150 N.W.2d 53, 58 (Minn. 1967) (holding that the legislature did not intend to create a crime of attempted third-degree murder because third-degree murder involved depraved-mind murder and therefore no element of intent); *State v. Carter*, 170 N.W.2d 681, 682-83 (Wis. 1969) (holding that there was no crime of attempted second-degree murder because second-degree murder had no element of intent).

147. See, e.g., *Robinson*, 883 P.2d at 767 ("We have declined to extend the [felony-murder] doctrine beyond its legislative rationale of deterring foreseeable deaths that occur during an inherently dangerous felony."); *Price*, 726 P.2d at 860 ("To acknowledge the crime would entail broadening the scope of the felony-murder doctrine when the trend has been to narrow or to abolish the applicability of the doctrine.").

148. See *Price*, 726 P.2d at 859; *Head*, 443 N.E.2d at 51.

149. See *Price*, 726 P.2d at 859.

150. 883 P.2d 764 (Kan. 1994).

151. See *id.* at 766.

dangerous felony.¹⁵² Invoking the felony-murder rule in situations where a homicide did not take place extended the rule past its intended aims.¹⁵³ The court held that felony-murder liability could not be triggered without a death.¹⁵⁴

Other courts have refused to expand felony murder's use of constructive malice to vitiate the need to prove specific intent in an attempt conviction.¹⁵⁵ In *Head v. State*,¹⁵⁶ the defendant was convicted of attempted felony murder when he seriously wounded a convenience store clerk during the course of a robbery.¹⁵⁷ The Supreme Court of Indiana observed that extrapolating the constructive malice theory onto situations when only serious bodily injury occurred unjustifiably extended the doctrine and provided excessive freedom for the prosecution to exploit the rule.¹⁵⁸ The court stated that "[i]t does not follow that in purely arbitrary circumstances, the legislature intended to create a discretionary vehicle whereby the state could seek a conviction for attempted murder without an obligation to prove the intent to kill."¹⁵⁹

Indeed, another problem in recognizing attempted felony murder as a crime stems from the inherent difficulty in determining a rational basis for when the prosecution should be able to charge the defendant with such a crime.¹⁶⁰ For example, how serious must the victim's injury be, or how close to killing the victim must the defendant come, before the prosecution can dispense with having to prove intent?¹⁶¹ While wounding a victim during the course of a

152. *See id.* at 767.

153. *See id.*

154. *See id.*; *see also* *People v. Patterson*, 257 Cal. Rptr. 407, 409 (Ct. App. 1989) (holding that if a killing did not occur, the felony-murder rule did not apply and therefore was inapplicable to attempted murder); *Head v. State*, 443 N.E.2d 44, 50 (Ind. 1982) (stating that "the felony-murder rule cannot be applied unless the death of another occurred by virtue of the commission or attempted commission of the underlying felony").

155. *See* *People v. Collie*, 634 P.2d 534, 545 (Cal. 1981); *People v. Harris*, 377 N.E.2d 28, 31 (Ill. 1978); *State v. Price*, 726 P.2d 857, 859 (N.M. Ct. App. 1986).

156. 443 N.E.2d 44 (Ind. 1982).

157. *See id.* at 47.

158. *See id.* at 50. The court noted that extending the doctrine "would create a rule unrelated to the mental state or moral culpability of any particular defendant." *Id.* at 50-51; *see also* *State v. Amlotte*, 456 So. 2d 448, 451 (Fla. 1984) (Overton, J., dissenting) ("Further extension of the felony murder doctrine so as to make intent irrelevant for purposes of the attempt crime is illogical and without basis in law."), *overruled by* *State v. Gray*, 654 So. 2d 552 (Fla. 1995).

159. *Head*, 443 N.E.2d at 51.

160. *See* DRESSLER, *supra* note 1, § 27.05[B][3], at 360.

161. *See id.* at 360-61.

felony would probably trigger the attempted felony-murder offense, would simply frightening the victim be sufficient?¹⁶² Requiring that a death occur before the felony-murder doctrine can be used at least maintains a bright-line limit on the unwieldy doctrine.¹⁶³

Some states have analogized the nonrecognition of attempted felony murder to the nonrecognition of attempt versions of crimes requiring a mens rea of negligence or recklessness.¹⁶⁴ For example, in *State v. Kimbrough*,¹⁶⁵ the Tennessee Supreme Court compared the logical inconsistency in attempted felony murder to a similar inconsistency in attempted involuntary manslaughter.¹⁶⁶ The *Kimbrough* court cited a previous decision in which a Tennessee court had refused to recognize attempted involuntary manslaughter because such a crime “‘would require proof that one intended a result that accidentally occurred.’”¹⁶⁷ At least one pair of commentators has argued that a defendant cannot be convicted of an attempt to commit a crime that consists of recklessly or negligently causing a certain result because, if there were an intent to bring about a certain result, the attempt would involve an intentional act.¹⁶⁸

Although attempted felony murder fails in theory, policy in support of the doctrine's application has, at times, been known to trump theory.¹⁶⁹ However, it has been argued by one court that

162. See Rodriguez, *supra* note 138, at 65.

163. See, e.g., *State v. Robinson*, 883 P.2d 764, 767 (limiting application of felony-murder rule to only those cases where an actual homicide occurs).

164. See LAFAVE & SCOTT, *supra* note 5, § 6.2, at 500-01. LaFave and Scott offer a helpful example regarding the different intents under which one may be convicted of murder, but not convicted of attempt:

Some crimes, such as murder, are defined in terms of acts causing a particular result plus some mental state which need not be an intent to bring about that result. Thus, if A, B, C, and D have each taken the life of another, A acting with the intent to kill, B with an intent to do serious bodily injury, C with a reckless disregard of human life, and D in the course of a dangerous felony, all three [sic] are guilty of murder because the crime of murder is defined in such a way that any one of these mental states will suffice. However, if the victims do not die from their injuries, then only A is guilty of attempted murder; on a charge of attempted murder it is not sufficient to show that the defendant intended to do serious bodily harm, that he acted in reckless disregard for human life, or that he was committing a dangerous felony. Again, this is because intent is needed for the crime of attempt, so that attempted murder requires an intent to bring about that result described by the crime of murder (i.e., the death of another).

Id. (footnotes omitted).

165. 924 S.W.2d 888 (Tenn. 1996).

166. See *id.* at 891.

167. *Id.* (quoting *Hull v. State*, 553 S.W.2d 90, 94 (Tenn. Crim. App. 1977)).

168. See LAFAVE & SCOTT, *supra* note 5, § 6.2, at 502.

169. See Tomkovicz, *supra* note 3, at 1460-65 (discussing popular political support as a rationale for the endurance of the felony-murder rule).

policy considerations are insufficient to extend the felony-murder doctrine to the attempted murder context.¹⁷⁰ Because the State seeks to deter individuals from engaging in dangerous felonies where it is foreseeable that death could occur, the State allows the prosecution to disregard the element of intent in a felony-murder conviction.¹⁷¹ When death does not occur, the detriment placed on defendants by the felony-murder rule outweighs and overcomes the benefit the State receives in being able to ignore intent.¹⁷²

A final rationale for not recognizing attempted felony murder articulated by some states, including the North Carolina court in *Lea*, is that attempted felony murder is an unnecessary crime in a thorough criminal statutory scheme.¹⁷³ The *Lea* court noted that "each aspect of the misconduct allegedly engaged in by defendant Colon here is punishable under at least one other criminal statute duly enacted by our General Assembly."¹⁷⁴ If a defendant actually intends to kill the victim, the defendant can be charged with attempted first-degree murder.¹⁷⁵ Otherwise, if a defendant wounds and seriously injures the victim but does not act with a specific intent to kill, a defendant can be convicted of assault with a deadly weapon inflicting serious injury.¹⁷⁶ Punishing criminals under the current scheme promotes a closer connection between moral culpability and criminal conduct in that the defendant is punished according to his actual mens rea as opposed to a mens rea imputed to him by the

170. See *Head v. State*, 443 N.E.2d 44, 50 (Ind. 1982).

171. See *id.* at 48.

172. See *id.* at 50.

173. See *Lea*, 126 N.C. App. at 450, 485 S.E.2d at 880; see also *Head*, 443 N.E.2d at 50-51 (observing that the statutory code allowed the punishment to be increased for felonies during which bodily injury occurred); *State v. Price*, 726 P.2d 857, 860 (N.M. Ct. App. 1986) (noting that the recognition of attempted felony murder as a crime was not necessary because the defendant could have been charged with more appropriate crimes); *State v. Kimbrough*, 924 S.W.2d 888, 891 (Tenn. 1996) (observing that the legislature had already provided for instances in which bodily injury occurred during the commission of a crime); Barbara Kritchevsky, *Criminal Attempt-Murder Two: The Law in Tennessee After State v. Kimbrough*, 28 U. MEM. L. REV. 3, 50 (1997) (noting that the elimination of attempted felony murder as a crime involves little practical consequence since the prosecutor can still charge the defendant with attempted murder if the defendant intended to kill).

174. *Lea*, 126 N.C. App. at 450, 485 S.E.2d at 880.

175. See *State v. Collins*, 334 N.C. 54, 60, 431 S.E.2d 188, 191 (1993). For the purposes of punishment, North Carolina classifies attempted first-degree murder as a Class B2 felony. See N.C. GEN. STAT. § 14-2.5 (Supp. 1997). If the defendant used a weapon in commission of the crime and caused serious injury, the defendant could be charged with assault with a deadly weapon with intent to kill inflicting serious injury. See *id.* § 14-32 (1993). This crime is punished as a Class C felony. See *id.* § 14-2.5.

176. See N.C. GEN. STAT. § 14-32.

felony-murder doctrine.

Despite these several arguments made against the recognition of attempted felony murder, until a few years ago, two states, Arkansas and Florida, continued to explicitly recognize the crime.¹⁷⁷ However, in 1995, in *State v. Gray*,¹⁷⁸ the Florida Supreme Court overruled *Amlotte v. State*,¹⁷⁹ which, eleven years earlier, had recognized attempted felony murder as a crime.¹⁸⁰ Providing little rationale for its decision, the court in *Amlotte* specified the elements of attempted felony murder as: (1) the perpetration of or the attempt to perpetrate an enumerated felony, and (2) an intentional overt act which could, but does not, cause the death of another.¹⁸¹ The court held that if the attempt occurred during the commission of a felony, the law would presume the existence of the specific intent required to prove attempt.¹⁸² In overruling *Amlotte*, the Florida court in *Gray* echoed the reasoning of the Kansas court in *Head v. State* that the felony-murder rationale should not be used to presume an intent to murder when there is no completed act of homicide.¹⁸³ The *Gray* court decided to recede from *Amlotte* because "[t]he legal fictions

177. See *White v. State*, 585 S.W.2d 952, 954 (Ark. 1979); *State v. Amlotte*, 456 So. 2d 448, 450 (Fla. 1984) (Overton, J., dissenting) (regretting that "[t]he majority has arrived at an indefensible conclusion which gives Florida the dubious distinction of being one of the very few states to recognize such a crime"), overruled by *State v. Gray*, 654 So. 2d 552 (Fla. 1995). A few other states do recognize a crime referred to as "attempted felony murder." See *State v. S.P.*, 608 So. 2d 232, 235-36 (La. Ct. App. 1992); *State v. Holley*, Nos. CA 8195, 8224, 1983 WL 2554, at *5 (Ohio Ct. App. Nov. 28, 1983). However, these states have felony-murder statutes that require the killing be committed during the course of the felony and with specific intent. See e.g., LA. REV. STAT. ANN. § 14:30 (West 1997) (requiring in its first-degree murder statute that the defendant must have the "specific intent to kill . . . and [be] engaged in the perpetration of [these named felonies]"). Therefore, the defendant cannot be convicted of attempted felony murder without proof that the defendant specifically intended to kill the victim. See *Holley*, 1983 WL 2554, at *5.

178. 654 So. 2d 552 (Fla. 1995).

179. 456 So. 2d 448 (Fla. 1984), overruled by *State v. Gray*, 654 So. 2d 552 (Fla. 1995).

180. See *Gray*, 654 So. 2d at 554; *Amlotte*, 456 So. 2d at 449.

181. See *Amlotte*, 456 So. 2d at 449.

182. See *id.* at 449-50.

183. See *Gray*, 654 So. 2d at 554; *State v. Head*, 443 N.E.2d 44, 50-51 (Ind. 1982) (refusing to presume intent to murder in the absence of a homicide); see also *supra* notes 156-59 and accompanying text (discussing *Head*). In *Gray*, the actual issue concerned not whether the crime of attempted felony murder existed, but what constituted an "overt act" sufficient to warrant attempted felony murder. See *Gray*, 654 So. 2d at 552. During a chase with police, the defendant's car ran a red light and hit another car, seriously injuring the driver. See *id.* at 553. The precise issue on appeal concerned whether the defendant's running of the red light constituted a sufficiently "overt act" to form the basis of an attempted felony murder charge. See *id.* at 552. The court bypassed ruling on the overt-act question in favor of reversing the holding in *Amlotte* altogether. See *id.* at 552-53.

required to support the intent for felony murder are simply too great.¹⁸⁴

Thus, Arkansas is the only state that currently recognizes attempted felony murder. In *White v. State*,¹⁸⁵ the state court established its position by sustaining the defendant's conviction of attempted felony murder committed during the course of burglary and rape.¹⁸⁶ After breaking, in which the court sustained the defendant's conviction of attempted felony murder committed during the course of burglary and rape.¹⁸⁷ In *White*, after breaking into the home of the victim's family, the defendant continuously threatened to kill members of the family.¹⁸⁸ The defendant pointed his gun at different family members and fired two shots that barely missed the father, but no one was injured during the attack.¹⁸⁹ Although the facts of the case suggest that the State could have proved attempted murder under the traditional theory of criminal attempt,¹⁹⁰ the conviction rested on the basis of felony murder.¹⁹¹ Revealing little rationale for its decision, the court simply concluded that the jury could reasonably find that the elements required to prove intent had been satisfied.¹⁹² The court determined that the shots fired by the defendant constituted a " 'substantial step in a course of conduct intended to culminate in the commission of [the] offense' of murder 'in the course of and in the furtherance of the' commission of the felonies of burglary and rape 'under circumstances manifesting extreme indifference to the value of human life.' " ¹⁹³

184. *Gray*, 654 So. 2d at 552-53. One commentator has noted that "abrogation of the crime of attempted felony murder will greatly lessen the potential harshness of the felony murder doctrine itself." Mark M. Dobson, *Criminal Law: 1995 Survey of Florida Law*, 20 NOVA L. REV. 67, 96 (1995).

185. 585 S.W.2d 952 (Ark. 1979).

186. *See id.* at 954.

187. *See id.*

188. *See id.*

189. *See id.*

190. The Arkansas statute allowed a person to be convicted of criminal attempt if the person "purposely engage[d] in conduct that constitute[d] a substantial step in course of conduct intended to culminate in the commission of an offense." ARK. CODE ANN. § 41-701(1)(b) (Michie Repl. 1977).

191. *See White*, 585 S.W.2d at 953.

192. *See id.* at 954.

193. *Id.* (quoting ARK. CODE ANN. § 41-701, 41-1502(1)(a) (Michie Repl. 1977)). The *White* decision has been cited seldomly in subsequent Arkansas cases. In one subsequent case, *Swaite v. State*, 612 S.W.2d 307 (Ark. 1981), the court acknowledged that the crime of attempted capital murder consisted of the combined usage of the attempt statute and the capital murder statute. *See id.* at 310. The court stated that in the circumstance of attempted felony murder, the intent to kill is immaterial. *See id.*

As supported by the vast majority of states that have refused to recognize attempted felony murder as a crime,¹⁹⁴ the North Carolina Court of Appeals correctly decided *State v. Lea*. As a matter of theory, attempted felony murder is a legal contradiction.¹⁹⁵ As a matter of policy, the extension of the felony-murder rule is unnecessary in light of preexisting statutory provisions capable of punishing felons according to their individual culpabilities.¹⁹⁶ The court's ruling demonstrates once again its desire to maintain felony murder within controlled bounds.¹⁹⁷

BRIAN D. ROARK

194. See *supra* note 146 (citing cases).

195. See *State v. Kimbrough*, 924 S.W.2d 888, 890 (Tenn. 1986) (describing charge of attempted felony murder as "inherently inconsistent"); *supra* notes 135-45 and accompanying text.

196. See *supra* note 173 and accompanying text.

197. See *supra* notes 77-98 and accompanying text (discussing limitations placed on the felony-murder rule by the North Carolina courts).

State v. Adams: When Mommy Talks, You Better Pay Attention . . . and, if No Indictment Has Been Issued, You Can Use Her Uncounseled Statements Against Her in Court

Initially, the *Massiah*¹ exclusionary rule seems fairly simple to explain: the Sixth Amendment of the Constitution gives a person accused of a crime the right to counsel at trial.² The Supreme Court has specified that this right is not limited to the trial context.³ So, when a person faces criminal charges, incriminating statements that she makes to the police without her lawyer present cannot be used against her in court.⁴ In its most elementary form, this is the *Massiah* rule.

The rule is not, of course, so simple. The major requirements should not pose too much confusion because they are fairly objective. The person must have been accused of a crime to invoke the Sixth Amendment right to counsel.⁵ Additionally, formal prosecutorial proceedings must have commenced against the accused;⁶ that is, an indictment or formal charges must have been issued, or a preliminary hearing or arraignment must have taken place.⁷ Furthermore, the court may extend the right to counsel to cover statements regarding not only the indicted offense, but also offenses for which formal proceedings have not yet begun, but which are so "closely related" to the indicted offense as to be factually and legally indistinct.⁸

The situation becomes somewhat more complex for the parent suspected of abusing a child. The parent who is accused of child abuse or neglect will likely stand before the court in two separate proceedings. In one proceeding, a civil abuse or neglect action

1. See *Massiah v. United States*, 377 U.S. 201 (1964).

2. See U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."). For a lively discussion of the purpose and meaning of the Sixth Amendment right to counsel, see Akhil Reed Amar, *Sixth Amendment First Principles*, 84 GEO. L.J. 641, 705-11 (1996). See generally CHARLES E. TORCIA, 3 WHARTON'S CRIMINAL PROCEDURE, §§ 364-74, at 239-44 (13th ed. 1991 & West Supp. 1997) (discussing the right to counsel).

3. See *Powell v. Alabama*, 287 U.S. 45, 57 (1932).

4. See *Massiah*, 377 U.S. at 205-06.

5. See U.S. CONST. amend. VI.

6. See *Kirby v. Illinois*, 406 U.S. 682, 689-90 (1972).

7. See *id.*

8. See *United States v. Arnold*, 106 F.3d 37, 42 (3d Cir. 1997); see also *infra* notes 127-81 (discussing the development of the "closely related" exception in the federal and state courts).

brought by social services agents, the court will determine whether the child should remain with the parent, perhaps under the supervision of caseworkers, or if the child should be removed from the home and placed in foster care.⁹ Separately, the parent may also face criminal prosecution for child abuse and possibly imprisonment.¹⁰ Of course, the gravity of the parent's situation increases immensely when the district attorney commences a criminal abuse proceeding, thus triggering the procedural safeguards provided by the Constitution.¹¹ These constitutional protections do not apply equally in the *civil* abuse context, however.¹² As one commentator has stated succinctly, the Sixth Amendment right to counsel "has no place in civil litigation" of any variety.¹³

A number of states have recognized, however, that the interests of the parent during the civil abuse proceeding also may require special protection.¹⁴ These jurisdictions have prescribed by statute that a parent against whom a petition of abuse¹⁵ has been filed is

9. See Douglas J. Besharov, *Child Abuse: Arrest and Prosecution Decision-Making*, 24 AM. CRIM. L. REV. 315, 316-17 (1987); see also *id.* at 319-21 (discussing the inadequacies of the protective services system).

10. See *id.* at 321 ("We might well decide that protecting children from serious physical harm is worth the risk [of separating family members through foster care]. But foster care is often used when the child could be adequately protected by jailing the offending parent."); see also *id.* at 333-36 (discussing factors that influence a local prosecutor's decision to begin a criminal action).

11. The safeguards, rooted in the Fifth and Sixth Amendments, include the right to remain silent and limitations on the admissibility of confessions, the requirement of the presence of counsel at post-formal charge identification lineups, and the right to counsel during questioning and at trial. See JOSEPH G. COOK, 2 CONSTITUTIONAL RIGHTS OF THE ACCUSED §§ 6:1-6:40, at 6-4 to 6-268 (concerning confessions); § 7:2, at 7-9 to 7-24 (concerning post-charge lineups); and §§ 8:1-8:23, at 8-3 to -160 (concerning right to counsel) (3d ed. 1996).

12. For example, the Fifth Amendment privilege against self-incrimination will not absolve a mother from presenting her allegedly abused child to a juvenile court when ordered to do so. See *Baltimore City Dep't of Soc. Servs. v. Bouknight*, 493 U.S. 549, 559-62 (1990).

13. Robert P. Mosteller, *Child Abuse Reporting Laws and Attorney-Client Confidences: The Reality and the Specter of Lawyer as Informant*, 42 DUKE L.J. 203, 271 (1992); see also *State v. Adams*, 345 N.C. 745, 748, 483 S.E.2d 156, 157 (1997) ("By its terms, the Sixth Amendment applies only to criminal cases.").

14. The Supreme Court expounded on this interest in *Santosky v. Kramer*, 455 U.S. 745 (1982):

The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life.

Id. at 753-54.

15. In North Carolina, an abuse, neglect, or dependency action commences upon the

entitled to the assistance of counsel.¹⁶ Moreover, once the prosecutor commences a criminal action, Sixth Amendment rights will attach, including the prophylactic exclusionary provision prohibiting the admission of statements made in contravention of the right to counsel.¹⁷

In *State v. Adams*,¹⁸ the North Carolina Supreme Court examined a situation marking the intersection of these civil and criminal rights.¹⁹ The court held that once social services caseworkers have filed a civil abuse petition, but before the district attorney has obtained an indictment for criminal abuse, a parent may not rely on the Sixth Amendment right to counsel to suppress inculpatory statements made to police officers during their investigation.²⁰

This Note discusses the factual background and reasoning of the North Carolina Supreme Court in *Adams*.²¹ It then surveys the Sixth Amendment jurisprudence of the United States Supreme Court and the development of the "closely related" exception in the lower federal courts and state courts.²² Finally, the Note undertakes a critical examination of the North Carolina Supreme Court's rejection of the "closely related" exception for the parent subject to an abuse petition but not yet subject to formal criminal proceedings, evaluating the court's conclusion in light of illustrative decisions handed down by other courts.²³

Heather Gullick was born on June 28, 1992.²⁴ Six months later,

filing of a petition, the pleading in the case. See N.C. GEN. STAT. § 7A-559 (1995). The petition primarily serves two purposes: (1) it invokes the juvenile court's jurisdiction; and (2) it serves as an official statement of the facts of the case. See *In re Green*, 67 N.C. App. 501, 504, 313 S.E.2d 193, 195 (1984).

16. See, e.g., CAL. WELF. & INST. CODE § 307.4 (West Supp. 1998); CONN. GEN. STAT. ANN. § 46b-135(b) (West 1995); D.C. CODE ANN. § 16-2304(b)(1) (1997); MD. CODE ANN., CTS. & JUD. PROC. § 3-821 (1995); MICH. COMP. LAWS ANN. § 712A.4(6) (West 1996); N.J. STAT. ANN. § 9:6-8.43 (West 1993); N.C. GEN. STAT. § 7A-587 (1995); 42 PA. CONS. STAT. ANN., § 6337 (West 1982); S.C. CODE ANN. § 20-7-110(B) (Law Co-op. 1985); VA. CODE ANN. § 16.1-266(C) (Michie 1996); W. VA. CODE § 49-6-2 (1996). Idaho's provision differs in that the presiding judge decides whether the presence of counsel would be beneficial to a parent. See IDAHO CODE § 16-1618(a) (Supp. 1997).

17. See *infra* notes 69-76 and accompanying text (discussing *Massiah v. United States*, 377 U.S. 201 (1964), in which the United States Supreme Court first employed this exclusionary rule).

18. 345 N.C. 745, 483 S.E.2d 156 (1997).

19. See *id.* at 747, 483 S.E.2d at 157.

20. See *id.* at 748, 483 S.E.2d at 158.

21. See *infra* notes 24-67 and accompanying text.

22. See *infra* notes 68-189 and accompanying text.

23. See *infra* notes 190-265 and accompanying text.

24. See Affidavit of Susan Seahorn, Record at 8, *State v. Adams*, 122 N.C. App. 538, 470 S.E.2d 838 (1996) (No. 9412SC559).

the child, after being admitted to Cape Fear Valley Medical Center in Fayetteville because she was suffering from anal fissures,²⁵ was referred to Duke University Hospital for evaluation for sexual and physical abuse.²⁶ A physician determined that Heather had numerous injuries to her vaginal area as well as a broken femur and two broken ribs.²⁷ About a week later, on December 7, 1992, Linda Parlett of the Cumberland County Department of Social Services ("DSS") telephoned Detective Jo Autry of the Sex Crimes Unit of the Cumberland County Sheriff's Department, who commenced an investigation into the matter.²⁸ On December 9, 1992, DSS filed a petition of abuse and neglect in the Juvenile Section of the Cumberland County District Court.²⁹ The court appointed attorney Gerri Spates to represent Mary Clara Adams, Heather's mother, in the juvenile proceeding.³⁰

On December 22, 1992, Detective Autry contacted Mary Adams's mother, who informed the officer that her daughter had an attorney and that her attorney had instructed her not to speak with the police.³¹ Detective Autry later convinced Spates to bring Mary Adams to the Sheriff's Department for an interview and polygraph test.³² Three weeks later, Detective Autry requested another meeting. After speaking with her client, Spates told Detective Autry that Mary Adams did not want another interview.³³ Mary Adams had no further contact with her attorney until they appeared in juvenile court on March 24, 1993.³⁴

Detective Autry then began attempting to contact Ms. Adams directly.³⁵ Eventually, Detective Autry called Ms. Adams at work

25. *See id.*

26. *See* Brief for the State at 2-3, *Adams* (No. 9412SC559).

27. *See id.*

28. *See id.*; Affidavit of Susan Seahorn, Record at 9, *Adams* (No. 9412SC559).

29. *See* Affidavit of Susan Seahorn, Record at 9, *Adams* (No. 9412SC559). North Carolina's comprehensive definition of an abused juvenile includes infliction of serious physical, sexual, or emotional injury on a child under age 18. *See* N.C. GEN. STAT. § 7A-517(1) (1995). A juvenile may be classified as neglected for a number of reasons including abandonment, lack of proper supervision or care by a parent or guardian, or living in a hazardous home environment. *See id.* § 7A-517(21).

30. *See* Affidavit of Susan Seahorn, Record at 9, *Adams* (No. 9412SC559).

31. *See* Brief for the State at 3, *Adams* (No. 9412SC559).

32. *See id.*

33. *See* Defendant-Appellee's Brief at 2, *Adams* (No. 9412SC559).

34. *See id.* at 2-3.

35. *See* Order of Superior Court, Record at 14, *Adams* (No. 9412SC559). The State disputed this claim, stating instead that Detective Autry spoke with Ms. Adams by phone on one occasion, but otherwise had no contact with her until the March 4 meeting. *See* Brief for the State at 3, *Adams* (No. 9412SC559).

and told her that she needed to discuss the results of the polygraph.³⁶ Detective Autry also called Ms. Adams's father and told him his daughter would be arrested if she did not come to the Law Enforcement Center.³⁷ Mr. Adams encouraged his daughter to meet with the officer, telling her that she could not risk being arrested while at work.³⁸

Without her attorney, Ms. Adams went to the Law Enforcement Center on March 4, 1993, but Detective Autry was not present.³⁹ Ms. Adams left a note stating that she would return the following day.⁴⁰ She returned the next day with Heather's father, but without her attorney, and participated in an interview.⁴¹ During the interview, Detective Autry left the room.⁴² While the detective was gone, Ms. Adams confessed to another officer to having harmed the child and repeated the statement to Detective Autry upon her return.⁴³ She stated that "she had squeezed the child to help her have a bowel movement; that she had put her knee on the child and had pushed the child's leg between the cushions and the couch when she would not be still during changing."⁴⁴ Ms. Adams further explained that she "cleaned the child with a Q-tip, washrag and her finger."⁴⁵ After making the statement, Heather's mother learned that she would face criminal abuse charges.⁴⁶

Mary Adams was charged with a first-degree statutory sexual offense and two counts of felonious child abuse.⁴⁷ Ms. Adams moved to suppress her statements to the police on the ground that her Sixth

36. See Order of the Superior Court, Record at 14, *Adams* (No. 9412SC559).

37. See *id.*

38. See *id.*

39. See Defendant-Appellee's Brief at 3, *Adams* (No. 9412SC559).

40. See Order of the Superior Court, Record at 14, *Adams* (No. 9412SC559).

41. See New Brief for the State at 4, *Adams*, 345 N.C. 745, 483 S.E.2d 156 (1997) (No. 293PA96).

42. See *id.*

43. See *id.*

44. *Id.*

45. *Id.*

46. See *id.*

47. See *Adams*, 345 N.C. at 746, 483 S.E.2d at 156. Under § 14-27.4(a)(1), a person who is at least 12 years of age commits a first-degree sexual offense by engaging in a sexual act with a child under age 13 and at least four years younger than himself. See N.C. GEN. STAT. § 14-27.4(a)(1) (1993). A parent or caregiver commits felonious child abuse by "intentionally inflict[ing] any serious physical injury upon or to [a child under 16 years of age] or . . . intentionally commit[ting] an assault upon the child which results in any serious physical injury." *Id.* § 14-318.4(a). Additionally, a parent who commits a sexual act upon a child under age 16 is guilty of felonious child abuse. See *id.* § 14-318.4(a2).

Amendment right to counsel had been violated, rendering the statements inadmissible.⁴⁸ The trial court granted her motion and excluded the statements.⁴⁹

The North Carolina Court of Appeals affirmed the trial court's decision, holding that, after the filing of a juvenile abuse petition, "the adverse positions of government and defendant have solidified" and the parent faces "the prosecutorial forces of organized society" in such a way as to trigger the defendant's right to counsel. This is so because of the unique nature of the juvenile proceedings.⁵⁰ In North Carolina, the court explained, DSS and law enforcement have a "reciprocal duty" to notify each other of suspected child abuse, resulting in "parallel civil and criminal" actions "both operat[ing] against the defendant."⁵¹ Even though the two actions have different goals—punishment of the adult offender in the criminal forum and protection of the child victim in the civil—"the distinctions between

48. See *Adams*, 345 N.C. at 746, 483 S.E.2d at 156. Specifically, Ms. Adams argued that her "right to counsel was violated by law enforcement repeatedly contacting her, pressuring her to be interviewed, and interviewing her without counsel after the accused had been appointed counsel and had expressed a desire to deal with law enforcement through her counsel." Affidavit of Susan Seahorn, Record at 11, *Adams*, 122 N.C. App. 538, 470 S.E.2d 838 (1996) (No. 9412SC559). Ms. Adams also claimed violations of the Fifth Amendment and North Carolina Constitution, see *Adams*, 345 N.C. at 746, 483 S.E.2d at 156, but the superior court did not address these issues and neither party briefed them to the supreme court, see *id.* at 747, 483 S.E.2d at 157.

49. See *Adams*, 345 N.C. at 746-77, 483 S.E.2d at 157; Order of the Superior Court, Record at 15, *Adams*, 122 N.C. App. 538, 470 S.E.2d 838 (1996) (No. 9412SC559). The superior court found, as a fact, that Ms. Adams's Sixth Amendment right to counsel had attached at the point that the abuse and neglect petition was filed against her. See *id.* The court therefore concluded as a matter of law that the interview had violated her constitutional rights. See *id.*

50. *Adams*, 122 N.C. App. at 542, 470 S.E.2d at 841 (quoting *Kirby v. Illinois*, 406 U.S. 682, 689-90 (1972)). Judge McGee wrote for an unanimous panel, which included Judges Eagles and Walker. See *id.* at 545, 470 S.E.2d at 843.

51. *Id.* at 542-43, 470 S.E.2d at 841. By statute, North Carolina provides for extensive interaction between the local DSS and law enforcement agencies. When DSS discovers evidence of child abuse, it must report the evidence to the local district attorney's office and law enforcement within 48 hours. See N.C. GEN. STAT. § 7A-548(a) (1995). Any other person, including law enforcement, learning of an episode of child abuse is required to report this information to DSS. See *id.* § 7A-543; see also Mosteller, *supra* note 13, at 211-24 (discussing the historical development and requirements of child abuse reporting laws in 22 jurisdictions, including North Carolina). Moreover, DSS can enlist the help of state and local law enforcement for its investigation. See N.C. GEN. STAT. § 7A-544. Within 48 hours of notification by DSS, the local law enforcement agency must "initiate and coordinate a criminal investigation with the protective services investigation being conducted by [DSS]." *Id.* § 7A-548(a). See generally Besharov, *supra* note 9, at 323-33 (discussing reporting laws, police investigations, and procedures for placing children in protective custody).

the two actions often become blurred.”⁵² Therefore, because of the importance of “protect[ing] the rights of a defendant entangled in the intricacies of both civil and criminal law,” the court concluded that the presence of counsel is required during police questioning after the filing of a civil abuse petition against a parent.⁵³

Turning to the facts before it, the court specified that Ms. Adams’s Sixth Amendment right to counsel attached when the civil petition was filed against her;⁵⁴ therefore, the police interrogation on March 5, 1993, amounted to a denial of this constitutional right as well as of her statutory right to counsel,⁵⁵ which, the court explained, “extends to all contacts which occur ‘following and as a consequence of’ and are ‘directly related to’ the proceedings for which counsel has been appointed.”⁵⁶ Consequently, the court of appeals held that Ms. Adams’s statements to the police were inadmissible against her.⁵⁷

The North Carolina Supreme Court heard the case six months later.⁵⁸ Justice Webb, writing for a unanimous court, identified the sole issue as “whether the initiation of a civil juvenile petition for abuse and neglect is the equivalent of the initiation of formal, adversarial proceedings for purposes of the invocation of the Sixth Amendment right to the assistance of counsel.”⁵⁹ The court explained that in *Kirby v. Illinois*⁶⁰ the United States Supreme Court clarified that the right to counsel under the Sixth Amendment attaches only at the initiation of “adversary judicial proceedings” against a defendant—in the form of a preliminary hearing, information, formal charge, arraignment, or indictment.⁶¹ These official proceedings solidify “the adverse positions of the government and the defendant” and exemplify the government’s commitment to prosecute.⁶² It is only then that the need for defense counsel arises.

52. *Adams*, 122 N.C. App. at 544, 470 S.E.2d at 842. As an example, the court noted that individuals serving as investigators in one proceeding can also serve in the other. See *id.* (citing *State v. Morrell*, 108 N.C. App. 465, 424 S.E.2d 147 (1993)).

53. *Id.*

54. See *id.*

55. See N.C. GEN. STAT. § 7A-587.

56. *Adams*, 122 N.C. App. at 544, 470 S.E.2d at 842 (quoting *In re Maynard*, 116 N.C. App. 616, 619-20, 448 S.E.2d 871, 873 (1994)).

57. See *id.* at 545, 470 S.E.2d at 843.

58. The court heard the case on December 10, 1996. The case was before the supreme court on a grant of discretionary review pursuant to § 7A-31(c) as well as on appeal of right of a constitutional question under § 7A-30(1). See *Adams*, 345 N.C. at 745, 483 S.E.2d at 156.

59. *Adams*, 345 N.C. at 747, 483 S.E.2d at 157.

60. 406 U.S. 682 (1972).

61. *Adams*, 345 N.C. at 747, 483 S.E.2d at 157 (citing *Kirby*, 406 U.S. at 689-90).

62. *Id.* at 748, 483 S.E.2d at 157 (discussing *Kirby*, 406 U.S. at 689-90).

With these considerations in mind, the court concluded that the State had not yet committed itself to prosecute Mary Adams at the time DSS filed the abuse and neglect petition against her.⁶³

Moreover, according to the court, the Sixth Amendment is applicable only to criminal matters.⁶⁴ DSS's filing of an abuse and neglect petition initiates only a civil case;⁶⁵ a prosecutor has to commence a criminal matter separately. Considering this distinction, the court stated: "We cannot say, as did the Court of Appeals, that the civil and criminal proceedings are so intertwined that the commencement of a civil proceeding triggers the protection involved in a criminal case."⁶⁶ As a result, the supreme court reversed the decision of the court of appeals, concluding that it was "bound to hold" under *Kirby* that Ms. Adams had no Sixth Amendment right to counsel at the filing of the abuse petition.⁶⁷

During the past thirty years, the United States Supreme Court and other federal and state courts have sought to define the requirements of the Sixth Amendment right to counsel.⁶⁸ In 1964, the Supreme Court handed down the seminal decision in *Massiah v. United States*.⁶⁹ In that case, federal agents placed a listening device

63. *See id.*

64. *See id.* ("By its terms, the Sixth Amendment applies only to criminal cases.").

65. *See id.*

66. *Id.* Professor Mosteller explains: "The Sixth Amendment right [to counsel] is quite limited in coverage. It has no place in civil litigation, and attaches in criminal litigation only when a suspect formally becomes the accused by indictment, preliminary hearing, or other similar step in the criminal proceeding." Mosteller, *supra* note 13, at 271.

67. The court also concluded that Ms. Adams was not denied her statutory right to counsel. *See Adams*, 345 N.C. at 748, 483 S.E.2d at 157. While the court of appeals had relied on an earlier case in finding statutory violation, the supreme court explained that the case concerned only representation during abuse and neglect proceedings—not criminal matters. *See id.* at 748, 483 S.E.2d at 157-58 (discussing and distinguishing *In re Maynard*, 116 N.C. App. 616, 448 S.E.2d 871 (1994)); *see also infra* notes 214-16 (discussing *Maynard*).

68. For a discussion of the Supreme Court's pre-*Massiah* Sixth Amendment right to counsel jurisprudence, see WAYNE R. LAFAYE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 6.4 (1984 & Supp. 1991); *see also* ALFREDO GARCIA, THE SIXTH AMENDMENT IN MODERN AMERICAN JURISPRUDENCE 3-15 (1992) (discussing the history of the Sixth Amendment right to counsel); FRANCIS H. HELLER, THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES 3-34, 109-38 (1951) (discussing the history behind the Sixth Amendment and early Supreme Court decisions concerning the right to counsel); OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, REPORT TO THE ATTORNEY GENERAL ON THE SIXTH AMENDMENT RIGHT TO COUNSEL UNDER THE MASSIAH LINE OF CASES (1986), *reprinted in* 22 U. MICH. J.L. REFORM 661, 672-74 (1989) [hereinafter MASSIAH REPORT] (discussing the historical development of the right to counsel).

69. 377 U.S. 201 (1964). For a contemporaneous critique of *Massiah*, *see* Arnold N.

in a car belonging to the codefendant of a man who had been indicted on federal drug charges, retained a lawyer, entered a plea of not guilty, and had been released on bail.⁷⁰ The defendant, Massiah, and his codefendant had a long conversation in the car, during which Massiah made several incriminating statements.⁷¹ The federal agents recorded these statements and admitted them against Massiah at trial.⁷² The Supreme Court held that the agents violated the defendant's Sixth Amendment right to counsel by obtaining incriminating statements against him after his indictment and without counsel's presence.⁷³ The Court barred the prosecution's use of Massiah's statements,⁷⁴ effecting an exclusionary rule to the Sixth Amendment.⁷⁵

Eight years later, in *Kirby v. Illinois*,⁷⁶ the Court revisited the

Enker & Sheldon H. Elsen, *Counsel for the Suspect: Massiah v. United States and Escobedo v. Illinois*, 49 MINN. L. REV. 47, 53-58 (1964). For a more recent analysis of the decision, see OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, REPORT TO THE ATTORNEY GENERAL ON THE LAW OF PRETRIAL INTERROGATION (1986), reprinted in 22 U. MICH. J.L. REFORM 437, 485-88 (1989).

70. See *Massiah*, 377 U.S. at 201-03.

71. See *id.* at 203.

72. See *id.*

73. See *id.* at 206.

74. See *id.* at 207. The Court qualified its holding, however, by noting that it did not "question that in this case, as in many cases, it was entirely proper to continue an investigation of the suspected criminal activities of the defendant and his alleged confederates, even though the defendant had already been indicted." *Id.*

75. *Massiah* marked the first instance in which the Court required the exclusion of evidence based on a violation of the Sixth Amendment right to counsel. The adversarial system and the Sixth Amendment, the Court explained, contemplate a defendant aided at trial by counsel. See *id.* at 204. When post-indictment statements are taken from a suspect for the purpose of use at trial, counsel's presence is similarly required to protect the accused. See *id.* The Court explained that using Massiah's incriminating statements, "deliberately elicited from him after he had been indicted and in the absence of counsel," *id.*, amounted to a denial of the "basic protections" of the Sixth Amendment, *id.* at 206. Further, the Court clarified that its holding required only that the prosecution refrain from using the statements against Massiah in court. See *id.* at 207. For significant criticisms of the reasoning behind the *Massiah* exclusionary rule, see MASSIAH REPORT, *supra* note 68, at 684-96; Edwin Meese III, *Promoting Truth in the Courtroom*, 40 VAND. L. REV. 271, 276-81 (1987); H. Richard Uviller, *Evidence from the Mind of the Criminal Suspect: A Reconsideration of the Current Rules of Access and Restraint*, 87 COLUM. L. REV. 1137, 1154-95 (1987). But see James J. Tomkovicz, *The Massiah Right to Exclusion: Constitutional Premises and Doctrinal Implications*, 67 N.C. L. REV. 751, 753-55 (1989) (explaining the practical nature of the right to exclusion under *Massiah*); James J. Tomkovicz, *The Truth About Massiah*, 23 U. MICH. J.L. REFORM 641, 654-83 (1990) (critiquing the Office of Legal Policy's). See generally Martin Bahl, Comment, *The Sixth Amendment as Constitutional Theory: Does Originalism Require That Massiah Be Abandoned?*, 82 J. CRIM. L. & CRIMINOLOGY 423 (1991) (analyzing *Massiah* and its progeny from an originalist viewpoint).

76. 406 U.S. 682 (1972).

question of the scope of the Sixth Amendment in a different context. Chicago police officers stopped Kirby and a companion on the street and asked the two men for identification.⁷⁷ When the men provided suspicious reasons for possessing another person's traveler's checks and identification, the police arrested them and took them to the station.⁷⁸ After learning that the owner of the identification and checks had recently been robbed, the police brought him in, whereupon he immediately identified Kirby and his associate as the perpetrators.⁷⁹ Both men were indicted six weeks later.⁸⁰ At trial, Kirby argued on Sixth Amendment grounds for the suppression of the identification at his subsequent trial because it was made at a time when no attorney was present.⁸¹ The trial court rejected this motion, the identification was admitted, and the men were convicted.⁸² Affirming the admission, the United States Supreme Court explained that "a person's Sixth and Fourteenth Amendment right to counsel attaches only at or after the time that adversary judicial proceedings have been initiated against him."⁸³ The Court noted that prior cases defined the initiation of "adversarial criminal proceedings" as "formal charge, preliminary hearing, indictment, information, or arraignment."⁸⁴ The Court explained that only then were the parties' positions fully established and, consequently, the need for counsel apparent.⁸⁵ The Sixth Amendment, the Court concluded, does not apply to interactions, such as a pre-indictment identification, that take place prior to a "critical stage[]" of the prosecution.⁸⁶

77. *See id.* at 684.

78. *See id.*

79. *See id.* at 684-85.

80. *See id.* at 685.

81. *See id.* at 685-86.

82. *See id.* at 686.

83. *Id.* at 688 (citations omitted).

84. *Id.* at 689.

85. As the Court explained:

For it is only then that the government has committed itself to prosecute, and only then that the adverse positions of government and defendant have solidified. It is then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law. It is this point, therefore, that marks the commencement of the "criminal proceedings" to which alone the explicit guarantees of the Sixth Amendment are applicable.

Id. at 689-90 (citing *Massiah*, 377 U.S. at 201; *Spano v. New York*, 360 U.S. 315 (1959); *Powell v. Alabama*, 287 U.S. 45 (1932)).

86. *Id.* at 690-91 (quoting *Simmons v. United States*, 390 U.S. 377, 382-83 (1968)). In dissent, Justice Brennan, joined by Justices Marshall and Douglas, would have required a different analytical framework:

Five years later, in *Brewer v. Williams*,⁸⁷ the Supreme Court affirmed on Sixth Amendment grounds a federal district court's issuance of a writ of habeas corpus.⁸⁸ In this case, known as the "Christian burial speech" case,⁸⁹ defendant Robert Williams, a recent escapee from a mental hospital, was charged and arraigned in Davenport, Iowa, for the abduction of a ten-year-old girl.⁹⁰ A Des Moines lawyer had previously informed officers there that he represented Williams.⁹¹ After the arraignment in Davenport, another lawyer instructed Williams not to speak to the police until he had conferred with his lawyer in Des Moines and also instructed the police that they were not to question Williams until that time.⁹² Williams was placed in the back seat of a squad car, and two officers drove him to Des Moines.⁹³ During the trip, one of the officers, Detective Leaming, who knew Williams to be a former mental patient and a deeply religious person, stated his belief " 'that the parents of this little girl should be entitled to a Christian burial for the little girl who was snatched away from them on Christmas [E]ve and murdered.' " ⁹⁴ A short while later, Williams directed the officers to the location of the girl's body.⁹⁵ Williams argued for the suppression of his statements made in the car but eventually was convicted of first-degree murder.⁹⁶

The Supreme Court noted that judicial proceedings had been initiated against Williams before the car ride⁹⁷ and that he had been

"In sum, the principle of *Powell v. Alabama* and succeeding cases requires that we scrutinize *any* pretrial confrontation of the accused to determine whether the presence of counsel is necessary to preserve the defendant's basic right to a fair trial as affected by his right meaningfully to cross-examine the witnesses against him and to have effective assistance of counsel at the trial itself. It calls upon us to analyze whether potential substantial prejudice to defendant's rights inheres in the particular confrontation and the ability of counsel to help avoid that prejudice."

Id. at 694 (Brennan, J., dissenting) (quoting *United States v. Wade*, 388 U.S. 218, 227 (1967)).

87. 430 U.S. 387 (1977).

88. *See id.* at 406.

89. The term apparently arose in the briefs and oral argument of the attorneys. *See id.* at 392.

90. *See id.* at 389-91.

91. *See id.* at 390.

92. *See id.* at 391-92.

93. *See id.* at 392.

94. *Id.* at 393 (alteration in original) (quoting Detective Leaming).

95. *See id.*

96. *See id.* at 394. The Iowa Supreme Court affirmed the conviction. *See State v. Williams*, 182 N.W.2d 396, 406 (Iowa 1971).

97. *See Brewer*, 430 U.S. at 399. These proceedings, however, concerned the

informed of his right to counsel.⁹⁸ In addition, the Court characterized Detective Leaming's action as "purposely [seeking] during Williams's isolation from his lawyers to obtain as much incriminating information as possible."⁹⁹ Drawing on *Massiah*, the Court explained that "[i]t thus requires no wooden or technical application of the . . . doctrine to conclude that Williams was entitled to the assistance of counsel guaranteed to him by the Sixth and Fourteenth Amendments."¹⁰⁰ In affirming the issuance of the writ—and effectively holding that Williams's statements were inadmissible in the murder trial—the Court concluded that "so clear a violation of the Sixth and Fourteenth Amendments as here occurred cannot be condoned."¹⁰¹

In *Maine v. Moulton*,¹⁰² decided eight years after *Brewer*, the Court upheld the decision of the Supreme Judicial Court of Maine which reversed the defendant's burglary and theft convictions pursuant to the Sixth Amendment.¹⁰³ In *Moulton*, defendants Perley Moulton and Gary Colson were indicted on four counts of theft.¹⁰⁴ Over a year and a half later, Colson contacted the local police, confessed his role in the thefts, and agreed to cooperate in the prosecution of Moulton.¹⁰⁵ During a later meeting, Colson, wearing a hidden wire transmitter, was able to elicit several incriminating statements from Moulton.¹⁰⁶ Subsequently, Moulton was convicted despite his efforts to suppress the recorded statements.¹⁰⁷ Moulton appealed his convictions on the grounds that his Sixth Amendment right to counsel had been violated when the statements were obtained.¹⁰⁸ Maine's highest court agreed and ordered a new trial.¹⁰⁹

Affirming the state's high court, the Supreme Court explained

abduction charge, and not the later murder charge, for which Williams was convicted.

98. *See id.* at 404.

99. *Id.* at 399.

100. *Id.* at 401.

101. *Id.* at 406. For an extensive discussion of *Brewer*, see Yale Kamisar, *Brewer v. Williams, Massiah, and Miranda: What Is "Interrogation"? When Does It Matter?*, 67 GEO. L.J. 1 (1978).

102. 474 U.S. 159 (1985).

103. *See id.* at 180.

104. *See id.* at 162.

105. *See id.* at 162-63. In exchange for his help, the police told Colson that no additional charges would be brought against him. Colson had informed the police that he and Moulton not only had received stolen auto parts, but also had broken into a local car dealership to steal the parts. *See id.* at 163.

106. *See id.* at 164-66.

107. *See id.* at 166-67.

108. *See id.* at 167.

109. *See State v. Moulton*, 481 A.2d 155, 161, 166 (Me. 1984).

that "to deprive a person of counsel during the period prior to trial may be more damaging than denial of counsel during the trial itself."¹¹⁰ Moreover, the Court clarified, "the prosecutor and police have an affirmative obligation not to act in a manner that circumvents and thereby dilutes the protection afforded by the right to counsel."¹¹¹ Here, the police knew that Moulton's right to counsel had attached with the theft indictments, yet they suggested that Colson wear the wire and record his conversations with Moulton.¹¹² As a result, the Court concluded that the police had denied Moulton's Sixth Amendment right to the assistance of counsel and that Moulton's incriminating statements would be barred at his new trial.¹¹³

Six years later, in *McNeil v. Wisconsin*,¹¹⁴ the Supreme Court clarified the limitations of the protection provided by the Sixth Amendment. Police arrested Paul McNeil in Omaha, Nebraska, for an armed robbery in West Allis, Wisconsin.¹¹⁵ He was then transferred back to Wisconsin and represented by counsel at a first appearance on the matter.¹¹⁶ Several days later, Detective Joseph Butts questioned McNeil about an unrelated armed burglary, murder, and attempted murder in Caledonia, Wisconsin.¹¹⁷ McNeil admitted that he had been involved in these events.¹¹⁸ Within a few days, prosecutors formally charged him with the Caledonia crimes.¹¹⁹ McNeil unsuccessfully moved to suppress his statements pertaining to those offenses and was convicted of armed robbery, second-degree murder, and attempted first-degree murder.¹²⁰ On appeal, McNeil "contended that his courtroom appearance with an attorney for the West Allis crime constituted an invocation of the *Miranda* right to counsel, and that any subsequent waiver of that right during police-initiated questioning regarding *any* offense was invalid."¹²¹

The Supreme Court acknowledged that his Sixth Amendment

110. *Moulton*, 474 U.S. at 170.

111. *Id.* at 171.

112. *See id.* at 180 ("[W]e hold that the Maine police knowingly circumvented Moulton's right to have counsel present at a confrontation between Moulton and a police agent . . .").

113. *See id.*; *see also* Bahl, *supra* note 75, at 436-37 (discussing *Moulton*).

114. 501 U.S. 171 (1991).

115. *See id.* at 173.

116. *See id.*

117. *See id.* at 173-74.

118. *See id.* at 174.

119. *See id.*

120. *See id.*

121. *Id.*

right to counsel had attached and had been invoked for the initial armed robbery charge, but stated that the right is "offense specific."¹²² As the Court explained, "[the right] cannot be invoked once for all future prosecutions, for it does not attach until a prosecution has commenced."¹²³ The Court concluded that because McNeil made his statements before he had been formally charged, arraigned, or indicted for the Caledonia crimes, his right to counsel related to *those* offenses had not yet attached.¹²⁴ Accordingly, the Sixth Amendment did not bar admission of those statements.¹²⁵

Prior to *McNeil*, however, a number of other courts had begun to recognize that the Sixth Amendment right to counsel may apply not strictly to a single charged offense, but to other offenses as well.¹²⁶ In *People v. Clankie*,¹²⁷ one of the first decisions in which Sixth Amendment protection was extended in this way, the Illinois Supreme Court explained that, in *Maine v. Moulton*, "the [United States Supreme] Court also recognized that some technically distinct, formally charged offenses are actually so closely related to certain offenses for which formal charges have not been made that the right to counsel for the charged offense cannot constitutionally be isolated from the right to counsel for the uncharged offense."¹²⁸ The *Moulton* court implicitly recognized this principle, the *Clankie* court explained, by vacating both the theft and burglary convictions of the defendant

122. *See id.* at 175.

123. *Id.*

124. *See id.* at 176.

125. *See id.* The Court went on to explain:

[I]f we were to adopt petitioner's rule, most persons in pretrial custody for serious offenses would be *unapproachable* by police officers suspecting them of involvement in other crimes, *even though they have never expressed any unwillingness to be questioned*. Since the ready ability to obtain uncoerced confessions is not an evil but an unmitigated good, society would be the loser.

Id. at 181. For discussions of *McNeil*, see Craig R. Johnson, Note, *McNeil v. Wisconsin: Blurring a Bright Line on Custodial Interrogation*, 1992 WIS. L. REV. 1643; Kenneth P. Jones, Note, *McNeil v. Wisconsin: Invocation of Right to Counsel Under Sixth Amendment by Accused at Judicial Proceeding Does Not Constitute Invocation of Miranda Right to Counsel for Unrelated Charge*, 26 GA. L. REV. 1049 (1992); Patricia Ullman, Note, *Fifth and Sixth Amendments—The Right to Counsel in Multiple Charge Arraignments*, 82 J. CRIM. L. & CRIMINOLOGY 904 (1992).

126. *See* *United States v. Mitcheltree*, 940 F.2d 1329, 1342-43 (10th Cir. 1991); *United States v. Louis*, 679 F. Supp. 705, 709 (W.D. Mich. 1988); *People v. Clankie*, 530 N.E.2d 448, 451-53 (Ill. 1988); *People v. Hoskins*, 523 N.E.2d 80, 83-84 (Ill. Ct. App. 1988).

127. 530 N.E.2d 448 (Ill. 1988).

128. *Id.* at 451.; *see also* Joseph C. Gergits et al., *Survey of Illinois Law: Criminal Law and Procedure*, 18 S. ILL. U. L.J. 747, 754-57 (1994) (discussing *Clankie* and comparing it to other Illinois cases involving confessions); Howard Suskin & Amy Rosenberg Small, *Criminal Procedure*, 21 LOY. U. CHI. L.J. 349, 376-77 (1990) (discussing *Clankie*).

even though at the time of the incriminating statements Moulton had not been charged with burglary.¹²⁹ The court observed that this same principle applied in *Brewer v. Williams* because the Supreme Court barred the use of Williams's admission in his murder trial, even though he had been indicted only for abduction at the time of the "Christian burial speech."¹³⁰ The Illinois Supreme Court then concluded that "[t]he United States Supreme Court has thus apparently assumed that sixth amendment rights of one formally charged with an offense extend to offenses closely related to that offense and for which a defendant is subsequently formally accused."¹³¹ The court therefore reversed Williams's burglary convictions.¹³²

Although it might appear that the Supreme Court's opinion in *McNeil* put an end to the "closely related" exception,¹³³ the Fifth Circuit acknowledged the principle just six months after *McNeil* was decided. In *United States v. Cooper*,¹³⁴ Clinton Ladon Cooper was charged with aggravated robbery, a state offense. Six days later, a federal agent visited Cooper while he was incarcerated and interrogated him about his possession of a firearm during the robbery.¹³⁵ Cooper confessed to possession of the unlicensed firearm and subsequently was indicted on federal charges.¹³⁶ Cooper argued that the federal agent violated his Sixth Amendment right to counsel when he questioned Cooper about the robbery.¹³⁷ The Fifth Circuit held that even though the two prosecutions—federal and state—would use essentially the same evidence, they involved different conduct and therefore were not "extremely closely related."¹³⁸ In

129. See *Clankie*, 530 N.E.2d at 451 (discussing *Maine v. Moulton*, 474 U.S. 159 (1985)).

130. See *id.* (discussing *Brewer v. Williams*, 430 U.S. 387 (1977)).

131. *Id.* at 452.

132. See *id.* at 452-53.

133. For purposes of clarity, this Note uses "closely related" to refer to this exception. Courts have used the terms "closely related," "extremely closely related," and "inextricably intertwined," all of which apparently mean the same thing. See *United States v. Arnold*, 106 F.3d 37, 41 (3d Cir. 1997); see also *United States v. Carpenter*, 963 F.2d 736, 740 (5th Cir. 1992) (equating "inextricably intertwined" and "extremely closely related"); *United States v. Hines*, 963 F.2d 255, 257 (9th Cir. 1992) (per curiam) (using "inextricably intertwined"); *Whittlesey v. State*, 665 A.2d 223, 233 (Md. 1995) (using "closely related"), *cert. denied*, 516 U.S. 1148 (1996).

134. 949 F.2d 737 (5th Cir. 1991). For a discussion of *Cooper* and its relationship to *McNeil*, see Jones, *supra* note 125, at 1064-67.

135. See *Cooper*, 949 F.2d at 740.

136. See *id.* at 740-41.

137. See *id.* at 743.

138. *Id.* at 744.

effect, the court recognized the possibility of a "closely related" exception, even though the facts before it did not support a reversal of the defendant's conviction.¹³⁹

After *Cooper*, a number of federal circuit courts recognized the closely related exception and attempted to define its requirements.¹⁴⁰ In *United States v. Hines*,¹⁴¹ for instance, the Ninth Circuit stated that "[a]n exception to the offense-specific requirement of the Sixth Amendment occurs when the pending charge is so inextricably intertwined with the charge under investigation that the right to counsel for the pending charge cannot constitutionally be isolated from the right to counsel for the uncharged offense."¹⁴² Here, the court distinguished the defendant's activities in two separate months. Even though the same offense was charged in both instances, the time, place, and persons involved were all different.¹⁴³ As a result, the court held that the charges were "separate and distinct" for Sixth Amendment purposes.¹⁴⁴

Similarly, in *United States v. Kidd*,¹⁴⁵ the Fourth Circuit recognized the exception and explained that "[i]n order to fall within [it], the offense being investigated must derive from the same factual predicate as the charged offense."¹⁴⁶ Norman Kidd was indicted on six drug charges¹⁴⁷ after government informants tape-recorded approximately seven of Kidd's sales of cocaine base (crack).¹⁴⁸ Kidd

139. The Fifth Circuit later stated that in *Cooper* it had "acknowledged that the Sixth Amendment right to counsel might well attach to a charge that 'was extremely closely related to pending . . . charges.'" *United States v. Williams*, 993 F.2d 451, 457 (5th Cir. 1993) (quoting *Cooper*, 949 F.2d at 744).

140. See, e.g., *United States v. Doherty*, 126 F.3d 769, 776 (6th Cir. 1997) *cert. denied*, 118 S. Ct. 2299 (1998); *United States v. Arnold*, 106 F.3d 37, 40-41 (3d Cir. 1997); *United States v. Laury*, 49 F.3d 145, 150 n.11 (5th Cir. 1995); *United States v. Kidd*, 12 F.3d 30, 33 (4th Cir. 1993); *Williams*, 993 F.2d at 456-57; *Hendricks v. Vasquez*, 974 F.2d 1099, 1104 (9th Cir. 1992); *United States v. Hines*, 963 F.2d 255, 257-58 (9th Cir. 1992) (*per curiam*); *United States v. Carpenter*, 963 F.2d 736, 740-41 (5th Cir. 1992); see also Gary A. Udashen & Robert Udashen, *Criminal Procedure: Confession, Search, and Seizure*, 46 SMU L. REV. 1237, 1257-59 (1993) (discussing the Fifth Circuit's decisions in *Carpenter* and *Cooper*).

141. 963 F.2d 255 (9th Cir. 1992) (*per curiam*).

142. *Id.* at 257.

143. See *id.*

144. *Id.* at 257-58.

145. 12 F.3d 30 (4th Cir. 1993).

146. *Id.* at 33. Kidd was charged with five counts of cocaine possession and distribution under 21 U.S.C. § 841(a) and one count of conspiracy to possess with intent to distribute cocaine base per 21 U.S.C. § 846. See *id.* at 31.

147. Kidd was charged with five counts of cocaine possession and distribution under 21 U.S.C. § 846. See *id.* at 31.

148. See *id.*

was arrested on July 3, 1992, and counsel was appointed for him.¹⁴⁹ On August 26, an undercover informant who had no prior contact with Kidd made a tape-recorded crack purchase from him.¹⁵⁰ From this sale, the government obtained a superseding indictment, including the August 26 transaction as a separate distribution charge and extending the conspiracy period through August 26.¹⁵¹ Kidd later pled guilty to one count of the superseding indictment, and the government moved to dismiss the remaining six counts.¹⁵² During his sentencing hearing, Kidd objected to reference in the pre-sentence report to the August 26 sale,¹⁵³ arguing that the informant's contact with him after he had been indicted on drug distribution charges violated his Sixth Amendment right to counsel.¹⁵⁴ The court concluded, however, that the informant's contacting Kidd on August 26, after he had been indicted for drug distribution, was "factually distinct from, and independent of, the prior distribution offenses for which the Sixth Amendment right had been invoked."¹⁵⁵

The Fourth Circuit explained that as of August 26, Kidd's right to counsel had only attached in reference to the earlier drug distribution offenses.¹⁵⁶ During the August 26 transaction, the informant did not try to obtain information about the charges on which Kidd had been indicted.¹⁵⁷ Instead, the investigation concerned only new criminal activity.¹⁵⁸ In rejecting Kidd's right to counsel claim, the Fourth Circuit explained that "[t]he Sixth Amendment does not create a sanctuary for the commission of

149. *See id.*

150. *See id.* at 31-32.

151. *See id.* at 32.

152. *See id.*

153. The inclusion of the 0.15-gram sale on August 26 increased the total weight of crack sold from 1.89 grams to 2.04 grams, and thus raised Kidd's offense level from 18 to 20. *See id.*; *see also* U.S. SENTENCING GUIDELINES MANUAL §§ 2D1.1(C)(10)-(11) (1997) (identifying the quantities of cocaine base (crack) that correspond to offense levels 20 and 18); *id.* § 5A (listing the guideline range applicable to each offense level and criminal history category).

154. *See Kidd*, 12 F.3d at 32.

155. *Id.* (citing *United States v. Hines*, 963 F.2d 255, 257 (9th Cir. 1992) (per curiam)).

156. *See id.*

157. *See id.* at 32-33.

158. *See id.* at 33. The court distinguished the government's action here from other cases in which the post-indictment activity resulted in new evidence concerning pending charges. *See id.* at 32 (citing *Maine v. Moulton*, 474 U.S. 159, 176-77 (1985); *United States v. Mitchell*, 940 F.2d 1329, 1343 (10th Cir. 1991); *United States v. Terzado-Madruga*, 897 F.2d 1099, 1110 (11th Cir. 1990)). The court explained that "[t]he mere fact that both the pending charges and the new offense involved drug distribution does not mean the right to counsel attached to both. To hold otherwise would essentially permit charged suspects to commit similar crimes with impunity." *Kidd*, 12 F.3d at 33.

additional crimes during the pendency of an indictment.”¹⁵⁹ The court intimated that a Sixth Amendment violation would have resulted if the exchange had *not* “involved a different purchaser-informant, occurred at a different time, and took place in a different location.”¹⁶⁰ Moreover, barring reference to the August 26 sale “‘would unnecessarily frustrate the public’s interest in the investigation of criminal activities.’”¹⁶¹

The Third Circuit’s recent adoption of the closely related exception in *United States v. Arnold*¹⁶² differs from prior decisions in that the court found the exception to be applicable to the facts before it. Concerning separate charges of witness intimidation and attempted murder, the Third Circuit held: “Given that Arnold’s central purpose and the intended results of both offenses were the same, we cannot but conclude that the two offenses were sufficiently related for purposes of the Sixth Amendment exception.”¹⁶³ The court indicated that it was significant that the events “arose from the same predicate facts, conduct, intent and circumstances.”¹⁶⁴

A growing contingent of state courts now recognize the “closely related” exception.¹⁶⁵ In *In re Pack*,¹⁶⁶ one of the first cases to apply the exception after *McNeil*, the Superior Court of Pennsylvania held “that the Pennsylvania Supreme Court has interpreted the Sixth Amendment right to counsel, which is offense specific, to apply to all the offenses arising from the same incident for which a defendant is charged.”¹⁶⁷ In *Pack*, a youth was formally charged with theft and assigned an attorney, but an officer questioned him afterward concerning a burglary charge and obtained incriminating

159. *Id.*

160. *Id.* The court did not, however, state that the absence of the features would unequivocally result in a Sixth Amendment right to counsel violation.

161. *Id.* (quoting *Moulton*, 474 U.S. at 180).

162. 106 F.3d 37, 42 (3d Cir. 1997) (“We adopt the ‘closely related’ exception and hold that it applies here.”).

163. *Id.* at 42.

164. *Id.*

165. See, e.g., *Whittlesey v. State*, 665 A.2d 223, 232-36 (Md. 1995); *Commonwealth v. Rainwater*, 681 N.E.2d 1218, 1223-24 (Mass. 1997); *In re Pack*, 616 A.2d 1006, 1010 (Pa. Super. Ct. 1992). But see *People v. Clair*, 828 P.2d 705, 722 (Cal. 1992) (explaining that, under *McNeil*, cases which employed early versions of the closely related exception “are no longer vital”) (citations omitted).

166. 616 A.2d 1006 (Pa. Super. Ct. 1992).

167. *Id.* at 1010-11 (citing *Commonwealth v. Santiago*, 599 A.2d 200, 202 (Pa. 1991)). The court paid respect to *McNeil* here in its description of the Sixth Amendment right to counsel as “offense specific.” See *McNeil v. Wisconsin*, 501 U.S. 171, 175 (1991) (“The Sixth Amendment right, however, is offense specific.”).

statements.¹⁶⁸ The court held that these charges “arose from the same incident” and that the court should have suppressed the statement at trial.¹⁶⁹ “To hold otherwise,” the court explained, “would allow the Commonwealth to circumvent the Sixth Amendment right to counsel merely by charging a defendant with additional related crimes.”¹⁷⁰

Three years later, the Supreme Court of Maryland, in *Whittlesey v. State*,¹⁷¹ discussed extensively the development of the exception, although it concluded that the charges in question were not “‘closely related.’”¹⁷² The court identified two instances in which the exception would apply—one in the case of police misconduct,¹⁷³ and the other, extending from *Clankie*, which focused exclusively on whether the two offenses stemmed from the same base of facts.¹⁷⁴ The court examined the second line of cases, noting that while all the courts require identity of “time, place, and conduct,”¹⁷⁵ some also require the same prosecuting sovereign for both charges,¹⁷⁶ and others look to see if the incriminating statements served as evidence for both charges.¹⁷⁷ Relying on the analyses put forth in two prior

168. See *Peck* at 1007-08.

169. *Id.* at 1011.

170. *Id.*

171. 665 A.2d 223 (Md. 1995).

172. *Id.* at 236.

173. See *id.* at 234-35 (citing *United States v. Martinez*, 972 F.2d 1100, 1103-06 (9th Cir. 1992); *United States v. Mitcheltree*, 940 F.2d 1329, 1339-45 (10th Cir. 1991); *United States v. Olsen*, 840 F. Supp. 842, 848-53 (D. Utah 1993)). For example, in *Mitcheltree*, police recorded a conversation between the defendant and a police informant after the defendant had been indicted. See *Mitcheltree*, 940 F.2d at 1339. The Tenth Circuit concluded that this conduct amounted to “‘an impermissible interference with the right to assistance of counsel.’” *Id.* at 1341 n.13 (quoting *United States v. Henry*, 447 U.S. 264, 274-75 (1980)).

174. See *Whittlesey*, 665 A.2d at 235 (citing *United States v. Cooper*, 949 F.2d 737, 743-44 (5th Cir. 1991); *People v. Clankie*, 530 N.E.2d 448, 451-52 (Ill. 1988); *In re Michael B.*, 178 Cal. Rptr. 291, 295-96 (Ct. App. 1981)).

175. *Id.* (citing *United States v. Kidd*, 12 F.3d 30, 33 (4th Cir. 1993); *United States v. Hines*, 963 F.2d 255, 257 (9th Cir. 1992) (per curiam); *Hendricks v. Vasquez*, 974 F.2d 1099, 1104-05 (9th Cir. 1992); *United States v. Carpenter*, 963 F.2d 736, 741 (5th Cir. 1992); *Bruno v. State*, 613 A.2d 440, 447 (Md. Ct. Spec. App. 1992), *aff'd*, 632 A.2d 1192 (Md. 1993); *Upton v. State*, 853 S.W.2d 548, 555-56 (Tex. Crim. App. 1993) (en banc)).

176. See *id.* (citing *United States v. Williams*, 993 F.2d 451, 457 (5th Cir. 1993); *United States v. Nocella*, 849 F.2d 33, 37-38 (1st Cir. 1988); *United States v. Olsen*, 840 F. Supp. 842, 849 (D. Utah 1993)). But see *United States v. Doherty*, 126 F.3d 769, 776 (6th Cir. 1997) (holding that identity of sovereign is irrelevant); *United States v. Laury*, 49 F.3d 145, 150 n.11 (5th Cir. 1995) (same); *United States v. Louis*, 679 F. Supp. 705, 709 (W.D. Mich. 1988) (same).

177. See *id.* (citing *In re Pack*, 616 A.2d 1006, 1010-11 (Pa. Super. Ct. 1992)).

federal cases,¹⁷⁸ the Maryland court concluded that the defendant's offenses—a murder charge and a charge of making false statements to a state official—met neither the “time, place, and conduct test” nor the “same evidence test.”¹⁷⁹ As such, the Sixth Amendment right to counsel had not attached for the later murder charge at the time the defendant made incriminating statements.¹⁸⁰

Among the courts that have adopted and applied the “closely related” exception, only the Appellate Division of the Superior Court of New Jersey, in *State v. P.Z.*,¹⁸¹ extended the exception beyond the criminal context. On facts similar to those of Mary Adams's case, the court examined the question of whether the Sixth Amendment right to counsel protects a father, under investigation for child abuse, who made incriminating statements to a social worker after the filing of civil charges but before the commencement of criminal abuse proceedings.¹⁸² The State argued that even though a statutory right to counsel had attached once the civil action began, under *Kirby* the right to counsel in the subsequent criminal matter had not yet arisen.¹⁸³ The court rejected the State's position, noting that the civil abuse case, “although a civil matter, had very serious personal consequences to all parties involved, including the defendant. . . . The State was defendant's adversary in that action, as well as during the time when the statement in question was taken.”¹⁸⁴ In order to ensure that child abuse investigations are comprehensive, the court reasoned that parents would need assurance that their cooperation would be protected from possible admission in a subsequent criminal trial.¹⁸⁵ The court concluded that extending the constitutional right to counsel to cover these interactions with parents would best achieve

178. See *id.* at 235-36 (discussing *United States v. Williams*, 993 F.2d 451, 457 (5th Cir. 1993) and *Hendricks v. Vasquez*, 974 F.2d 1099, 1104-05 (9th Cir. 1992)).

179. *Id.* at 236.

180. See *id.*

181. 666 A.2d 1000 (N.J. Super. Ct. App. Div. 1995), *rev'd*, 703 A.2d 901 (N.J. 1997). Note that *Adams* was decided by the North Carolina Supreme Court on April 11, 1997, see *Adams*, 345 N.C. at 745, 483 S.E.2d at 156, while the New Jersey Supreme Court did not reverse *P.Z.* until November 26, 1997, see *State v. P.Z.*, 703 A.2d 901, 901 (N.J. 1997). Accordingly, the New Jersey lower court's decision existed as persuasive authority at the time of *Adams*. For a discussion of the New Jersey Supreme Court's reversal of *P.Z.*, see *infra* notes 258-64 and accompanying text.

182. See *P.Z.*, 666 A.2d at 1001-03.

183. See *id.* at 1004. *P.Z.* was represented by an appointed attorney in the civil abuse (“Title Nine”) matter pursuant to section 9.6-8.43 of the New Jersey Statutes. See *P.Z.*, 666 A.2d at 1002.

184. *Id.*

185. See *id.* at 1004-05.

this goal.¹⁸⁶ As such, the court held that statements made by parents to social services officials during abuse and neglect investigations would be inadmissible against them unless *Miranda* warnings had been given and the Sixth Amendment right to counsel, as extended, had been respected.¹⁸⁷

Thus, without directly adopting the "closely related" exception, the *P.Z.* court effectively applied it, but in a new context. Rather than limiting the Sixth Amendment right to counsel to "all criminal prosecutions,"¹⁸⁸ the New Jersey appellate court broadened the right to encompass *civil* matters that arose from identical facts and about which society had a particularly strong concern.¹⁸⁹ Arguably, then, the same reasoning could apply to the facts in Mary Adams's case.

Although the North Carolina Court of Appeals did not explicitly adopt the "closely related" exception in Mary Adams's case, its reliance on *P.Z.* implicitly demonstrated its acceptance of the exception under such circumstances.¹⁹⁰ By contrast, the North Carolina Supreme Court's resolution made no direct reference to the exception or to *P.Z.*, but relied solely on *Kirby v. Illinois*.¹⁹¹ The court explained that because the filing of an abuse and neglect

186. *See id.* at 1005.

187. *See id.*

188. U.S. CONST. amend. VI.

189. Here the concern was the effective investigation of child abuse allegations. The court explained: "So too are we convinced that the threat of criminal prosecutions will result in parents not cooperating with [Division of Youth and Family Services] investigations, and therefore, fewer children receiving the protection that Title Nine demands, and possibly being forced to continue suffering in an abusive environment." *P.Z.*, 666 A.2d at 1005. The right to counsel is certainly not the only right afforded by the Sixth Amendment which garners special consideration in the child abuse context. *See, e.g.,* Julie A. Anderson, Comment, *The Sixth Amendment: Protecting Defendants' Rights at the Expense of Child Victims*, 30 J. MARSHALL L. REV. 767, 790-801 (1997) (concerning the right of confrontation and the right to self-representation). For a discussion of the application of the Fifth Amendment right against self-incrimination in the context of civil and criminal child abuse matters, see William Wesley Patton, *The World Where Parallel Lines Converge: The Privilege Against Self-Incrimination in Concurrent Civil and Criminal Child Abuse Proceedings*, 24 GA. L. REV. 473 (1990).

190. *See State v. Adams*, 122 N.C. App. 538, 542, 470 S.E.2d 838, 841 (1996) (citing *P.Z.*, 666 A.2d at 1001-05), *rev'd*, 345 N.C. 745, 483 S.E.2d 156 (1997); *cf.* *United States v. Arnold*, 106 F.3d 37, 42 (3d Cir. 1997) ("We adopt the 'closely related' exception and hold that it applies here."). The court's use of language associated with the exception at least indicates familiarity with it. *See Adams*, 122 N.C. App. at 543, 470 S.E.2d at 841 (characterizing civil and criminal abuse proceedings as "intertwined").

191. *See Adams*, 345 N.C. at 747-48, 483 S.E.2d at 157 (citing *Kirby v. Illinois*, 406 U.S. 682, 689-90 (1972)). In fact, counsel for Ms. Adams had fully briefed the court on the *Cooper* line of cases, particularly *P.Z.* *See Defendant-Appellee's New Brief* at 14-15, *Adams* (No. 293PA96) (discussing *United States v. Cooper*, 949 F.2d 737, 743-44 (5th Cir. 1991) and *P.Z.*, 666 A.2d at 1002-04).

petition amounts to the beginning of a *civil* action, and because the Sixth Amendment pertains only to *criminal* matters, there was simply no constitutional protection of Ms. Adams's right to counsel under the Sixth Amendment.¹⁹² The two proceedings were not sufficiently "intertwined" to "trigger[] the protection involved in a criminal case."¹⁹³

How meaningful, though, is the civil-criminal distinction in the context of an abuse or neglect action against a parent by the State? In most types of cases, the distinction is elementary.¹⁹⁴ There is a significant difference, for instance, between a shareholder's derivative suit and a charge of first-degree rape. The elements are completely different,¹⁹⁵ even if the actions that gave rise to the proceedings occurred contemporaneously. The sentencing and remedial options before the factfinder are equally divergent.¹⁹⁶ In almost no manner are the two actions alike.

Compare, however, criminal abuse and neglect proceedings with those before a juvenile court. When an instance of child abuse is alleged, the facts presented to the criminal and juvenile courts almost always will be exactly the same, especially because, as in North

192. See *Adams*, 345 N.C. at 748, 483 S.E.2d at 157.

193. *Id.*

194. For an insightful discussion of when the distinction becomes more complicated, see Mary M. Cheh, *Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction*, 42 HASTINGS L.J. 1325, 1348-64 (1991); see also Carol S. Steiker, *Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide*, 85 GEO L.J. 775, 782-809 (1997) (discussing "intellectual," "institutional," and "socio-cultural" challenges to the civil-criminal distinction as well as the intricacies of punishment theory and differences between civil and criminal procedural requirements).

195. In North Carolina, rape in the first degree occurs when:

[a] person . . . engages in vaginal intercourse . . . [w]ith another person by force and against the will of the other person, and . . . [e]mploys or displays a dangerous or deadly weapon or an article which the other person reasonably believes to be a dangerous or deadly weapon; or . . . [i]nfllicts serious personal injury upon the victim or another person.

N.C. GEN. STAT. § 14-27.2(a) (1993). By contrast, derivative suits for shareholders have been described as "the principal remedy by which defrauded minority shareholders may call directors, officers, promoters, and controlling shareholders to account for mismanagement, diversion of assets, and fraudulent manipulation of corporate affairs." JAMES D. COX ET AL., *CORPORATIONS* § 15.1, at 398-99 (1997).

196. Because North Carolina defines first-degree rape as a Class B1 felony, see N.C. GEN. STAT. § 14-27.2, a convicted offender with a prior record, under aggravating circumstances, could face a maximum sentence of life in prison without parole. See N.C. GEN. STAT. § 15A-1340.17 (1997). Plaintiffs in shareholder derivative suits, by contrast, may demand a wide variety of actions of the court, including money damages and dissolution of the corporation. See COX, *supra* note 195, at 404-05 (listing nine different types of actions classified as derivative suits).

Carolina, DSS and law enforcement likely will collaborate in investigating allegations,¹⁹⁷ and the statutory definitions of criminal and civil abuse are practically identical.¹⁹⁸ Additionally, the constitutional¹⁹⁹ and statutory²⁰⁰ rights to representation by counsel ensure that the adjudication will be adversarial. Consequently, excluding the differences in possible dispositions—incarceration²⁰¹ as opposed to loss of parental custody²⁰² or termination of parental rights²⁰³—and different burdens of proof—beyond a reasonable doubt²⁰⁴ versus clear and convincing evidence²⁰⁵—the actions are fundamentally mirror images of each other: it is the State against a parent.²⁰⁶

197. See, e.g., N.C. GEN. STAT. § 7A-548(a) (1995) (requiring local law enforcement to coordinate its criminal investigation of abuse with the protective services investigation of DSS).

198. See *supra* note 29 (summarizing North Carolina's statutory definition of civil child abuse); *supra* note 47 (summarizing North Carolina's statutory definition of felonious child abuse).

199. "In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defence." U.S. CONST. amend. VI.

200. For example, in North Carolina, "[i]n cases where the juvenile petition alleges that a juvenile is abused, neglected or dependent, the parent has the right to counsel and to appointed counsel in cases of indigency unless the parent waives the right." N.C. GEN. STAT. § 7A-587 (1995).

201. Child abuse constitutes a felony offense under N.C. GEN. STAT. § 14-318.4 (1993). As a Class E felony, a conviction may result in imprisonment. See *id.* § 15-1340.17 (1997).

202. A child may be removed from the home upon an adjudication of abuse or neglect, but generally only after other dispositional alternatives, primarily home supervision, have proven unhelpful or would place the child in continued danger. See N.C. GEN. STAT. § 7A-647 (1995). In such a case, the child may be placed with a relative or family friend, or in foster care if necessary. See *id.*

203. For North Carolina's statutory requirements for terminating parental rights, see N.C. GEN. STAT. § 7A-289.32 (1995). The extreme option of terminating the rights of a parent has been examined recently by the United States Supreme Court. See *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996) (holding that indigent parents are allowed a free trial transcript upon appeal of the decision to terminate their parental rights); see also Mary McCrory Krupnow, Note, *M.L.B. v. S.L.J.: Protecting Familial Bonds and Creating a New Right of Access in the Civil Courts*, 76 N.C. L. REV. 621, 646 (1998) (discussing "the peculiar role of parental termination adjudication in the court system").

204. In an adult criminal matter, the prosecution must prove its case beyond a reasonable doubt. See *Addington v. Texas*, 441 U.S. 418, 427 (1979).

205. See N.C. GEN. STAT. § 7A-635 ("The allegations in a petition alleging abuse, neglect, dependence, or undisciplined behavior shall be proved by clear and convincing evidence."); see also *Santosky v. Kramer*, 455 U.S. 745, 770-71 (1982) (holding that, in the context of parental rights termination proceedings, due process requires clear and convincing evidence).

206. See *State v. Adams*, 122 N.C. App. 538, 542, 470 S.E.2d 830, 841 (1995) ("[T]he parent faces the prosecutorial forces of organized society."). Professor Cheh points out that the United States Supreme Court "has recognized that 'in terms of potential consequences, there is little to distinguish . . . [a juvenile] adjudicatory hearing . . . from a

Despite these shared characteristics, North Carolina courts have articulated and adhered to distinctions between juvenile and criminal proceedings.²⁰⁷ The purpose of the juvenile court system, the supreme court has specified, “‘is not for the punishment of offenders but for the salvation of children.’”²⁰⁸ Compared to criminal trials, “[j]uvenile proceedings . . . stand in a different light. Whatever may be their proper classification, they certainly are not ‘criminal prosecutions.’”²⁰⁹ As such, due process requirements, even in juvenile delinquency proceedings,²¹⁰ are less rigorous than when applied to criminal matters.²¹¹

traditional criminal prosecution.” Cheh, *supra* note 194, at 1362 (alteration in original) (quoting *Breed v. Jones*, 421 U.S. 519, 530 (1975)). A few commentators have recently re-examined the nature of juvenile proceedings. See Robert O. Dawson, *The Future of Juvenile Justice: Is It Time to Abolish the System?*, 81 J. CRIM. L. & CRIMINOLOGY 136, 155 (1990) (concluding that, in the delinquency context, the juvenile and criminal systems should remain separate); Meridith Felise Sopher, “*The Best of All Possible Worlds*”: *Balancing Victims’ and Defendants’ Rights in the Child Sexual Abuse Case*, 63 FORDHAM L. REV. 633, 658-64 (1994) (advocating a “team approach” to sexual abuse prosecution).

207. Professor Cheh underscores the distinctive nature of criminal proceedings:

From this assessment, it follows that a matter can only be criminal if formally intended to be and denominated as such: following the form of a criminal trial and calling a person to account for action clearly named as criminal by the legislature. . . . In other words, . . . it is correct to say that proceedings are criminal only if so labeled by the legislature. Being so labeled, [courts] must follow the procedures that not only protect the defendant but also give weight and meaning to the ceremonial aspect of guilt adjudication.

Cheh, *supra* note 194, at 1360.

208. *In re Walker*, 282 N.C. 28, 39, 191 S.E.2d 702, 709 (1972) (quoting *Commonwealth v. Fisher*, 62 A. 198, 199 (Pa. 1905)).

209. *In re Burrus*, 275 N.C. 517, 529, 169 S.E.2d 879, 886 (1969), *aff’d*, 403 U.S. 528 (1971); see also *Walker*, 282 N.C. at 37, 191 S.E.2d at 708 (“Whatever may be the proper classification for a juvenile proceeding in which the child is alleged to be undisciplined, it certainly is not a criminal prosecution within the meaning of the Sixth Amendment which guarantees the assistance of counsel ‘in all criminal prosecutions.’” (citing *Burrus*, 275 N.C. at 529, 169 S.E.2d at 886-87) (quoting U.S. CONST. amend. VI)).

210. North Carolina defines a “delinquent juvenile” as “[a]ny juvenile less than 16 years of age who has committed a crime or infraction under State law or under an ordinance of local government, including violation of the motor vehicle laws.” N.C. GEN. STAT. § 7A-517(12) (1995). For a general discussion of North Carolina juvenile delinquency proceedings, including plea bargaining, adjudication, and disposition, see ILENE B. NELSON, *CHILDREN IN THE LAW: A CASEBOOK FOR PRACTICE* 223-38 (Ilene B. Nelson ed., 1992).

211. See, e.g., *Walker*, 282 N.C. at 37-38, 191 S.E.2d at 708-09 (explaining that juveniles do not have the right to counsel in undisciplined child adjudications). According to Professor Cheh, however, the United States Supreme Court’s extension of constitutional protections to juvenile matters almost amounts to treating them as criminal proceedings. See Cheh, *supra* note 194, at 1361-62; *Burrus*, 275 N.C. at 528-30, 169 S.E.2d at 886-87 (explaining that due process does not require jury trials in juvenile delinquency adjudications, but that the Fifth Amendment privilege against self-incrimination is the same as that in a criminal trial).

Adjusting the rules for due process seems to make sense when, as in delinquent and undisciplined child proceedings, the juvenile court's disposition of the case concludes the judicial role in the matter.²¹² For an accused parent, however, the civil adjudication may not be the final step. As in Mary Adams's case, after DSS has filed its abuse or neglect petition, local law enforcement may choose to pursue allegations in the criminal forum.²¹³

Before filing charges, though, law enforcement officials may need to conduct additional investigation, perhaps desiring to question their primary suspect. Should the parent's Sixth Amendment right to counsel attach only after the prosecutor has taken the allegations to the courthouse, even though the State is relying on the same facts and witnesses which gave rise to the civil petition? If so, it would appear to conflict with limitations placed on state officials in recent cases. For example, in *In re Maynard*,²¹⁴ the North Carolina Court of Appeals held that once a neglect petition has been filed against a parent and the statutory right to counsel has attached, DSS case workers cannot then urge the parent to sign adoption consent documents in the absence of an attorney.²¹⁵ The *Maynard* court expressly analogized the case to a criminal matter in which the defendant invokes the right to counsel.²¹⁶ Similarly, at least one court in a criminal proceeding has barred admission on Sixth Amendment grounds of inculpatory statements made by a parent to a social worker, acknowledging the interconnectedness of the criminal and civil abuse investigations.²¹⁷

212. Professor Cheh explains that "the [Supreme] Court has invoked the due process requirements of fundamental fairness to say that, as a matter of due process of law, most, but not all, protections associated with criminal trials apply to juveniles." Cheh, *supra* note 194, at 1362 (citing *McKeiver v. Pennsylvania*, 403 U.S. 528, 541 (1971)). This conclusion makes sense given the different goals of the criminal and juvenile systems: punishment of offenders versus protection of children. See *Walker*, 282 N.C. at 39, 191 S.E.2d at 709.

213. See N.C. GEN. STAT. § 7A-548(a) (1995).

214. 116 N.C. App. 616, 448 S.E.2d 871 (1994).

215. See *id.* at 619-21, 448 S.E.2d at 873-74. The court of appeals relied on *Maynard* in its resolution of *State v. Adams*. See *State v. Adams*, 122 N.C. App. 538, 544, 470 S.E.2d 838, 842 (1995) ("[D]efendant was denied her [Sixth Amendment] right to counsel under *Maynard*."), *rev'd*, 345 N.C. 745, 483 S.E.2d 156 (1997). The supreme court, however, explicitly rejected this comparison, stating that *Maynard* was unhelpful because it did not concern criminal proceedings. See *Adams*, 345 N.C. at 748, 483 S.E.2d at 157-58.

216. See *Maynard*, 116 N.C. App. at 620, 448 S.E.2d at 874 (citing *Miranda v. Arizona*, 384 U.S. 436, 474 (1966)).

217. See *State v. P.Z.*, 666 A.2d 1000, 1001-05 (N.J. Super. Ct. App. Div. 1995), *rev'd*, 703 A.2d 901 (N.J. 1997). At a hearing held on a motion to suppress the defendant's statements, the trial court judge explained his rationale behind granting the motion:

[T]he allegations clearly that they were talking about [in the civil proceeding], if

Mary Adams's situation does not exactly parallel these circumstances, of course. In contrast with both of these instances, Ms. Adams was questioned not by a DSS worker, but by Cumberland County police.²¹⁸ She spoke directly to Detective Autry and other officers in the Law Enforcement Center after having avoided contact with them for some time.²¹⁹ Accordingly, there was little room for assumption that she was unaware of her audience and their interests in her.²²⁰ Yet, the court of appeals in *Maynard* compared the position of a parent after a neglect action has been filed to that of a criminal defendant, to whom constitutional protection is extended in dealing with law enforcement officers.²²¹ It would then seem more reasonable to extend such an analogy to the situation in which a parent, facing a petition of child abuse and its inherent criminal implications, speaks to law enforcement directly and without the aid of an attorney.

Even if such an analogy could be made, certain distinctions between Mary Adams's case and cases that have employed the "closely related" exception militate against a broader application of the Sixth Amendment. First, in general, the North Carolina Supreme Court appears less willing than other state courts to extend the Sixth

true, could have just as well been handled criminally.

And [the civil statute] recognizes that, because [it] say[s] ... let the Prosecutor know immediately. Keep the Prosecutor informed.

It's a difficult bridge that we jump back and forth from.

The Prosecutor is in the case, the Prosecutor is out of the case, not really a Criminal action.

No Criminal Complaints really filed, but they're there.

They're—and I don't mean to say this in any type of sinister way, they're hovering, hovering, listening, hearing, talking to the DYFS people. Trying to do their job. Looking to prosecute these people criminally, if that's appropriate.

But I think when they do that, they've got to be held to the standard, which one is held to if a Complaint has, in fact been filed, and counsel has been appointed.

Id. at 1001-02 (quoting trial court judge). A recent North Carolina case also identified an agency relationship under similar facts between a DSS worker and law enforcement. See *State v. Morrell*, 108 N.C. App. 465, 473-74, 424 S.E.2d 147, 152-53 (1987). But see *State v. Nations*, 319 N.C. 318, 324-26, 354 S.E.2d 510, 514-15 (1987) (holding that a social worker's conversation with a charged defendant in jail, after which the worker reported incriminating statements to police, did not amount to agency relationship between the police and DSS); *State v. Nations*, 319 N.C. 329, 331, 354 S.E.2d 516, 518 (1987) (same).

218. See *supra* notes 39-46 and accompanying text.

219. See *supra* notes 39-46 and accompanying text.

220. Cf. *Nations*, 319 N.C. 318, 321, 354 S.E.2d 510, 512 (1987) (recounting social worker's testimony that he had informed the defendant that their conversation would not be confidential and that he had an obligation to report information to the district attorney).

221. See *Maynard*, 116 N.C. App. at 620-21, 448 S.E.2d at 874.

Amendment jurisprudence of the United States Supreme Court.²²² In *State v. P.Z.*, the appellate court distinguished the right to counsel under the New Jersey Constitution from the right required by the federal Constitution.²²³ For example, New Jersey courts have required more than a “‘perfunctory recitation of the right to counsel and to remain silent’” in order to render valid a defendant’s waiver of these rights, while the federal high court has mandated comparatively loose standards.²²⁴ The opinions of North Carolina courts, on the other hand, tend to dovetail with the Sixth Amendment pronouncements of the United States Supreme Court.²²⁵ In that regard, the opinion of the North Carolina Supreme Court in *Adams*, in which it looked solely to *Kirby v. Illinois*²²⁶ for instruction on the right to counsel question, appears consistent with its prior jurisprudence and inconsistent with the holding in *P.Z.*²²⁷

222. See *supra* notes 58-67 and accompanying text.

223. See *P.Z.*, 666 A.2d at 1003 (“New Jersey has traditionally accorded greater protection of the right to counsel than the United States.” (citing *State v. Sanchez*, 609 A.2d 400, 407-08 (N.J. 1991))). The New Jersey Supreme Court, in its subsequent resolution of *P.Z.*, circumscribed this point:

Although this Court has held that the right to counsel found in Article I, Paragraph 10 of the New Jersey Constitution can provide greater protection than the Sixth Amendment right to counsel, . . . we have read Article I, Paragraph 10 as consonant with the Federal Constitution on the issue of when the right to counsel is triggered.

State v. P.Z., 703 A.2d 901, 913 (N.J. 1997) (citations omitted).

224. *P.Z.*, 666 A.2d at 1003 (quoting *Sanchez*, 609 A.2d at 408). In *Patterson v. Illinois*, 487 U.S. 285 (1988), the United States Supreme Court held that the provision of the *Miranda* warnings validly informed a suspect in custody of the right to silence and counsel. See *id.* at 299-300. According to the New Jersey Supreme Court, however, “[s]uch a recitation does not tell the defendant the nature of the charges, the dangers of self-representation, or the steps counsel might take to protect the defendant’s interest.” *P.Z.*, 666 A.2d at 1003 (quoting *Sanchez*, 609 A.2d at 408). But see *State v. Tucker*, 645 A.2d 111, 123 (N.J. 1994) (declining to extend the right to counsel at a first appearance before indictment when the invocation was unclear). For discussions of *Patterson*, see John S. Banas, III, Note, *Sixth Amendment—Waiver of the Sixth Amendment Right to Counsel at Post-Indictment Interrogation*, 79 J. CRIM. L. & CRIMINOLOGY 795 (1988); Colin E. Fritz, Comment, *Patterson v. Illinois: Applying Miranda Waivers to the Sixth Amendment Right to Counsel*, 74 IOWA L. REV. 1261 (1989).

225. See, e.g., *State v. Gibbs*, 335 N.C. 1, 43-44, 436 S.E.2d 321, 345 (1993) (following *Kirby v. Illinois*, 406 U.S. 682, 689-90 (1972)); *State v. Franklin*, 308 N.C. 682, 687-89, 304 S.E.2d 579, 583-84 (1983) (same); *State v. McDowell*, 301 N.C. 279, 288-89, 271 S.E.2d 286, 293 (1980) (same); see also *Franklin*, 308 N.C. at 689 n.3, 304 S.E.2d at 584 n.3 (“The [United States Supreme] Court has extended the sixth amendment right to counsel, as opposed to the *Miranda* right, backwards from the trial through the indictment to the initiation of judicial proceedings, presumably the first appearance before a judicial officer’ and ‘the Court is unlikely to extend the right any further.’” (alteration in original) (quoting *Kamisar*, *supra* note 101, at 83)).

226. 406 U.S. 682 (1972).

227. See *Adams*, 345 N.C. at 748, 483 S.E.2d at 157 (“We are bound to hold, pursuant

Second, two courts, one federal and one state court, have recently scrutinized the derivation of the initial right to counsel in determining whether to apply the "closely related" exception.²²⁸ Examination of the nature of the right to counsel in North Carolina may help reveal the parameters of its availability. In North Carolina, the right to counsel for parents in abuse and neglect matters is wholly a statutory provision.²²⁹ Likewise, in New Jersey, parents are statutorily entitled to the assistance of an attorney in such proceedings.²³⁰ Additionally, once a complaint of abuse or neglect is filed, the New Jersey Department of Youth and Family Services ("DYFS") may undertake an investigation, including having preliminary conferences with involved parties.²³¹ In recognition of "the fundamental injustice that might result from the use of self-incriminatory statements made to DYFS agents where criminal consequences are likely,"²³² the New Jersey legislature also expressly barred such use in a subsequent criminal proceeding of any statement made by a party in a preliminary conference.²³³ According to the lower appellate court in *P.Z.*, only when *Miranda* warnings are given and the Sixth Amendment right to counsel is offered could the prosecutor use an admission from a preliminary conference.²³⁴

to *Kirby*, that the defendant's Sixth Amendment right to an attorney did not attach at [the time of the filing of the abuse and neglect petition]."); cf. *P.Z.* 666 A.2d at 1004 (rejecting the State's argument that "*Kirby* . . . requires that adverse 'criminal' proceedings be instituted in order for the right to counsel to attach, and that because the proceedings in the Title Nine action were civil, defendant did not have that right at the time he gave the confession").

228. See *United States v. Doherty*, 126 F.3d 769, 778-83 (6th Cir. 1997); *P.Z.*, 666 A.2d at 1004-05.

229. See N.C. GEN. STAT. § 7A-587 (1995).

230. See N.J. STAT. ANN. § 9:6-8.43 (West 1993). One difference between the North Carolina and New Jersey statutes is that, whereas New Jersey allows for public defenders to represent parents in civil abuse actions, see *id.*, North Carolina expressly forbids the appointment of public defenders for parents in civil abuse, neglect, and dependency matters, see N.C. GEN. STAT. § 7A-587.

231. See N.J. STAT. ANN. § 9:6-8.35.

232. *P.Z.*, 666 A.2d at 1004.

233. See N.J. STAT. ANN. § 9:6-8.36. In *P.Z.*, the appellate court explained that "the clear purpose of the Title Nine proceeding of protecting the abused child is a prime consideration. DYFS investigations will undoubtedly be more productive in revealing potential dangers to children, thereby permitting remedial action, if the fear of having one's own statement used in a criminal prosecution is abated." *P.Z.*, 666 A.2d at 1004. The New Jersey Supreme Court, however, disagreed, stating that "acceptance of [this] argument would shift the primary focus of Title Nine from the right of children to be protected from abuse and neglect to the right of parents to the custody of their children." *State v. P.Z.*, 703 A.2d 901, 914 (N.J. 1997).

234. See *P.Z.*, 666 A.2d at 1005. This rule would apply "although defendant was not in a custodial situation and no adverse criminal proceedings had begun." *Id.* The New

By contrast, North Carolina's provisions appear much more limited. Although information compiled by the local DSS director must remain confidential, there is no clearly identifiable bar on information-sharing between DSS and the district attorney.²³⁵ Moreover, unlike New Jersey, the North Carolina legislature has not explicitly extended protection to admissions made to local DSS agents.²³⁶ Although it is possible for a North Carolina court, on facts similar to those of *P.Z.*, to interpret a legislative intent to protect admissions made in the course of DSS investigations, not even the opinion of the court of appeals in *Adams* drew that conclusion.²³⁷

This distinction has been determinative in a recent federal case. Six months after the North Carolina Supreme Court decided *Adams*, the Sixth Circuit decided *United States v. Doherty*.²³⁸ In this case, a Native American resident of a tribal reservation in Michigan, Ross Allen Doherty, was convicted of sexually abusing two children.²³⁹

Jersey Supreme Court expressly rejected these conclusions in its subsequent resolution of *P.Z.* See *P.Z.*, 703 A.2d at 908-14 (discussing the Fifth and Sixth Amendments).

235. See N.C. GEN. STAT. § 7A-544 (1995) ("All information received by the Department of Social Services, including the identity of the reporter, shall be held in strictest confidence by the Department."); *id.* § 7A-548 ("[T]he Director shall make an immediate oral and subsequent written report of the findings to the district attorney . . . and the appropriate law enforcement agency . . .").

236. See, e.g., *State v. Nations*, 319 N.C. 318, 324-26, 354 S.E.2d 510, 514-15 (1987) (holding that a DSS official's act of informing local police of an admission made to him did not violate the defendant's Sixth Amendment right to counsel). At trial in this case, the DSS worker testified:

Mr. Nations asked me if my—if his conversation with me would be confidential. I explained to him that I could not assure that, that my job was to protect children and that that would be my first priority and that by General Statute, whenever I learned that there had been a commission of a crime that I had an obligation to report that to the District Attorney.

Id. at 321, 354 S.E.2d at 512 (quoting Bob Hensley, Supervisor of Protective Services of the Rutherford County DSS, regarding his meeting with defendant); see also NELSON, *supra* note 210, at 64-65 (listing as one reason for parents to have counsel in abuse, neglect, or dependency matters the "recognition that their statements in a civil abuse or neglect proceeding may be used in a criminal prosecution of abuse and neglect" (citing HOWARD A. DAVIDSON, U.S. DEP'T OF HEALTH AND HUMAN SERVS., CHILD ABUSE AND NEGLECT LITIGATION: A MANUAL FOR JUDGES 99 (1981))).

237. Specifically, the court, rather than drawing on legislative intent or wording, found the right to counsel essentially on policy grounds:

[I]nvestigators involved on one side of civil/criminal abuse proceedings can be involved on the other side. . . . Because of the blurring of the two actions, it is particularly important to protect the rights of a defendant entangled in the intricacies of both civil and criminal law. This protection is best provided by counsel.

State v. Adams, 122 N.C. App. 538, 544, 470 S.E.2d 838, 842 (1996), *rev'd*, 345 N.C. 745, 483 S.E.2d 156 (1997) (citation omitted).

238. 126 F.3d 769 (6th Cir. 1997).

239. See *id.* at 772. The defendant was convicted of "knowingly engaging in a sexual

After arraignment by the tribal court, during which he invoked his right to counsel,²⁴⁰ FBI agents questioned Doherty regarding federal charges, and he confessed to having committed the sexual offenses.²⁴¹ Doherty sought to suppress his confessions in the subsequent federal trial on Fifth and Sixth Amendment grounds.²⁴² Concerning the Sixth Amendment right to counsel, the Sixth Circuit acknowledged the existence of the “closely related” exception²⁴³ and held: “Given that precisely the same underlying conduct formed the basis for both charges, Doherty’s Sixth Amendment right to counsel would have attached with respect to the federal charges at the same time that it did with respect to the tribal charges—if the tribal arraignment created such a right.”²⁴⁴ The court reasoned, however, that because the tribal court arraignment did not bring with it a Sixth Amendment right to counsel²⁴⁵ and because the right to counsel afforded by the

act with a child,” 18 U.S.C. § 2243(a) (1994), applicable to Native American reservations through 18 U.S.C. § 1153(a). *See id.*

240. The Hannaville Indian Community Tribal Court charged Doherty with statutory rape, which its criminal code defines as “includ[ing] sexual penetration of a child who is older than 12 years of age by a person who is a member of the same household as the child.” *See Doherty*, 126 F.3d at 772. The molested children were Doherty’s two stepdaughters. *See id.* at 773.

241. *See id.* at 772-73.

242. *See id.* at 773, 775.

243. The court explained:

Thus, every court that has considered the issue has recognized that the Sixth Amendment right to counsel extends to interrogations on new charges where “the pending charge is so inextricably intertwined with the charge under investigation that the right to counsel for the pending charge cannot constitutionally be isolated from the right to counsel for the uncharged offense.”

Id. at 776 (quoting *United States v. Hines*, 963 F.2d 255, 257 (9th Cir. 1992) (per curiam)). Further, “[t]he mere fact that two charges are brought by different sovereigns is irrelevant to this analysis, at least where the record suggests that officials of the two sovereigns are cooperating in their respective investigations.” *Id.* (citing *United States v. Laury*, 49 F.3d 145, 150 n.11 (5th Cir. 1995)); *United States v. Martinez*, 972 F.2d 1100, 1105 (9th Cir. 1992); *United States v. Rodriguez*, 931 F. Supp. 907, 927 (D. Mass. 1996)); *see also United States v. Louis*, 679 F. Supp. 705, 709 (W.D. Mich. 1988) (“[T]he key to analyzing whether a second charge is so related to the first that the Sixth Amendment protection invoked pursuant to the first extends to the second, is not whether the criminal charges are brought by the same sovereign.”). *But see United States v. Williams*, 993 F.2d 451, 457 (5th Cir. 1993) (“[T]he Sixth Amendment right to counsel might well attach to a charge that ‘was extremely closely related to pending . . . charges,’ at least where the charges concerned ‘the same’ type of crime, ‘victim, residence, time span, and sovereign.’” (alteration in original) (quoting *United States v. Cooper*, 949 F.2d 737, 744 (5th Cir. 1991))).

244. *Doherty*, 126 F.3d at 776.

245. *See id.* at 777-78. The court explained that the provisions of neither the Bill of Rights nor the Fourteenth Amendment apply to the Native American tribes. *See id.* at 777. “This is so because the tribes did not participate in the Constitutional Convention, and never formally consented to join the union. Accordingly, the tribes exercise powers

United States to defendants in Native American criminal proceedings is limited,²⁴⁶ the FBI investigators were not obligated to ensure that Doherty's attorney was present during questioning.²⁴⁷ The key distinction between Doherty's ability to have counsel at his tribal arraignment and during the later FBI interrogation was that the statutory right to counsel, invoked at the tribal court arraignment, did not separately require barring admission of uncounseled statements.²⁴⁸ Because the federal statute granting Doherty a right to counsel did not require suppressing his confession, the statement was properly admitted in the federal trial.²⁴⁹

Similarly, while North Carolina granted Ms. Adams a statutory

of self-government not pursuant to a Constitutional grant of authority, but pursuant to their status as sovereigns under principles of international law." *Id.* (citing Robert N. Clinton, *Tribal Courts and the Federal Union*, 26 WILLAMETTE L. REV. 841, 845-46 (1990); Philip P. Frickey, *Domesticating Federal Indian Law*, 81 MINN. L. REV. 31, 66 (1996)).

246. *See id.* at 778-81. In the Indian Civil Rights Act ("ICRA"), 25 U.S.C. § 1302 (1994), Congress provided for a statutory right to counsel in tribal matters, *see id.* § 1302(6), "but [did] not extend that right to the limits of the Sixth Amendment." *Doherty*, 126 F.3d at 778; *see also id.* § 1302(6) ("No Indian tribe in exercising powers of self-government shall . . . deny to any person in a criminal proceeding the right . . . at his own expense to have the assistance of counsel for his defense."). The court went on to explain that Congress did not intend to alter the non-adversarial nature of tribal proceedings, which a Sixth Amendment right to counsel would do. *See Doherty*, 126 F.3d at 780. Moreover, in light of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 3501 (1994), passed just after ICRA, the court explained that Congress had no intention to extend the *Massiah* exclusionary rule to tribal courts. *See Doherty*, 126 F.3d at 780-81 (discussing 18 U.S.C. § 3501).

247. *See Doherty*, 126 F.3d at 781.

248. The court explained:

The Sixth Amendment right to counsel does not attach until the "initiation of adversary judicial proceedings," . . . and before that right attaches, the mere existence of a statutory right to counsel—where the statute does not independently mandate the suppression of uncounseled confessions—does not trigger the application of [the Sixth Amendment exclusionary rule of] *Massiah* and *Jackson*.

Id. at 781-82 (emphasis added) (quoting *United States v. Gouveia*, 467 U.S. 180, 187 (1984)). The court had explained earlier that "the mere fact that a statute's language is similar to that found in the Constitution has never been considered to be conclusive proof that Congress intended the statute to have the same meaning as the Constitutional provision." *Id.* at 779 (citing *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 494-95 (1983)).

249. *See id.* at 782. The court explained:

Thus, where the Sixth Amendment right to counsel does not apply, which would require the suppression of an uncounseled confession, the mere existence of a statutory right to counsel is not interpreted to carry with it the *Jackson* effect of invalidating future confessions. Similarly, in the present case, Doherty voluntarily confessed his crimes, and his invocation of his limited statutory right to counsel in the tribal court was of no constitutional import.

Id.

right to counsel in her abuse and neglect proceeding, the General Assembly did not explicitly bar the admission of statements made after that right to counsel had attached.²⁵⁰ Such an express limitation, or lack thereof, played a fundamental role in the outcome in *P.Z.* and *Doherty*. Accordingly, the *Adams* court's failure to recognize a violation of Ms. Adams's Sixth Amendment right to counsel may be viewed as entirely consistent with *P.Z.* and *Doherty*.

Moreover, the argument for extending Sixth Amendment protection to the confession in *Doherty* is more compelling than in *Adams*. First, courts recognizing the "closely related" exception have articulated that the facts forming each charge must be essentially the same.²⁵¹ Both *Adams* and *Doherty* appear to satisfy this threshold requirement. Additionally, however, as the North Carolina Supreme Court noted, "by its terms, the Sixth Amendment applies only to criminal cases."²⁵² While *Doherty* concerned two criminal charges, *Adams* involved statements made while a *civil* petition was pending but before a criminal charge had been filed. Based on these two criteria alone, the circumstances in *Doherty* would appear to mandate application of the "closely related" exception.²⁵³ As one court observed, however, the exception should be applied "[o]nly under *extremely narrow* circumstances."²⁵⁴ One circumstance that extends beyond this range, according to *Doherty*, is the absence of legislative

250. See N.C. GEN. STAT. § 7A-587 (1995).

251. See, e.g., *United States v. Kidd*, 12 F.3d 30, 33 (4th Cir. 1993) ("In order to fall within this exception, the offense being investigated must derive from the same factual predicate as the charged offense."); *State v. Tucker*, 645 A.2d 111, 121 (N.J. 1994) ("If the offense under investigation is based on essentially the same factual context as the charged offense, assertion of the Sixth Amendment right to counsel on the charged offense should bar police-initiated interrogation on the related offense.").

252. *Adams*, 345 N.C. at 748, 483 S.E.2d at 157; see also *State v. P.Z.*, 703 A.2d 901, 914 (N.J. 1997) (holding that "the right to counsel guaranteed by ... the Sixth Amendment ... applies by its terms to criminal prosecutions only"); Mosteller, *supra* note 13, at 271 (same).

253. See *Doherty*, 126 F.3d at 776 ("Doherty was interrogated by federal agents with regard to the identical activities that were the subject of the tribal court charge.").

254. *United States v. Williams*, 993 F.2d 451, 456 (5th Cir. 1993) (emphasis added) (citing *United States v. Carpenter*, 963 F.2d 736, 740 (5th Cir. 1992); *United States v. Cooper*, 949 F.2d 737, 743-44 (5th Cir. 1991)). In *Williams*, the court rejected defendant's argument for application of the exception. See *id.* at 456-57. The defendant, against whom an Arkansas bill of information had been filed on a drug charge, made false statements about her drug activities before a federal grand jury. See *id.* at 454. She was later convicted of perjury, but not of any federal drug offense. See *id.* The defendant argued that her questioning before the grand jury constituted a violation of her right to counsel. See *id.* at 456. The court concluded that the state drug charges and the federal perjury allegations, "brought by different sovereigns and concerning different conduct, [were] not 'extremely closely related.'" *Id.* at 457.

interest in suppressing statements made after a defendant's statutory right to counsel has attached.²⁵⁵ The Sixth Circuit reached this conclusion concerning a criminal proceeding, in which an arguably constitutional right to counsel may exist under the Sixth Amendment.²⁵⁶ Ms. Adams's case, in comparison, involved a civil matter, outside the purview of the Sixth Amendment.²⁵⁷ Her right to counsel was thus purely statutory and subject to the limitations placed thereon by the legislature. Following the reasoning of *Doherty*, because the North Carolina General Assembly did not expressly provide for the suppression of statements made after the attachment of the statutory right, and because no Sixth Amendment provision had yet taken effect because only a civil matter had commenced, the North Carolina Supreme Court's resolution of Ms. Adams's case reflects an appropriate and logical analysis of the statutory and constitutional rights to counsel.

Finally, and probably most significantly, eight months after the North Carolina Supreme Court reversed the decision of the North Carolina Court of Appeals in *Adams*, the New Jersey Supreme Court followed suit, reversing the lower appellate court's ruling in *State v. P.Z.*²⁵⁸ The New Jersey court clarified, as had the North Carolina court in *Adams*, that the right to counsel provision of the Sixth Amendment applied strictly to criminal prosecutions.²⁵⁹ Moreover, even though parents retain a "fundamental interest in the custody and care of their children,"²⁶⁰ the court was unwilling "to expand the [statutory] rights of respondents to include protections afforded criminal defendants after they have been indicted or taken into custody."²⁶¹ To the contrary, according to the court, the extant statutory provisions adequately protect the interests of parents.²⁶² By

255. See *Doherty*, 126 F.3d at 782; cf. *State v. P.Z.*, 666 A.2d 1000, 1004 (N.J. Super. Ct. App. Div. 1995) (discussing the legislature's expressed intent to bar statements made in preliminary conferences from admission in subsequent criminal proceedings), *rev'd*, 703 A.2d 901 (N.J. 1997).

256. Of course, as the *Doherty* court pointed out, the constitutional argument here would be weak because the Sixth and Fourteenth Amendments do not apply to Indian tribes. See *Doherty*, 126 F.3d at 777-78; *supra* note 245.

257. See *supra* note 192 and accompanying text.

258. 703 A.2d 901 (N.J. 1997). The North Carolina Supreme Court filed its opinion in *State v. Adams* on April 11, 1997. See *Adams*, 345 N.C. at 745, 483 S.E.2d at 156. The New Jersey Supreme Court handed down this decision November 26, 1997. See *id.* at 901.

259. See *P.Z.*, 703 A.2d at 914 (citing *Gideon v. Wainwright*, 372 U.S. 335, 339-45 (1963); *Johnson v. Zerbst*, 304 U.S. 458, 462 (1938); *State v. Tucker*, 645 A.2d 111 (N.J. 1994); *State v. Sanchez*, 609 A.2d 400 (N.J. 1992)).

260. *Id.*

261. *Id.*

262. See *id.* (discussing N.J. STAT. ANN. § 9:6-8.43(a) (West 1993)).

requiring the trial court to inform parents of their right to counsel upon the filing of a petition of abuse and neglect, the legislature secured parents' fundamental interests in the care and custody of their children and provided them a legitimate opportunity to voice their positions in court.²⁶³ Finally, the court explained that extending Sixth Amendment protection in this circumstance would actually hinder the goals of abuse investigators, namely the protection of children.²⁶⁴

Thus, only months after the North Carolina Supreme Court issued its opinion, the New Jersey Supreme Court struck down the most compelling argument against the decision in *Adams*. If any question remained about the continuing validity of Ms. Adams's assertion of the right to counsel under the Sixth Amendment, the New Jersey court's action appears to have put it to rest. In the light of these two subsequent extrajurisdictional decisions, *Doherty* and *P.Z.*, the reasoning of the North Carolina Supreme Court appears reasonable and logical, if not constitutionally mandated.

Ever since the United States Supreme Court handed down the *Massiah* decision in 1964, critics have argued that applying an exclusionary rule to the Sixth Amendment right to counsel stifles effective police work.²⁶⁵ Perhaps the same type of criticism could have been leveled against the North Carolina Supreme Court if it had extended this exclusionary rule to include Mary Adams's statement to the Cumberland County Sheriff's Department. At the same time, however, if the rule is intended to protect accused persons against undue pressures of police questioning, then the circumstances here might warrant an added degree of sympathy. A frightened, confused parent who wants little more than to retain custody of a child probably will make an admission to a police officer, or, as in *P.Z.*, a

263. See *id.* ("Presumably, the Legislature considered that the right to counsel set forth in the statute provides safeguards sufficient to protect persons alleged by DYFS to have abused or neglected their children.").

264. See *id.* ("Forcing a DYFS caseworker to choose between providing *Miranda* warnings and foreclosing the use in criminal proceedings of information obtained in the course of an abuse and neglect investigation will not inure to the protection of children.").

265. As the United States Department of Justice, Office of Legal Policy, asserted several years ago:

Massiah continues to thwart the search for truth in criminal investigations and prosecutions by prohibiting the use of legitimate investigative techniques and by requiring the exclusion of reliable and probative evidence whose use would not deprive the defendant of a fair trial. In effect, the *Massiah* right not to be questioned and the *Massiah* exclusionary rule amount to obstructions of justice.

Massiah Report, *supra* note 68, at 706; see also *supra* note 75 (listing additional critiques of the exclusionary rule).

social worker. After *Adams*, this parent is likely assured of several devastating results: loss of the child to the state, a criminal conviction, and probably prison time. On the other hand, however, the goals of child protection and punishment for crime arguably are best served when investigators, both for social services and for law enforcement, have the benefit of any and all information. But is this justification not the same argument for discarding the *Massiah* exclusionary rule altogether?

Ultimately, no matter how this case was resolved, it would be difficult to celebrate the result. In one sense, though, the rule applied by the North Carolina Supreme Court does provide significant clarity, and perhaps acts as a cautionary signal for parents accused of abuse and their attorneys. Undoubtedly, however, given the heightened emotional state of parents in such circumstances, it will have little practical effect when a concerned mom or dad is willing to do anything, to say anything, to reveal anything, in order to assure the continued care, support, and love of a child.

PETER MARSHALL VARNEY

Employee Beware—Relocation Does Not Remove the Presumption of Employment-At-Will: *Kurtzman v. Applied Analytical Industries, Inc.*

To move or not to move for a new job:¹ this is the employment dilemma of the down-sized² 1990s. When deciding whether or not to move, employees will ponder the cost of living in a different place, the difficulties in selling or buying a home, and the prospect of choosing among different schools for their children.³ Many will assume that their new job is secure, or might have been assured in vague terms that their new position is long-term. Since the employee uproots his life to accept the new position, it seems rational that the

1. See, e.g., Lini S. Kadaba, *Pulling Up Stakes No Bull: Moving is No Fun*, GREENSBORO NEWS & REC., Dec. 4, 1994, at G1 (noting that the average cost of moving a home-owning employee is more than \$40,000, whereas relocating a home-owning new hire may cost \$30,000, and relocating a renting employee may cost \$13,000). The Internet can provide employees with a wealth of information on relocation. See, e.g., Employee Relocation Council, *Employee Relocation Council* (last visited Aug. 23, 1998 <<http://www.erc.org>>; Relocation Journal & Real Estate News, *Newsbreak*, (last visited Aug. 23, 1998) <<http://www.relojournal.com>>.

2. The phrase has become cliché, but one example is particularly poignant: In 15 months, the CEO of Scott Paper Company, Al Dunlap, sold nearly \$2.5 billion in assets, slashed one-third of the workforce and scored record earnings. In July 1995 he engineered the company's merger with Kimberly-Clark. When the merger is completed, Dunlap will personally walk away with about \$100 million. He makes no apologies. He says, "That's the free enterprise system."

MARY F. COOK, *THE HUMAN RESOURCES YEARBOOK 1996/1997*, at 1.4 (1996). Downsizing not only affects the employees and CEOs—it affects the surrounding communities as well, reducing tax revenues and increasing the need for public expenditures in areas hard hit by sudden and unexpected unemployment. See Mitchell Lee Marks, *Restructuring and Downsizing*, in *BUILDING THE COMPETITIVE WORKFORCE: INVESTING IN HUMAN CAPITAL FOR CORPORATE SUCCESS* 60, 79 (Philip H. Mirvis ed., 1993). As the job market improves, however, some workers may be happy to be "downsized" so they can move on to new and perhaps better experiences. See, e.g., Leslie Kaufman & John McCormick, *Year of the Employee*, NEWSWEEK, July 20, 1998, at 38, 39. (reporting that many recipients of "pink slips" are thrilled to leave because chances are good that laid-off workers will find a better-paying job within a month).

3. One author has described the modern relocation experience in detail: A corporate relocation adviser hands an individual a package overflowing with information on housing, schools, moving companies and more. The worker sifts through all the material, consults with a relocation counselor and embarks on a trip to the new locale to make arrangements for *The Big Move*. It's hectic, distracting and often overwhelming—even when an employee receives plenty of TLC.

Samuel Greengard, *Move Easier with Online Assistance*, WORKFORCE, Sept. 1, 1997, at 48.

employer will not fire them anytime soon.⁴ Employees moving to North Carolina and other employment-at-will states, however, should consider an additional factor—if they have not negotiated for a specific term of employment, then they are employees at-will, terminable with or without cause.⁵

Under North Carolina law, absent a contractual agreement specifying a definite term of employment,⁶ the relationship is presumed to be terminable at the will of either party, regardless of the quality of the performance of either party.⁷ Federal and state

4. See, e.g., Manesh K. Rath, *Left Standing at the Altar: How Relocation Affects the Employment Relationship*, 37 S. TEX. L. REV. 813, 842-43 (1996) (arguing that employees in negotiations rarely will ask for contract terms that protect them in case of termination because such a request implies the relationship is doomed before it begins).

5. See Kurtzman v. Applied Analytical Indus., Inc., 347 N.C. 329, 334, 493 S.E.2d 420, 423-24 (1997). Employees who believe their termination was unlawful may sue their employers under two different theories in North Carolina courts: a tort claim for wrongful discharge based on the theory that the termination violated public policy, see *Sides v. Duke Univ.*, 74 N.C. App. 331, 342-43, 328 S.E.2d 818, 826-27 (1985), or a contract claim that the termination breached an express or implied contract between the parties, see *id.* at 344-45, 328 S.E.2d at 828. The difference is important because recovering under a tort theory will allow the plaintiff to recover punitive damages, while recovery in contract will not. See Victoria W. Shelton, Note, *Will the Public Policy Exception to the Employment-At-Will Doctrine Ever Be Clear?—Amos v. Oakdale Knitting Co.*, 14 CAMPBELL L. REV. 123, 133 (1991). The North Carolina Supreme Court has not explicitly recognized a bad-faith exception to the employment-at-will doctrine, and the North Carolina Court of Appeals denies there is any such exception. See, e.g., *Salt v. Applied Analytical, Inc.*, 104 N.C. App. 652, 662, 412 S.E.2d 97, 103 (1991) ("We hold that there is no independent tort action for wrongful discharge of an at-will employee based solely on allegations of discharge in bad faith.").

6. A contract for a term indicates how long the parties want the employment relationship to last. See 30 C.J.S. *Employer-Employee* § 27(a) (1992). See generally 82 AM. JUR. 2D *Wrongful Discharge* § 3 (1992) (explaining that an employee who has a contract for a term may not be terminated without "good cause" or "just cause"). The terms may be expressed in specific amounts of time, or may depend on the happening of a particular event. See *Freeman v. Hardee's Food Sys., Inc.*, 267 N.C. 56, 62, 147 S.E.2d 590, 595 (1966) (determining that the plaintiff's award for breach of contract for term was not limited by the commencement of an action). In *Malever v. Kay Jewelry Co.*, 223 N.C. 148, 149, 25 S.E.2d 436, 437 (1943), the court first announced that a contract for "permanent" employment implies an indefinite general hiring, terminable at will. See *id.*; see also 30 C.J.S. *Employer-Employee* § 27(c) (1992) ("[A]s a general rule, in the absence of stipulations as to duration . . . , a contract for permanent employment is no more than an indefinite general hiring or hiring at will" (footnotes omitted)).

7. See, e.g., Kurtzman, 347 N.C. at 331, 493 S.E.2d at 422 (citing *Soles v. City of Raleigh Civil Serv. Comm'n*, 345 N.C. 443, 446, 480 S.E.2d 685, 687 (1997); *Harris v. Duke Power Co.*, 319 N.C. 627, 629, 356 S.E.2d 357, 359 (1987)). See generally J. Wilson Parker, *The Uses of the Past: The Surprising History of Terminable-At-Will Employment in North Carolina*, 22 WAKE FOREST L. REV. 167, 186-95 (1987) (examining early employment law cases and the role of the North Carolina Supreme Court in developing the employment-at-will doctrine). Professor Parker has suggested that the popularity of the employment-at-will doctrine can be attributed to laissez-faire economic theory and

statutes limit the presumption by prohibiting discharge based on discriminatory or retaliatory motives.⁸ Over time, the North Carolina Supreme Court has recognized several public policy exceptions to the employment-at-will doctrine,⁹ but such exceptions are confusing and limited in nature.¹⁰ In general, these public policy exceptions reflect

Social Darwinism. See *id.* at 179. The doctrine of employment-at-will was a departure from the English common law, where a year of employment was presumed. See *Sides*, 74 N.C. App. at 338, 328 S.E.2d at 824 (citing 2 WILLIAM BLACKSTONE, COMMENTARIES *425).

Horace Wood first proposed the employment-at-will doctrine when he published a treatise on master-servant relations in 1877. See HORACE WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT 272 (1877). At least one commentator has asserted that Wood did not have any authoritative support for his proposed rule. See, e.g., Jay M. Feinman, *The Development of the Employment-at-will Rule*, 20 AM. J. OF LEGAL HIST. 118, 126 (1976). Other scholars contend, however, that Wood did have authority and that other cases supported his view. See Mayer G. Freed & Daniel D. Polsby, *The Doubtful Provenance of "Wood's Rule" Revisited*, 22 ARIZ. ST. L.J. 551, 558 (1990) ("Horace Wood did not make up the rule of employment-at-will. He just told it like it was."); see generally HENRY H. PERRITT, JR., EMPLOYEE DISMISSAL LAW AND PRACTICE § 1.4, at 10 (4th ed. 1998) (explaining that the Industrial Revolution led both employers and employees to desire greater freedom to negotiate employment terms); Deborah A. Ballam, *Exploding the Original Myth Regarding Employment-At-Will: The True Origins of the Doctrine*, 17 BERKELEY J. EMP. & LAB. L. 91, 126-27 (1996) (concluding that the agricultural economy and scarcity of labor in nineteenth-century America made the English annual hiring rule impractical and made Wood's rule quite attractive).

8. See, e.g., 29 U.S.C.A. § 623 (West Supp. 1998) (prohibiting employment discrimination based on age); 42 U.S.C. § 2000-e-2(a) to (d) (1994) (prohibiting employment discrimination based on race, color, religion, sex, or national origin); 42 U.S.C. § 12112(a) (1994) (prohibiting employment discrimination against qualified individuals with disabilities). North Carolina has created several statutory exceptions to the employment-at-will doctrine. See, e.g., N.C. GEN. STAT. § 95-241 (1993) (prohibiting discharge in retaliation for filing worker's compensation claims, Occupational Safety and Health Administration (OSHA) claims, or similar claims); *id.* § 95-28.1A (Supp. 1997) (prohibiting discrimination based on sickle cell anemia); *id.* § 95-83 (1993) (permitting suits by employees who have been discharged because they joined or refused to join a union). Under § 95-240 of the North Carolina General Statutes, "retaliation" has been defined as any adverse employment action. See *id.* § 95-240 (1993). North Carolina has also enacted legislation to prohibit discrimination against the handicapped. See *id.* § 168A-5 (1995).

9. See *Amos v. Oakdale Knitting Co.*, 331 N.C. 348, 353-54, 416 S.E.2d 166, 169-70 (1992) (allowing a cause of action for employees fired for refusing to work below the minimum wage because public policy is violated when an employee is fired in contravention of the express policy declarations of the North Carolina General Statutes); *Coman v. Thomas Mfg. Co.*, 325 N.C. 172, 175, 381 S.E.2d 445, 447 (1989) (allowing a cause of action for wrongful discharge because public policy is offended when employee fired for refusing to violate federal trucking regulations but affirming summary judgment for the employer due to lack of evidence); *Sides*, 74 N.C. App. at 342, 328 S.E.2d at 826 (holding that the employee may bring cause of action when fired in retaliation for refusing to commit perjury because of public policy interest in proper administration of justice).

10. See, e.g., *Salt*, 104 N.C. App. at 664, 412 S.E.2d at 104 (holding that plaintiff employee who relocated to accept job could not sue for wrongful discharge solely on

the conviction of the North Carolina Supreme Court that no employee should be forced to choose between upholding the law or losing her job.¹¹ What constitutes upholding the law, however, has been defined narrowly by the North Carolina courts.¹²

The doctrine of employment-at-will, while somewhat limited by statutory and case law exceptions, remains firmly rooted in North Carolina law.¹³ Before *Kurtzman v. Applied Analytical Industries, Inc.*,¹⁴ an employee suing for wrongful discharge or breach of contract without a contract for a specific term already faced a formidable amount of case law favorable to the employer.¹⁵ After *Kurtzman*,

allegations of bad faith discharge without a public policy exception); *Walker v. Westinghouse Elec. Corp.*, 77 N.C. App. 253, 263, 335 S.E.2d 79, 86 (1985) (affirming summary judgment for the employer when the employee was fired for raising workplace safety concerns). See generally J. Michael McGuiness, *The Doctrine of Wrongful Discharge in North Carolina: The Confusing Path from Sides to Guy and the Need for Reform*, 10 CAMPBELL L. REV. 217, 229-34 (1988) (describing ways that the public policy exception has been applied in North Carolina and other jurisdictions); Duncan Alford, Note, *Coman v. Thomas Manufacturing Co.: Recognizing a Public Policy Exception to the At-Will Employment Doctrine*, 68 N.C. L. REV. 1178, 1188-89 (1990) (arguing that the supreme court did not define the contours of the public policy exception very clearly); Kimberly Anne Huffman, Note, *Salt v. Applied Analytical, Inc.: Clarifying the Confusion in North Carolina's Employment-at-Will Doctrine*, 70 N.C. L. REV. 2087, 2092-99 (1992) (analyzing state and federal cases in North Carolina where the public policy exception to employment-at-will was at issue).

11. See, e.g., *Coman*, 325 N.C. at 175, 381 S.E.2d at 447 (1989) ("[W]hile there may be a right to terminate a contract at will for no reason, or for an arbitrary or irrational reason, there can be no right to terminate such a contract for an unlawful reason or purpose that contravenes public policy." (quoting *Sides*, 74 N.C. App. at 342, 328 S.E.2d at 826 (1985))).

12. See, e.g., *Hogan v. Forsyth Country Club*, 79 N.C. App. 483, 500, 340 S.E.2d 116, 126-27 (1986) (affirming summary judgment for the employer when the employee claimed she was fired for complaining about sexual harassment by another employee); *Walker*, 77 N.C. App. at 263-64, 335 S.E.2d at 86 (hesitating to establish a public policy exception for raising safety concerns and affirming summary judgment for the employer for lack of evidence showing that the employee was discharged for raising workplace safety concerns). Further discussion of the public policy exception is beyond the scope of this Note.

13. See *Kurtzman*, 347 N.C. at 331, 493 S.E.2d at 422 ("North Carolina is an employment-at-will state").

14. 347 N.C. 329, 493 S.E.2d 420 (1997).

15. See, e.g., *Harris v. Duke Power Co.*, 319 N.C. 627, 632-33, 356 S.E.2d 357, 361 (1987) (holding that employment handbooks are not binding on the employer); *Still v. Lance*, 279 N.C. 254, 259, 182 S.E.2d 403, 406 (1971) (holding that a contract for a "permanent" job does not remove presumption of employment-at-will); *Malever v. Kay Jewelry Co.*, 223 N.C. 148, 149, 25 S.E.2d 436, 437 (1943) (holding that employer's assurances that job would be permanent did not remove the presumption of employment-at-will); *Buffaloe v. United Carolina Bank*, 89 N.C. App. 693, 696, 366 S.E.2d 918, 920 (1988) (holding that policy in employee manual to fire employees only for cause did not remove the presumption of employment-at-will, because "employment manuals or policies do not become part of the employment contract unless expressly included in it").

new employees whose contracts do not specify a term of employment probably have no claim in North Carolina courts when they move to North Carolina and are fired without cause shortly thereafter.¹⁶

This Note discusses the facts of *Kurtzman*, its history in the lower courts, and the North Carolina Supreme Court's resolution of the case.¹⁷ Next, the Note surveys the history of the employment-at-will doctrine in North Carolina state and federal courts, comparing it with the holding in *Kurtzman*.¹⁸ The Note then examines the alternatives open to the court in reaching its decision and considers the practical consequences of the holding.¹⁹ The Note concludes that the court—faced with a variety of interests to balance—reached the fairest result possible without more guidance from the General Assembly.²⁰

Lewis Kurtzman had a secure position as a national sales manager for a Rhode Island company when representatives of Applied Analytical Industries ("AAI"), a pharmaceutical testing company in Wilmington, North Carolina, approached him to discuss the possibility of employment with AAI.²¹ After several months of communications, AAI offered Kurtzman a position as the Vice-President of Sales and Marketing,²² which he accepted in March of 1992.²³ Throughout the negotiations, Kurtzman expressed concern about the security of the proposed position with AAI, but was assured that his position was secure.²⁴ At the end of March 1992,

16. See *Kurtzman*, 347 N.C. at 334, 493 S.E.2d at 423 ("To remove an employment relationship from the at-will presumption upon an employee's change of residence, coupled with vague assurances of continued employment, would substantially erode the rule and bring considerable instability to an otherwise largely clear area of the law."). But see *id.* at 423 (stating that earlier cases had neither "approved nor disapproved" the "moving residence" exception).

17. See *infra* notes 21-54 and accompanying text.

18. See *infra* notes 54-113 and accompanying text.

19. See *infra* notes 114-137 and accompanying text.

20. See *infra* notes 138-53 and accompanying text.

21. See *Kurtzman*, 347 N.C. at 330, 493 S.E.2d at 421.

22. See Plaintiff-Appellee's Brief at 2, *Kurtzman* (No. 103PA97).

23. See *Kurtzman*, 347 N.C. at 330, 493 S.E.2d at 421.

24. See *id.* at 331, 493 S.E.2d at 421. At trial, evidence showed that AAI assuaged Kurtzman's concerns during their negotiations with statements like: "If you do your job, you'll have a job," "This is a long-term growth opportunity for you," "This is a secure position," and "We're offering you a career position." *Id.* (quoting statements made by AAI to Kurtzman). The plaintiff's brief noted several more assurances AAI made to Kurtzman: "[W]e look forward to the valuable contribution to our *mutual future growth*," "After you have sold your house in Massachusetts, . . . we will pay one-eighth of [your closing costs and real estate commission] quarterly, . . . Thus, you will be reimbursed over a two year period." Plaintiff-Appellee's Brief at 6, *Kurtzman* (No. 103PA97) (quoting AAI's assurances to Kurtzman). The defendant's brief, however, notes

Kurtzman moved from Massachusetts and began working for AAI.²⁵ Kurtzman's wife and daughter remained in Massachusetts until their house was sold, then joined him in Wilmington.²⁶ Eight days into his employment, Kurtzman signed an employment application which stated that " 'employment can be terminated for any reason deemed sufficient by AAI.' "²⁷ Evidence at trial showed that this application was used for personnel records only, however, and was not part of any contract between Kurtzman and AAI.²⁸ Having worked at AAI less than eight months, AAI terminated Kurtzman's employment on November 2, 1992.²⁹

Kurtzman sued, alleging breach of contract, tortious interference with contractual relations, intentional infliction of emotional distress, and negligent misrepresentation.³⁰ Three of Kurtzman's claims were dismissed voluntarily or by summary judgment, leaving only the breach of contract action to proceed to a jury trial.³¹ The jury found

that evidence at trial also showed that when Kurtzman asked about securing an employment contract, AAI specifically told him that no such contract would be available. See Defendant-Appellant's New Brief at 4, *Kurtzman* (No. 103PA97).

25. See *Kurtzman*, 347 N.C. at 331, 493 S.E.2d at 421. AAI agreed to pay Kurtzman at least \$125,000 per year, almost \$30,000 more than he had been making at his previous position. See Defendant-Appellant's New Brief at 4, *Kurtzman* (No. 103PA97).

26. See *Kurtzman*, 347 N.C. at 331, 493 S.E.2d at 421. The North Carolina Court of Appeals decision also noted that AAI told Kurtzman that they would pay for any temporary housing costs and that the company contributed to the costs of selling his residence. See *Kurtzman v. Applied Analytical Indus., Inc.*, 125 N.C. App. 261, 266, 480 S.E.2d 425, 428, rev'd, 347 N.C. 329, 335, 493 S.E.2d 420, 424 (1997).

27. *Kurtzman*, 125 N.C. App. at 266, 480 S.E.2d at 428 (quoting Kurtzman's employment application). The North Carolina Supreme Court did not mention this job application in its opinion, probably because under North Carolina law an employment application that an employee is shown after that employee has begun working has no legal effect. See *Rucker v. First Union Nat'l Bank*, 98 N.C. App. 100, 102, 389 S.E.2d 622, 624 (1990); *Griffin v. Housing Auth.*, 62 N.C. App. 556, 557, 303 S.E.2d 200, 201 (1983); Plaintiff-Appellee's Brief at 35, *Kurtzman* (No. 103PA7).

28. See *Kurtzman*, 125 N.C. App. at 266, 480 S.E.2d at 428.

29. See *Kurtzman*, 347 N.C. at 331, 493 S.E.2d at 421. Lewis Kurtzman was not "down-sized," but the issue of why he was terminated was sharply contested at the trial court level. See Defendant-Appellant's New Brief at 5 n.3, *Kurtzman* (No. 103PA7). Although AAI claimed that Kurtzman's job performance had been unsatisfactory, the trial court found that Kurtzman was terminated without cause. See Plaintiff-Appellee's Brief at 11, *Kurtzman* (No. 103PA7). When he could not find a new job, Kurtzman started his own consulting business, but his salary decreased dramatically. See *Kurtzman*, 125 N.C. App. at 263, 480 S.E.2d at 426.

30. See *Kurtzman*, 125 N.C. App. at 263, 480 S.E.2d at 426.

31. See *id.* In *Alliance Company v. State Hospital at Butner*, 241 N.C. 329, 85 S.E.2d 386, the court stated that "[t]he relation of employer and employee is essentially contractual in nature, and is to be determined by the rules governing the establishment of contracts." *Id.* at 332-33, 85 S.E.2d at 389. Thus, Kurtzman's theory at trial was that AAI specifically promised him that he would only be discharged for deficient performance, i.e. "for cause," and that AAI in fact discharged him without cause. See Plaintiff-Appellee's

for Kurtzman, awarding him \$350,000 in damages.³²

By unanimous vote, the North Carolina Court of Appeals affirmed the trial court, holding that Kurtzman's change in residence, coupled with assurances from AAI about job security, were sufficient to remove the presumption of employment-at-will.³³ The court of appeals based its decision on the "additional consideration" exception to the employment-at-will doctrine.³⁴ This exception, recognized by North Carolina courts on occasion, applies when the employee provides additional consideration beyond his obligation of services and the employer makes assurances of a permanent position.³⁵ The court of appeals noted that the "additional consideration" exception does not "convert every employment-at-will agreement into an enforceable contract."³⁶ Instead, additional consideration means that if the employment agreement expressly or impliedly provides that the employment is for life or terminable only for cause, then the employment may be terminated without cause only after a reasonable time.³⁷

The North Carolina Supreme Court reversed the court of appeals, stating unequivocally that "North Carolina is an

Brief at 9-10, *Kurtzman* (No. 103PA97).

32. See *Kurtzman*, 125 N.C. App. at 263, 480 S.E.2d at 426, *rev'd*, 347 N.C. 329, 493 S.E.2d 320 (1990). AAI's motions to set aside the verdict or grant a new trial were both denied. See *id.* at 264, 480 S.E.2d at 426. The court of appeals also allowed the trial court's \$350,000 damage award to stand, stating that Kurtzman had provided solid evidence of the damages he suffered as a result of the breach of contract. See *id.* at 266-67, 480 S.E.2d at 428.

33. See *id.* at 266, 480 S.E.2d at 428.

34. In determining that an "additional consideration" exception applied in certain circumstances, the court of appeals relied on both North Carolina precedent and various treatises. See *id.* at 264-65, 480 S.E.2d at 427-28; see also *Sides v. Duke Univ.*, 74 N.C. App. 331, 345, 328 S.E.2d 818, 828 (1985) ("Where the employee gives some special consideration in addition to his services, such as relinquishing a claim for personal injuries against the employer, removing his residence from one place to another in order to accept employment, or assisting in breaking of a strike, such a contract may be enforced.") (quoting *Burkheimer v. Gealy*, 39 N.C. App. 450, 454, 250 S.E.2d 678, 682 (1979)).

35. See *Sides*, 74 N.C. App. at 345, 328 S.E.2d at 828 (citing *Tuttle v. Kernersville Lumber Co.*, 263 N.C. 216, 219, 139 S.E.2d 249, 251 (1964)). In its brief, AAI argued that the additional consideration language in *Sides* was "dictum" derived from two older cases, *Tuttle* and *Burkheimer*. See Defendant-Appellant's New Brief at 27, *Kurtzman* (No. 103PA97); *infra* note 44 and accompanying text. In its brief, AAI implied that older decisions like *Tuttle* and *Burkheimer* relied too heavily on a passage from CORPUS JURIS SECUNDUM which recognized that additional consideration may be sufficient to remove the presumption of employment-at-will. See Defendant Appellant's New Brief at 28, *Kurtzman* (No. 103PA97); see also 56 C.J.S. *Master & Servant* § 31 (1948).

36. *Kurtzman*, 125 N.C. App. at 265, 480 S.E.2d at 427.

37. See *id.*

employment-at-will state.”³⁸ According to the court, employees can remove the presumption of employment-at-will by proving the existence of a contract with terms of employment or by showing their termination to be prohibited by statutory exception.³⁹ The supreme court noted that North Carolina courts have also recognized a public policy exception to the employment-at-will doctrine.⁴⁰

Turning to the facts of Kurtzman’s case, the court noted that Kurtzman did not rely on any of the statutory or public policy exceptions, but instead relied on the “moving residence”⁴¹ exception as recited by the court of appeals in *Burkheimer v. Gealy*.⁴² Finding little merit in “this asserted ‘moving residence’ ” exception, the court also determined that AAI’s somewhat vague assurances of a permanent position were insufficient to create a contract for a specific term.⁴³ The court announced that although previous cases had cited the “moving residence” exception, it had never ruled on that specific issue.⁴⁴ Next, the court distinguished previous cases

38. *Kurtzman*, 347 N.C. at 331, 493 S.E.2d at 422.

39. *See id.* Statutory exceptions to the doctrine of employment-at-will are discussed *supra* note 9 and accompanying text.

40. *See Kurtzman*, 347 at 331-32, 493 S.E.2d at 422. The public policy exception to employment-at-will is discussed *supra* notes 9 and 12 and accompanying text.

41. The “moving residence” exception is just one of several “additional consideration” exceptions to the employment-at-will doctrine that North Carolina courts have recognized over the years. *See, e.g., Sides v. Duke Univ.*, 74 N.C. App. 331, 345, 328 S.E.2d 818, 828 (1985) (recognizing the “moving residence” exception). Other examples of additional consideration provided by employees include relinquishing a claim against the employer for personal injuries or breaking a strike. *See id.* Although the “moving residence” exception that Kurtzman relied on has been cited by various North Carolina courts, the North Carolina Supreme Court refers to his justification several times as an “asserted exception,” as if the exception never existed. *See Kurtzman*, 347 N.C. at 331-32, 493 S.E.2d at 422. Nonetheless, supreme court itself has even alluded to this exception. *See Harris v. Duke Power Co.*, 319 N.C. 627, 629, 356 S.E.2d 357, 359 (1987) (explaining that the employment-at-will doctrine is subject to some well-defined exceptions, including the “moving residence” exception). Without overruling *Harris*, the supreme court in *Kurtzman* specifically disapproved of the “moving residence” language in *Harris* and similar language in decisions by the court of appeals. *See Kurtzman*, 347 N.C. at 333, 493 S.E.2d at 423.

42. 39 N.C. App. 450, 250 S.E.2d 678 (1979).

43. *Kurtzman*, 347 N.C. at 332-33, 493 S.E.2d at 422 (emphasis added) (citing *Still v. Lance*, 279 N.C. 254, 259, 182 S.E.2d 403, 406 (1971)).

44. *See id.* (“Plaintiff’s contention that this exception is well established in our jurisprudence is incorrect.”). Indeed, AAI’s brief argued vigorously that the “moving residence” exception developed out of dictum and was cited in cases where the employees did not actually move. For example, in *Tuttle v. Kernersville Lumber Co.*, 263 N.C. 216, 139 S.E.2d 249 (1964), the court never mentions relocation. The *Tuttle* court, however, did recognize the additional consideration exception. *See id.* at 219, 139 S.E.2d at 251 (citing 56 C.J.S. *Master & Servant* § 31 (1948)). In *Tuttle*, the court determined that when an employment contract “is based upon the services being satisfactory,” the employee is

citing the exception and disapproved of language in earlier cases that could be construed as support for the "moving residence" exception.⁴⁵ The court then considered whether a "moving residence" exception fit within the limited public policy exceptions to employment-at-will and decided that it did not.⁴⁶ Because the other public policy exceptions were intended to prevent status-based discrimination or violations of the law, and since relocation for a job is commonplace, the court concluded that to recognize a "moving residence" exception would bring too much uncertainty into an area of law that had been clear.⁴⁷

Notably, the Court stated that the employment-at-will doctrine had "greatly facilitated the development of the American economy at the end of the nineteenth century."⁴⁸ Moreover, the court explained that the employment-at-will doctrine remains an incentive to economic development, and warned that erosion of the doctrine could lead to instability in the law.⁴⁹ Setting a high bar for future exceptions, the court then announced that any new exceptions to employment at-will should only be adopted with "substantial justification grounded in compelling considerations of public policy."⁵⁰ The "moving residence" exception, the court decided, did not meet this standard.⁵¹

still terminable at will. *Id.* at 219, 139 S.E.2d at 251 (citation omitted). Likewise, in *Burkheimer v. Gealy*, 39 N.C. App. 450, 250 S.E.2d 678 (1979), the employee did not move to accept a new job, but instead sent his prospective employer a letter proposing that his employment continue for the rest of his life. *See id.* at 453, 250 S.E.2d at 681. The employer responded that the employment agreement would last for a minimum of one year. *See id.* at 454, 250 S.E.2d at 681. The court in *Burkheimer* ruled that this response and the employee's subsequent acceptance of employment constituted an indefinite hiring, terminable at-will. *See id.* at 454, 250 S.E.2d at 682. In passing, however, the court noted that if an employee gave additional consideration to his services, then the contract is not terminable at-will. *See id.* Finally, in *Sides*, the employee did change residences, and the court of appeals applied the "moving residence" exception. *See Sides*, 74 N.C. App. at 345, 328 S.E.2d at 828. The court's language in *Sides* does not appear to be binding precedent, however, because it is dictum: the actual holding of *Sides* is that an employer may be liable for wrongful discharge when they discharge an employee who refuses to perjure themselves in defense of their employer. *See id.* at 343, 328 S.E.2d at 826-27. *Tuttle*, *Burkheimer*, and *Sides* are discussed in greater detail *infra* notes 63-68, 69-72, and 73-78, and accompanying text.

45. *See Kurtzman*, 347 N.C. at 333, 493 S.E.2d at 423.

46. *See id.* at 333-34, 493 S.E.2d at 423.

47. *See id.*

48. *Id.* at 334, 493 S.E.2d at 423 (quoting *Coman v. Thomas Mfg. Co.*, 325 N.C. 172, 174, 381 S.E.2d 445, 446 (1989)).

49. *See id.*

50. *Id.*

51. *See id.*

Justice Frye, the sole dissenter, admitted that the court had never addressed the precise issue in this case, but took a different view of the issue, framing it as purely contractual.⁵² In Frye's view, the critical question was whether the necessary elements of an enforceable contract were present.⁵³ For Frye, when an employer induces an employee to move based on specific assurances that he will not be discharged except for deficient performance, an agreement and consideration are in place, and the employee should not be terminable at-will.⁵⁴

Although a majority of the supreme court claimed that this area of law is "largely clear," there have been shades of disagreement on the "moving residence" exception in the North Carolina courts.⁵⁵ In *Malever v. Kay Jewelry Co.*,⁵⁶ one of the first North Carolina cases to address the issue of a "moving residence" exception to employment-at-will, the supreme court declined to apply the exception.⁵⁷ In *Malever*, the plaintiff had been working for the defendant in a seasonal position in Fayetteville, North Carolina, when the defendant offered him a "regular permanent job" in Charlotte.⁵⁸ Since he was giving up a higher wage, Malever indicated that he wanted employment beyond the holiday season, and the defendant assured him that he had a "permanent, steady place" with his company.⁵⁹ Eight weeks later, Malever's employer discharged him without cause, and Malever sued for the weeks he was out of work.⁶⁰ Ruling in favor of the employer, the supreme court distinguished Malever's situation from other "additional consideration" cases where plaintiffs had

52. See *id.* at 335, 493 S.E.2d at 424 (Frye, J., dissenting).

53. See *id.* at 336, 493 S.E.2d at 425 (Frye, J., dissenting).

54. See *id.* at 336-37, 493 S.E.2d at 425 (Frye, J., dissenting).

55. See *Kurtzman*, 347 N.C. at 333, 493 S.E.2d at 423 (disapproving language in earlier cases regarding the "moving residence" exception); *Harris v. Duke Power Co.*, 319 N.C. 627, 629, 356 S.E.2d 357, 359 (1987) (listing the "moving residence" exception among a group of well-defined exceptions to employment-at-will). But see *Kurtzman v. Applied Analytical Indus., Inc.*, 125 N.C. App. 261, 265, 480 S.E.2d 425, 427 ("This Court has recognized that additional consideration can include the removal of an employee's residence from one location to another in order to accept employment."), *rev'd*, 347 N.C. 329, 335, 493 S.E.2d 420, 424 (1997); *Salt v. Applied Analytical, Inc.*, 104 N.C. App. 652, 658-59, 412 S.E.2d 97, 101 (1991) (recognizing the "moving residence" exception, but declining to apply it to the particular facts).

56. 223 N.C. 148, 25 S.E.2d 436 (1943).

57. See *id.* at 149, 25 S.E.2d at 437.

58. See *id.* The plaintiff agreed to this arrangement, even though his salary would be less, because he would be closer to his family. See *id.*

59. *Id.* (quoting the defendant's communications with the plaintiff).

60. See *id.*

agreed to life employment in settlement of personal injury claims,⁶¹ and concluded that Malever had not given any additional consideration by moving to Charlotte.⁶²

After *Malever*, the courts in *Tuttle v. Kernersville Lumber Co.*⁶³ and *Burkheimer v. Gealy*,⁶⁴ recognized the existence of the "moving residence" exception, but neither case involved an employee who actually moved to accept employment. In *Tuttle*, the employee claimed that his contract entitled him to permanent employment if his work was satisfactory.⁶⁵ The supreme court disagreed, however, concluding that Tuttle's employer had complied fully with the terms of the contract; the court held that Tuttle was terminable at-will.⁶⁶ After stating its holding, however, the court stated further that when an employee provides additional consideration in addition to his services, then the contract may not be terminable at-will.⁶⁷ The court did not mention the "moving residence" exception explicitly, but did say that additional consideration could be "some other thing of value" besides the employee's services.⁶⁸

The *Burkheimer* court likewise recognized the "moving residence" exception even though it did not apply the exception to the facts presented. In *Burkheimer*, the plaintiff sued for breach of his employment contract after he was discharged from his job of eight years.⁶⁹ The terms and conditions of the employment contract were at the center of the dispute, with the plaintiff claiming to have made a contract for life, and the defendant claiming that the contract was for an indefinite term.⁷⁰ The court of appeals affirmed a directed verdict for the defendant, determining that the contract between the parties was a contract for an indefinite term, and, therefore, terminable at-

61. See, e.g., *Dotson v. F.S. Royster Guano Co.*, 207 N.C. 635, 178 S.E. 100 (1935); *Stevens v. Southern Ry. Co.*, 187 N.C. 528, 122 S.E. 295 (1924). See *Parker*, *supra* note 7, at 186-95, for a more thorough discussion of employment-at-will cases in North Carolina at the turn of the century.

62. See *Malever*, 223 N.C. at 149, 25 S.E.2d at 437.

63. 263 N.C. 216, 139 S.E.2d 249 (1964).

64. 39 N.C. App. 450, 250 S.E.2d 678 (1979).

65. See *Tuttle*, 263 N.C. at 218, 139 S.E.2d at 251.

66. See *id.* at 216, 139 S.E.2d at 249.

67. See *id.*

68. *Id.* (quoting 56 C.J.S. *Master and Servant* § 31 (1948)).

69. See *Burkheimer*, 39 N.C. App. at 451, 250 S.E.2d at 680.

70. See *id.* at 452-54, 250 S.E.2d at 681-82. The contract in question consisted of two letters: the first, from the plaintiff to the defendant, stated that the employment was to be for life, and the second, from the defendant to the plaintiff, stated that employment would last at least a year and then would continue unless changed by mutual agreement. See *id.* at 453, 250 S.E.2d at 681.

will.⁷¹ In dicta, however, the court recognized that when an employee gives special consideration, such as moving to accept a job, the presumption of employment-at-will may not apply.⁷²

Relying on language in *Tuttle* and *Burkheimer*, the court of appeals applied the "moving residence" exception in *Sides v. Duke University*.⁷³ Unlike all of the other North Carolina cases recognizing the exception, *Sides* is the only case that actually involved an employee who moved to accept her position.⁷⁴ The plaintiff was a nurse anesthetist who left her previous job in Michigan to work for Duke University Medical Center in Durham, North Carolina.⁷⁵ Before leaving Michigan, the plaintiff received assurances that nurse anesthetists at Duke could be terminated only for incompetence.⁷⁶ In the course of the plaintiff's tenure, a physician asked her to administer an anesthetic to a patient, but she refused because she believed the anesthetic would harm the patient.⁷⁷ In fact, the patient suffered severe brain damage after the physician administered the anesthetics, and his family brought suit against Duke University Medical Center, two physicians, and others.⁷⁸

Before giving any testimony, the plaintiff nurse in *Sides* was advised by physicians and attorneys at Duke not to tell everything she had seen regarding the patient.⁷⁹ The plaintiff did testify against the physician in deposition and at trial, and when she returned to work, many of the physicians began to treat her poorly.⁸⁰ Eventually, the plaintiff was discharged, and she filed a complaint alleging wrongful discharge and breach of contract.⁸¹ The court of appeals first recognized the public policy exception to employment-at-will in this case, holding that no employer can discharge an employee for refusing to testify untruthfully in a court case without civil liability.⁸²

71. See *id.* at 454, 280 S.E.2d at 682.

72. See *id.*

73. 74 N.C. App. 331, 328 S.E.2d 818 (1985).

74. See *id.* at 332-33, 328 S.E.2d at 820-21.

75. See *id.* at 332, 328 S.E.2d at 820-21.

76. See *id.* at 332-33, 328 S.E.2d at 821.

77. See *id.* at 333, 328 S.E.2d at 821.

78. See *id.*

79. See *id.* Some of the doctors warned that if she did testify to everything she had seen, she "would be in trouble." *Id.* (quoting statements made to the plaintiff).

80. See *id.* at 333-34, 328 S.E.2d at 821. The hostilities at work made the plaintiff's job, which entailed working closely with physicians, very difficult, but when she asked for help from a supervisor, she was rebuffed. See *id.* Later, when plaintiff was advised that her job performance was poor and that she had an abusive attitude, the plaintiff asked for specific examples but was given none. See *id.* at 334, 328 S.E.2d at 821.

81. See *id.* at 334-35, 328 S.E.2d at 822.

82. See *id.* at 342, 328 S.E.2d at 826.

Turning to the plaintiff's breach of contract claim, the court then held that the presumption of employment-at-will was overcome when the plaintiff moved from Michigan to North Carolina and relied on assurances from the defendants that she could not be discharged but for incompetence.⁸³

After *Sides*, the court of appeals began limiting the "moving residence" exception; two subsequent cases examined the issue in further detail. In *Buffaloe v. United Carolina Bank*,⁸⁴ the plaintiff moved from Charlotte to Lumberton to accept a promotion, relying on an employment manual which stated that he could be discharged only for illegal, immoral, or unethical conduct.⁸⁵ When the plaintiff was discharged for personnel problems, he sued for wrongful discharge.⁸⁶ Affirming a grant of summary judgment for the defendant, the court recognized the "moving residence" exception but held that it did not apply in this case because the plaintiff moved in order to get a promotion and not a new job.⁸⁷

Three years later, the court limited the "moving residence" exception again. In *Salt v. Applied Analytical, Inc.*,⁸⁸ the plaintiff relocated from a job where she had eleven and a half years of seniority and many company benefits to accept a position with the defendant where she earned less money and had to change residences.⁸⁹ Because she did not have a degree in chemistry and would not be able to return to her former job, the plaintiff was anxious about job security.⁹⁰ After working for the defendant for

83. See *id.* at 345, 328 S.E.2d at 828 ("Where the employee gives some special consideration in addition to his services, such as relinquishing a claim for personal injuries against the employer, removing his residence from one place to another in order to accept employment . . . such a contract may be enforced.").

84. 89 N.C. App. 693, 366 S.E.2d 918 (1988).

85. See *id.* at 696, 366 S.E.2d at 920. However, North Carolina does not incorporate employment handbooks into employee contracts unless they are expressly included in the contracts. See, e.g., *Harris v. Duke Power Co.*, 319 N.C. 627, 356 S.E.2d 357 (1987); *Walker v. Westinghouse Elec. Corp.*, 77 N.C. App. 253, 335 S.E.2d 79 (1985).

86. See *Buffaloe*, 89 N.C. App. at 694, 366 S.E.2d at 919.

87. See *id.* at 696-97, 366 S.E.2d at 921.

88. 104 N.C. App. 652, 412 S.E.2d 97 (1991). *Salt v. Applied Analytical, Inc.* and *Kurtzman v. Applied Analytical Industries, Inc.* involve the same pharmaceutical company, though the two employees involved in these cases were hired at different times and for different positions.

89. See *id.* at 654, 412 S.E.2d at 98.

90. See *id.* The defendant discussed career growth with the plaintiff and talked about plaintiff's future with the company in general terms. In a letter offering the plaintiff employment, the defendant said, "I believe the position which we are offering you will allow opportunities for your continued career growth in new areas . . ." *Id.* (quoting a letter from the defendant to the plaintiff).

fourteen months, receiving a raise, positive evaluations, and a bonus, the plaintiff was discharged for low productivity.⁹¹ She then sued for breach of contract.⁹² Affirming summary judgment for the defendants, the court of appeals determined that the plaintiff's change of residence did not constitute additional consideration sufficient to remove the presumption of employment-at-will.⁹³ The court distinguished *Sides* on the grounds that the plaintiff in *Sides* was specifically assured that she could only be discharged for incompetence.⁹⁴

In *Harris v. Duke Power Co.*,⁹⁵ the supreme court recognized the existence of the "moving residence" exception to employment-at-will.⁹⁶ Although the "moving residence" exception was not specifically at issue in this case,⁹⁷ the court did state that "the employee-at-will' rule is subject to some *well-defined* exceptions."⁹⁸ The *Harris* court determined that the plaintiff did not fall into any of the "well-recognized exceptions" to the general rule, including: retaliatory discharge for filing worker's compensation claims, retaliatory discharge for engaging in union activities, and additional consideration exceptions such as the "moving residence" exception to employment-at-will.⁹⁹

Several federal courts have examined the "moving residence" exception, but have also construed it narrowly.¹⁰⁰ In *House v. Cannon Mills Co.*,¹⁰¹ the plaintiff sued in federal court, alleging violations of the Age Discrimination in Employment Act¹⁰² and bringing a pendent state law claim for breach of contract.¹⁰³ Examining the plaintiff's breach of contract claim, the district court

91. *See id.* at 654-55, 412 S.E.2d at 98. The plaintiff denied the charges but left her job anyway. *See id.*

92. *See id.* at 655, 412 S.E.2d at 98.

93. *See id.* at 658-60, 412 S.E.2d at 100-01.

94. *See id.* at 659, 412 S.E.2d at 101.

95. 319 N.C. 627, 356 S.E.2d 357 (1987).

96. *See id.* at 629, 356 S.E.2d at 359.

97. In *Harris*, the employee sued his employer for discharge without cause, arguing that the employer's termination policy as stated in a manual distributed to management was incorporated into his contract. *See id.* at 628, 356 S.E.2d at 358.

98. *Id.* (emphasis added).

99. *See id.* at 629, 356 S.E.2d at 359.

100. *See, e.g., House v. Cannon Mills Co.*, 713 F. Supp. 159, 163 (M.D.N.C. 1988) ("This court does not read the North Carolina case law as establishing a general exception to the terminable-at-will rule in all cases which involve a relocation, however, not even when coupled with a job change.").

101. 713 F. Supp. 159 (M.D.N.C. 1988).

102. 29 U.S.C.A. § 623 (West Supp. 1998).

103. *See House*, 713 F. Supp. at 162.

held that although the plaintiff relocated to accept a position with the defendants, the defendant's assurances of a "long and prosperous career with Cannon Mills" were not sufficient to remove the presumption of employment at-will.¹⁰⁴ Likewise, in *Iturbe v. Wandel & Goltermann Technologies, Inc.*,¹⁰⁵ the court recognized the exception, but held that *Buffaloe v. United Carolina Bank*¹⁰⁶ was controlling, because the plaintiff had accepted a promotion instead of accepting a new job.¹⁰⁷

Thus, although North Carolina courts have recognized the "moving residence" exception, usually courts only refer to it in dicta.¹⁰⁸ To date, no supreme court decision has applied the exception to a case before it.¹⁰⁹ Instead, the supreme court has simply listed the exception as one that was "well-recognized,"¹¹⁰ a statement they have since renounced.¹¹¹ The court of appeals has been more receptive than the supreme court to the exception,¹¹² but both courts

104. *Id.* (quoting the defendant's statements to the plaintiff).

105. 774 F. Supp. 959 (M.D.N.C. 1991).

106. 89 N.C. App. 693, 366 S.E.2d 918 (1988); see *supra* notes 84-87 and accompanying text (discussing *Buffaloe*).

107. See *Iturbe*, 774 F. Supp. at 961. The Fourth Circuit has not published an opinion concerning a change of residence exception, but two unpublished dispositions have addressed the matter. See *Walsh v. CIBA-GEIGY Corp.*, No. 96-1528, 1997 WL 538006, at *1 (4th Cir. Sept. 2, 1997) (per curiam); *Smith v. Piedmont Aviation, Inc.*, No. 89-2382, 1990 WL 27352, at *1 (4th Cir. Feb. 26, 1990). In *Smith*, the plaintiff argued that his relocation from Myrtle Beach, South Carolina to Winston-Salem, North Carolina, and his employer's failure to follow the procedures for discharge in an employment handbook removed the presumption of employment-at-will. See *Smith*, 1990 WL 27352, at *2. The Fourth Circuit noted the exception but concluded that it did not apply because the plaintiff resigned and changed residences before receiving his employee manual; thus the "additional consideration" of changing residences could not be supported by a contract that was not yet in existence. See *id.* Likewise, in *Walsh*, the Fourth Circuit declined to apply the exception when defendant was promised employment until age 65, holding that in North Carolina, the "moving residence" exception does not apply when the employee moves to accept a job within the same company. See *Walsh*, 1997 WL 538006, at *3 (citing *Buffaloe v. United Carolina Bank*, 89 N.C. App. 693, 696-97, 366 S.E.2d 918, 921 (1988)). The court rejected plaintiff's characterization that the promise of employment until age 65 was a contract of definite duration. See *Walsh*, 1997 WL 538006, at *3.

108. See *supra* text accompanying notes 98-99 (stating that the "moving residence" exception was not at issue in the *Harris* case).

109. See *Kurtzman*, 347 N.C. at 333, 493 S.E.2d at 423 (stating that the supreme court "has not heretofore expressly passed upon [the 'moving residence' exception]").

110. See *Harris*, 319 N.C. at 629, 356 S.E.2d at 359.

111. See *Kurtzman*, 347 N.C. at 333, 493 S.E.2d at 423 (disapproving of language in *Harris* that might be construed as approving of the "moving residence" exception).

112. See, e.g., *Kurtzman v. Applied Analytical Indus., Inc.*, 125 N.C. App. 261, 265, 480 S.E.2d 425, 427, ("This court has recognized that additional consideration can include the removal of an employee's residence from one location to another in order to accept employment." (citation omitted)), *overruled by Kurtzman*, 347 N.C. 329, 493 S.E.2d 420 (1997).

have relied primarily on reasoning from *Corpus Juris Secundum* when recognizing or applying the exception.¹¹³

After *Kurtzman*, the employment-at-will debate is probably over in North Carolina: the continued validity of any change of residence exception to employment-at-will is highly doubtful at best.¹¹⁴ The court hinted at flexibility when it claimed that any "moving residence" exception to employment-at-will had been neither approved nor "disapproved,"¹¹⁵ however, after the *Kurtzman* decision it is unlikely that a plaintiff would succeed on a "moving residence" exception to employment-at-will.¹¹⁶ As the dissent noted, the majority chose to make a general rule about employee relocation,

113. See, e.g., *Tuttle v. Kernersville Lumber Co.*, 263 N.C. 216, 219, 139 S.E.2d 249, 251 (1964) ("Where, however, the employee gives consideration in addition to his services, as where he relinquishes a claim for personal injuries or gives some other thing of value . . . [it] is not such an indefinite contract as to come within the rule' [of employment-at-will].") (quoting 56 C.J.S. *Master & Servant* § 31 (1948)); *Burkheimer v. Gealy*, 39 N.C. App. 450, 454, 250 S.E.2d 678, 682 (1979) ("Where the employee gives some special consideration in addition to his services, such as relinquishing a claim for personal injuries against the employer, removing his residence from one place to another in order to accept employment, or assisting in breaking a strike, such a contract may be enforced." (emphasis added) (citing *Tuttle*, 263 N.C. at 219, 139 S.E.2d at 251)). In its brief, AAI argued that the *Burkheimer* court "embellished" the statement of the exception by the *Tuttle* court by adding language about a change of residence. See Defendant-Appellant's New Brief at 28, *Kurtzman* (No. 103PA97).

114. See *Kurtzman*, 347 N.C. at 333, 493 S.E.2d at 423 ("We neither specifically approved or disapproved such an exception, however, and any language in *Harris* that may be viewed as suggesting the contrary is disapproved."). The attorney for Lewis *Kurtzman* felt that the decision would have broad implications for employees moving to North Carolina:

"No employee living outside of North Carolina should ever consider living in this state after reading that opinion The court has, in essence, granted employers in this state a credit card to lure employees here, make promises to them and then walk away from those promises with the knowledge that the Supreme Court will say it's OK in the name of economic development."

Scott Smith, *Employment Ruling Nixed by High Court*, TRIANGLE BUS. J., Dec. 12, 1997, at 9 (quoting an interview with Lewis *Kurtzman*'s attorney). Needless to say, AAI's counsel saw the matter differently. The defendant's attorney hypothesized that if *Kurtzman*'s verdict had been allowed to stand, then "[i]mmediately, every employment relationship that began with someone moving would be open to the threat of a lawsuit and jury trial for any relationship that ended on other than satisfactory terms." *Id.* (quoting an interview with AAI's attorney). Indeed, the threat mentioned by AAI's attorney is a real one: the North Carolina Department of Commerce reported that more than 1.4 million people and 1,100 companies moved to North Carolina in 1996. See *id.*

115. *Kurtzman*, 347 N.C. at 333, 493 S.E.2d at 423 (emphasis added).

116. At least one North Carolina attorney felt that the decision by the court of appeals to affirm *Kurtzman*'s trial court verdict was already creating momentum for challenges to employment-at-will. See Smith, *supra* note 114, at 9. According to that attorney, the supreme court's reversal of *Kurtzman*'s trial court verdict "should halt that trend." *Id.*

rather than consider the case in purely contractual terms.¹¹⁷ Consequently, the court made a bid for certainty and a bright-line rule in this area, but in the process it may have disregarded more flexible possibilities.¹¹⁸

For instance, courts in other jurisdictions have applied promissory estoppel as a remedy when an employee makes preparations to relocate and then is discharged without cause.¹¹⁹ To state a claim for promissory estoppel, the plaintiff traditionally must establish: (1) that there was an unambiguous promise, (2) which was intended to be relied upon, (3) that was in fact relied upon, (4) the reliance was to the promisee's detriment, and (5) injustice will result if the promise is not enforced.¹²⁰ One problem with promissory estoppel, however, is that it only applies in cases where the employee has not yet begun working.¹²¹ Because the promises exchanged are fulfilled once the employee relocates and the employer gives the employee work, promissory estoppel does not provide a satisfactory remedy in most cases. Moreover, recovery under a promissory estoppel theory creates the anomaly that those who have merely made preparations to move may recover while those who have actually moved may not recover once they have started working.

Instead of relying on promissory estoppel to remedy damages suffered by relocating employees, Connecticut courts base their analysis on the reasonable expectations of the parties.¹²² Under Connecticut law, if the employer makes a statement assuring the employee of job security, and the plaintiff relies on that statement and relocates, then relocation is evidence of the employee's reasonable expectations of job security.¹²³ Under this doctrine, some

117. See *Kurtzman*, 347 N.C. at 337, 493 S.E.2d at 425 (Frye, J., dissenting) ("[A contractual] approach, which relies on contract principles, does not establish a 'general exception' to employment-at-will in all cases involving a relocation.").

118. See *infra* notes 119-37 (discussing the policy options open to the courts in employment-at-will cases).

119. See, e.g., *Gould v. Artisoft, Inc.*, 1 F.3d 544, 549-50 (7th Cir. 1993) (holding that when an employee had made a promise to relocate, an employer could not revoke the promise to employ); *Sheppard v. Morgan, Keegan & Co.*, 266 Cal. Rptr. 784, 787 (Ct. App. 1990) (holding that promissory estoppel applied where employee was terminated before relocating but after making preparations to move).

120. See, e.g., 3 ERIC MILLS HOLMES, CORBIN ON CONTRACTS § 8.9 (Joseph M. Perillo ed., rev. ed. 1996).

121. See, e.g., *Smith v. Beloit Corp.*, 162 N.W.2d 585, 587-88 (Wis. 1968) (finding that the employer's promise of employment is fulfilled where employee has begun work).

122. See *Rath*, *supra* note 4, at 826-27.

123. See *id.*; cf. *Coelho v. Posi-Seal Int'l, Inc.*, 544 A.2d 170 (Conn. 1988) (affirming the trial court verdict in favor of the employee for breach of an implied contract when his employer promised to support him on specific issues and failed to do so, firing him

plaintiffs in North Carolina might have succeeded in their claims against employers.¹²⁴ The problems with this doctrine, however, stem from the impracticality of proving exactly what the parties' intentions were, because promises were made orally and, by the time of trial, may have occurred several years earlier.¹²⁵

Rather than create a blanket rule that relocation would not constitute additional consideration to support a promise of "permanent" employment, the North Carolina Supreme Court could have interpreted its precedent and that of the court of appeals to hold that such an exception to employment-at-will does exist.¹²⁶ If the court had agreed with the plaintiff in *Kurtzman* that relocation and assurances of job security remove the presumption of employment-at-will, it would have needed to create standards to clarify what kinds of assurances from employers are necessary and what constituted a reasonable length of employment under the circumstances; otherwise the confusing disagreements between the supreme court and the

instead).

124. See, e.g., *Salt v. Applied Analytical Inc.*, 104 N.C. App. 652, 659-60, 412 S.E.2d 97, 101 (1991) (holding that the employee could not recover because the employer's assurances of a promising future were too vague to remove the presumption of employment-at-will). But cf. *Sides v. Duke Univ.*, 74 N.C. App. 331, 345, 328 S.E.2d 818, 828 (1985) (holding that the employer's assurances of no discharge without incompetence were sufficient to remove the presumption of employment-at-will).

125. See Frank Victory, *The Erosion of the Employment-At-Will Doctrine and the Statute of Frauds: Time to Amend the Statute*, 30 AM. BUS. L.J. 97, 118 (1992) ("An employer cannot, however, know when a terminated employee might allege that a statement was made years earlier during an interview with a personnel officer, who has long since died, left the company, or retired, and which created a subjective expectation of termination only for cause."). Professor Victory argues that the numerous exceptions applied to the employment-at-will doctrine, coupled with the allowance of permanent employment contracts under the Statute of Frauds, has brought about a substantial erosion of the employment-at-will doctrine, with negative consequences for employers. See Victory, *supra*, at 121-22. See also Alford, *supra*, note 10, at 1191 (claiming that the North Carolina Supreme Court's decision in *Coman v. Thomas Manufacturing Co.*, 325 N.C. 172, 381 S.E.2d 445 (1989), placed too high a burden on employers to justify reasons for discharge).

126. See, e.g., *Harris v. Duke Power Co.*, 319 N.C. 627, 629, 356 S.E.2d 357, 359 (1987) (listing "well-defined" exceptions to the employment-at-will rule, including the "moving residence" exception as stated by *Sides v. Duke University*, 74 N.C. App. 331, 345, 328 S.E.2d 818, 828 (1985)). Other jurisdictions have allowed employees to recover based on the additional consideration exception. See, e.g., *Ohanian v. Avis Rent A Car Sys., Inc.*, 779 F.2d 101, 109 (2d Cir. 1985) (determining that the employee's move from San Francisco to New York and the employer's oral assurances about job security were sufficient consideration to support a promise of lifetime employment); *Murphree v. Alabama Farm Bureau Ins. Co.*, 449 So. 2d 1218, 1221 (Ala. 1984) (reversing summary judgment for the employer and stating that the employee's relocation was some evidence of additional consideration).

court of appeals could continue indefinitely.¹²⁷

Other states have taken varying approaches, but states allowing plaintiffs to recover in this situation often do so on an implied contract theory.¹²⁸ In Pennsylvania, for example, to prevail on a "moving residence" exception to employment-at-will, a plaintiff must show: (1) that the employer made a statement assuring the employee of job security, and (2) that the employee underwent a substantial hardship by way of relocating.¹²⁹ If the court finds that the "moving residence" exception applies, then it must then discern how long the employee should be protected under the exception to the rule, and whether the hardship suffered by the employee is commensurate with the amount of time employed.¹³⁰ As one author, Manesh Rath, has noted, the "additional consideration" exception as applied by Pennsylvania is problematic because it compares the employee's relocation with the employer's promises, instead of comparing the exchange of promises between employer and employee.¹³¹ Likewise, the "substantial hardship" test creates practical problems by discouraging employers from hiring employees who reside farther away.¹³² As Rath imagines, this could lead to unfavorable questions in job interviews regarding the location of the candidate's residence, the candidate's familial status, possibly leading to favoritism towards single candidates in the hiring process.¹³³

While not a possibility examined thus far by any North Carolina court, one student commentator has suggested that the fairest

127. See *supra* notes 56-113 and accompanying text for a discussion of the contradictory holdings of the supreme court and court of appeals.

128. See Rath, *supra* note 4, at 827 ("The question ... that binds all of these approaches and that all of the courts are asking, is: does the parties' behavior—the employer's vague assurances of job security plus the employee's relocating to accept that position—amount to an implied contract or not?").

129. The "substantial hardship" test is important because it distinguishes employees who move across regions of the country to accept employment as opposed to those employees who relocate closer to a job purely for their own convenience. See *id.* at 825 (comparing relative hardships on an employee who moved from Maine to Pennsylvania to accept an offer, but who was single with an employee who was married and left a job of eighteen years and a home of forty years).

130. See, e.g., *Marsh v. Boyle*, 530 A.2d 491, 494 (Pa. Super. Ct. 1987) (citing *Veno v. Meredith*, 515 A.2d 571, 580 (Pa. Super. Ct. 1986)); Rath, *supra* note 4, at 823-25.

131. See Rath, *supra* note 4, at 833-34. Moreover, Rath argues, the employee's relocation is best viewed as evidence of the employee's expectations, not the employer's promises. See *id.* at 834 ("The result is that the court gains a more fair solution, but trades away certainty of the law.").

132. See *id.* at 834-35 ("[T]he farther an employee must move to accept the position, the longer he is protected by a just cause contract.").

133. See *id.* at 835.

approach would be to reverse the presumption of employment-at-will.¹³⁴ Under such an approach, the commentator suggested that employers could give employees a choice between employment-at-will and just-cause dismissal standards, perhaps providing incentives like increased pay for the employee to choose the employment-at-will option.¹³⁵ Because some believe that a just-cause dismissal standard could result in market inefficiency,¹³⁶ the best way to balance the respective interests of employers and employees might be to shift the burden to employers to prove that their employment practices would inform a reasonable person about the consequences of at-will employment.¹³⁷

In resolving the issue of relocation and employment-at-will in *Kurtzman*, the North Carolina Supreme Court had to balance the interests of employers hoping to attract the best candidates, the interests of employees who moved their homes and families only to be terminated a short time later, and the public interest in clear employment laws. The *Kurtzman* court chose clarity of the law over fairness to employees who may lack the bargaining power to negotiate for clear terms of employment.¹³⁸ Moreover, the court chose a decidedly status-quo approach, in line with its consistent protection of the employment-at-will doctrine.¹³⁹ Although few would argue for the enforcement of lifetime employment contracts where the employer's promises were ambiguous, it is difficult to see any practical difference between contracts that previously have been

134. See Peter Stone Partee, Note, *Reversing the Presumption of Employment-at-will*, 44 VAND. L. REV. 689, 691 (1991) ("[E]stablishing a rebuttable presumption that an employer can be discharged only for just cause would preserve employment-at-will's economic benefits, while fully protecting those employees most likely to be devastated by an arbitrary discharge.").

135. See *id.* at 709.

136. See *id.* at 701. The argument goes that properly functioning markets will allocate resources to those who value them most, and, therefore, employers must value employment-at-will more than employees value job security. See *id.* See generally Mayer G. Freed & Daniel D. Polsby, *Just Cause for Termination Rules and Economic Efficiency*, 38 EMORY L.J. 1097, 1144 (1989) (concluding that government review of employment dismissal decisions would be more costly for both employers and employees).

137. See Partee, *supra* note 134, at 709.

138. Some have argued that employees lack bargaining power against their employers only in the rarest of instances. See, e.g., Freed & Polsby, *supra* note 136, at 1099-1101. On the other hand, a practitioner has suggested that very few employees have the bargaining power necessary to obtain an employment for a definite duration. See Martha A. Geer, *Exceptions to the Employment-at-will Doctrine*, FUNDAMENTALS OF EMPLOYMENT LAW (North Carolina Bar Foundation Continuing Legal Education, Cary, N.C.), May 5, 1995, at IV-1.

139. See *supra* notes 9, 95-99 and accompanying text (discussing *Coman v. Thomas Manufacturing* and *Harris v. Duke Power Co.*).

upheld by the North Carolina Supreme Court, like that in *Sides*, and the contract in *Kurtzman*.¹⁴⁰

The majority in *Kurtzman* expressly stated that they did not hold, as the dissent suggested, that the establishment of a definite term of service is the sole means of removing the presumption of employment-at-will.¹⁴¹ Following the holding in *Kurtzman*, however, it is difficult to see how anything short of a contract or a public policy exception would remove the presumption of employment at-will.¹⁴² While the rule seems harsh, it is important to remember that employment-at-will works both ways: employers don't have to keep bad employees and employees don't have to keep bad jobs. As the supreme court has said in a different context, "[t]he free enterprise system demands that competing employers be allowed to vie for the services of the 'best and brightest' employees without fear of subsequent litigation."¹⁴³

In preserving a strict employment-at-will doctrine in North Carolina, the supreme court stuck to its guns as well as its precedent, but precedent does not necessarily make for the best policy.¹⁴⁴ On one hand, the court no doubt was concerned about burden on the court system, costs to the taxpayers of numerous "moving residence" claims, and economic costs of allowing employees to sue their

140. In *Kurtzman*, the employee was promised that he would have a job so long as he did his job, and the supreme court concluded that this promise was insufficient to remove the presumption of employment-at-will. See *Kurtzman*, 347 N.C. at 333, 493 S.E.2d at 423. In *Sides v. Duke University*, 74 N.C. App. 331, 328 S.E.2d 818 (1985), however, the employee was promised that she could only be removed for incompetence, and the court of appeals held that this same promise was sufficient to remove the presumption, and the supreme court affirmed. See *id.* at 345, 328 S.E.2d at 828.

141. See *Kurtzman*, 347 N.C. at 334, 493 S.E.2d at 424.

142. See *supra* note 116 (describing the view of one attorney about the likelihood of success on a "moving residence" claim after *Kurtzman*).

143. *Peoples Life Ins. Co. v. Hooks*, 322 N.C. 216, 222, 367 S.E.2d 647, 651 (1988).

144. The harshness of employment-at-will is best illustrated by more examples from downsized corporate America:

At Tenneco, where 1,200 employees were laid off over a six-week period, many learned of their fates when confronted by armed guards carrying boxes to use in clearing out their desks. At Allied Bank of Texas, department heads called meetings and then read the names of those to be laid off in front of their coworkers.

Marks, *supra* note 2, at 79. Such stories are likely to abound as companies cut costs to remain competitive, but one might wonder why more protections for employees are not in place given the disruptive effect massive layoffs can have on communities. One author has proposed a Model Termination Act, requiring employers to terminate employees only for cause, and requiring employees to give up their right to sue in lieu of mandatory arbitration. See JOHN JUDE MORAN, *EMPLOYMENT LAW: NEW CHALLENGES IN THE BUSINESS ENVIRONMENT* 143 (1997).

employers more often.¹⁴⁵ On the other hand, the court might have given more consideration to what kinds of tactics employers ought to be allowed to use in recruiting and terminating employees, because the quality of employers North Carolina can attract ought to be just as important as the quantity of employers.¹⁴⁶ Moreover, the court did not address one issue that commentators have pointed out repeatedly: if employers wish to avoid lawsuits for breaching an implied contract, they may simply stop making promises they do not intend to keep.¹⁴⁷ Ultimately, however, the policy aspects of the *Kurtzman* decision are more or less appealing depending on which side of the debate one sympathizes with: employers or employees.¹⁴⁸ In *Kurtzman*, the court clearly sided with employers, claiming that the employment-at-will doctrine "remains an incentive to economic

145. See Smith, *supra* note 114, at 9. According to a San Francisco public policy firm Smith cites, one in five California businesses have now restricted their hiring and 11% of California businesses have not increased their hiring because of the increase in cost of providing jobs. See *id.*; cf. House v. Cannon Mills Co., 713 F. Supp. 159, 164 (M.D.N.C. 1988) ("Recognition of a general exception [to employment-at-will] whenever relocation or job change is involved would emasculate the terminable-at-will rule, because many if not most hirings involve either a job change or a change of residence or both.").

146. Employers who use tactics like those used by AAI in this case may reap the consequences of their actions in low employee morale. As one commentator has observed, "Employee morale is intangible, but it does affect your productivity level." Tim Gray, *Ruling Replenishes Ammo to Continue Firing at Will*, BUSINESS N.C., May 1998, at 18, 20 (quoting an interview with employment law Professor Marion Crain). Gray's article included an interview with AAI's counsel, who stated that the lawsuit might never have been brought in the first place if his client had included a statement of employment-at-will status in the letter offering Kurtzman his position. See *id.*

147. See Brief of the North Carolina Academy of Trial Lawyers as Amicus Curiae in Support of Plaintiff Lewis Kurtzman, at 8, *Kurtzman* (No. 103PA97); see also *id.* at 17 (noting that if an employee or candidate made false statements about a resume to an employer, that employer could be expected to take action against the candidate); cf. Sandra J. Mullings, *Truth-In-Hiring Claims and the At-Will Rule: Should an Employer Have a License to Lie?*, 1997 COLUM. BUS. L. REV. 105, 111-12 (distinguishing a suit for wrongful termination from a suit for misrepresentation because in suits for misrepresentation the employer's right to terminate the employee is preserved).

148. The North Carolina Academy of Trial Lawyers were not subtle about who they sided with:

Each time this court considers requiring greater accountability of corporations in connection with their dealing with employees, corporations transform themselves into Chicken Little. According to the companies, while the sky may not be falling, the end of North Carolina's economy, as we know it, is near. Yet, neither North Carolina's ability to attract businesses nor the courts' work load appear to have suffered a substantial blow from landmark decisions [by the supreme court] in *Amos v. Oakdale Knitting Co.* and *Coman v. Thomas Manufacturing Co.*, which expanded the rights of employees by permitting them to bring claims of wrongful discharge in violation of public policy.

Brief of the North Carolina Academy of Trial Lawyers as Amicus Curiae in Support of Plaintiff Lewis Kurtzman, at 17, *Kurtzman* (No. 103PA97) (citations omitted).

development, and any significant erosion of it could serve as a disincentive."¹⁴⁹

In *Kurtzman*, by refusing to recognize any "moving residence" exception, the court saved itself from creating a new set of standards, including how far an employee would have to move to state a claim, what damages would result, and what sort of assurances would have to be made to the employee in order to qualify for the exception.¹⁵⁰ Indeed, there is a good argument that if such an exception is to exist, the General Assembly should be the body to make such decisions.¹⁵¹ Until the General Assembly elaborates on North Carolina employment law,¹⁵² however, employees will be dependent on the courts for a remedy. In the meantime, let them heed Justice Whichard's warning: "North Carolina is an employment-at-will state."¹⁵³

MARY MCCRORY KRUPNOW

149. *Kurtzman*, 347 N.C. at 334, 493 S.E.2d at 423.

150. See *supra* notes 121, 125, 131-33 & 136 and accompanying text (discussing problems with the approaches taken in other states recognizing the exception).

151. See *supra* note 8 (discussing the only statutory protections currently afforded to employees in North Carolina).

152. Cf. *supra* notes 122-25, 129-33 (describing novel approaches in Connecticut and Pennsylvania).

153. *Kurtzman*, 347 N.C. at 331, 493 S.E.2d at 422. See generally Pauline T. Kim, *Bargaining with Imperfect Information: A Study of Worker Perceptions of Legal Protection in an At-Will World*, 83 CORNELL L. REV. 105 (1997) (describing the lack of knowledge or misunderstanding prevalent among most employees about the legal doctrine of employment-at-will).

Lankford v. Wright: Recognizing Equitable Adoption in North Carolina

In 1873, North Carolina codified its first laws relating to the adoption of minor children.¹ For 125 years, this statutory route has been the only means available for adoption in North Carolina.² Every state in the nation has a similar statute for legal adoption.³ Filled with time consuming procedures, costly filings, and confusing paperwork, the statutory route to adoption has been criticized for being too harsh on potential adoptive parents.⁴ In response to these criticisms, many states have recognized another form of adoption—equitable adoption⁵—which permits a child who was not adopted in

1. See Act of March 3, 1873, ch. 155, § 1, 1872-73 N.C. Pub. Laws 254, 255 (codified as amended at N.C. GEN. STAT. §§ 48-1-100 to -10-105 (1995 & Supp. 1997)). For an in-depth tracking of the progression of adoption statutes in North Carolina, see Francis H. Fairley, *Inheritance Rights Consequent to Adoptions*, 29 N.C. L. REV. 227, 229-37 (1951).

2. See N.C. GEN. STAT. §§ 48-1-100 to -10-105.

3. See, e.g., MO. ANN. STAT. §§ 453.005-.503 (West 1997); OKLA. STAT. ANN. tit. 10, § 7501-1.1 to -1.5 (West 1998); TEX. FAMILY CODE ANN. §§ 162.001-.507 (West 1996 & Supp. 1998).

4. See Devjani Mishra, *The Road to Concord: Resolving the Conflict of Law over Adoption by Gays and Lesbians*, 30 COLUM. J.L. & SOC. PROBS. 91, 103 (1996). But see Elizabeth Bartholet, *Private Race Preferences in Family Formation*, 107 YALE L.J. 2351, 2352 (1998) (noting that “our society discourages adoption through restrictive regulation, making adoption expensive while failing to provide the financial subsidies that we accord procreation”).

5. Other jurisdictions refer to equitable adoption as “virtual adoption” or “adoption by estoppel.” This Note uses the term equitable adoption throughout. The majority of states presently recognize equitable adoption. See, e.g., *Benefield v. Faulkner*, 29 So. 2d 1, 4 (Ala. 1947) (enforcing a contract to adopt child even though the contract was not acknowledged or recorded as required by statute); *In re Estate of Lamfrom*, 368 P.2d 318, 321 (Ariz. 1962) (detailing the contractual elements required for relief under specific performance for equitable adoption); *In re Estate of Rivolo*, 15 Cal. Rptr. 268, 271 (Ct. App. 1961) (recognizing equitable adoption); *Barlow v. Barlow*, 463 P.2d 305, 308-09 (Colo. 1969) (en banc) (recognizing the doctrine of equitable adoption for intestate succession); *Sheffield v. Barry*, 14 So. 2d 417, 419 (Fla. 1943) (en banc) (utilizing specific performance to enforce a contract to adopt); *Williams v. Murray*, 236 S.E.2d 624, 625 (Ga. 1977) (recognizing virtual adoption as a means to avoid the unfair result of intestate succession laws); *Weiss v. Beck*, 115 N.E.2d 768, 772 (Ill. 1953) (requiring an adoptee to establish a contract to adopt by clear and conclusive evidence); *In re Estate of Painter*, 67 N.W.2d 617, 618 (Iowa 1954) (stating that Iowa recognized adoption by estoppel); *McGarvey v. State*, 533 A.2d 690, 691-93 (Md. 1987) (discussing equitable adoption in Maryland); *Roberts v. Sutton*, 27 N.W.2d 54, 57 (Mich. 1947) (inferring a contract to adopt in equity to save the right of the equitably adopted child to inherit); *In re Estate of Berge*, 47 N.W.2d 428, 430 (Minn. 1951) (stating the requirement of clear and convincing evidence to establish a contract to adopt); *Westlake v. Westlake*, 201 S.W.2d 964, 968 (Mo. 1947) (holding that an adoptee must establish equitable adoption by showing a

accordance with state adoption statutes to inherit from the intestate estate of a decedent.⁶

The fact patterns involved in equitable adoption cases are similar in many situations. Birth parents place their child in a foster home, or the home of a neighbor, agreeing to relinquish their parental rights to the foster parents who raise the child. The foster parents clothe, feed, and educate the child, as well as rear the child following their morals and ideals. In return, the child benefits the foster parents by giving them the affection and obedience expected of a natural child. The only thing missing is the paperwork involved in a legal adoption procedure. Therefore, when a foster parent of the child dies without a will, or without including the child in an executed will, the child has no statutory right to claim any of the foster parent's estate. To resolve this injustice, courts may use their equity power to enforce the doctrine of equitable adoption.⁷

For almost 100 years a majority of states have recognized equitable adoption as a solution to the injustice of declaring the seemingly adopted, yet not statutorily adopted, child a stranger to the foster parent's estate.⁸ North Carolina courts, however, had not followed this trend,⁹ but in *Lankford v. Wright*,¹⁰ the Supreme Court of North Carolina became the twenty-ninth state court to recognize

contract to adopt by clear and convincing evidence and leaving no reasonable doubt in the mind of the chancellor); *Frye v. Frye*, 738 P.2d 505, 506 (Nev. 1987) (holding that equitable adoption could be used to impose a duty to pay child support); *Ashman v. Madigan*, 122 A.2d 382, 383 (N.J. Super. Ct. Ch. Div. 1956) (stating that direct evidence of an agreement to adopt is not necessary); *Lankford v. Wright*, 347 N.C. 115, 121, 489 S.E.2d 604, 608 (1997) (recognizing equitable adoption); *Eggstaff v. Phelps*, 226 P. 82, 85-86 (Okla. 1924) (allowing a claim under equitable adoption); *Johnson v. Olson*, 26 N.W.2d 132, 133-34 (S.D. 1947) (requiring clear, cogent, and convincing evidence to prove an enforceable agreement to adopt); *Jones v. Guy*, 143 S.W.2d 906, 910 (Tex. 1940) (permitting an estoppel theory to prove equitable adoption); *In re Estates of Williams*, 348 P.2d 683, 684-85 (Utah 1960) (requiring clear and convincing evidence to prove equitable adoption); *Wheeling Dollar Sav. & Trust Co. v. Singer*, 250 S.E.2d 369, 372 (W. Va. 1978) (recognizing equitable adoption).

6. See *Estate of Wilson v. Van Dett*, 168 Cal. Rptr. 533, 535 (Ct. App. 1980) ("It may properly be emphasized that [certain authorities] concern only the right of an equitably adopted child to inherit by virtue of contract; they do not otherwise, nor do we, equate the rights of such an equitably adopted child with those of a legally, or statutorily, adopted child."); see also Elizabeth A. Gaudio, Recent Decisions, *Limiting the Scope of Equitable Adoption*, 54 MD. L. REV. 822, 825-26 (1995) (noting that the claim of the equitably adopted child to inherit is a claim made in equity to avoid the unfair results of intestacy laws).

7. See *supra* note 5 (listing cases discussing equitable adoption).

8. See *supra* note 5 (listing the states that recognize equitable adoption).

9. See *infra* notes 104-29 and accompanying text (discussing the brief history of the North Carolina courts' refusal to recognize equitable adoption).

10. 347 N.C. 115, 489 S.E.2d 604 (1997).

equitable adoption.¹¹

This Note first addresses the facts in *Lankford*, the decisions of the lower courts, and the opinion of the North Carolina Supreme Court.¹² Next, the Note traces the origins of the doctrine of equitable adoption in the United States, including the scant history of the doctrine in North Carolina.¹³ The Note then analyzes the modern-day doctrine of equitable adoption and focuses on the changes that have taken place over the years.¹⁴ Because the dissent in *Lankford* expressed concern with the majority's use of equity power in establishing equitable adoption, the Note also discusses equity jurisprudence and how it was used specifically in *Lankford*.¹⁵ Finally, the Note addresses some of the issues that may arise as a result of the decision.¹⁶

On January 15, 1944, Mary M. Winebarger gave birth to Barbara Ann Newton Lankford.¹⁷ When Barbara was still a child, her natural mother, Mary, entered into an agreement with her neighbors, Clarence and Lula Newton, in which the Newtons consented to adopt and to raise Barbara as their child.¹⁸ In accordance with the agreement, Barbara moved in with the Newtons and took the surname of her new family, becoming known as Barbara Ann Newton.¹⁹

The Newtons treated Barbara as their own child, and they publicly recognized her as their daughter at all times.²⁰ For example, records and other documentation listed the foster child as Barbara Ann Newton and recognized her as the daughter of Clarence and Lula Newton,²¹ and upon Clarence Newton's death in 1960, the local newspaper obituary listed Barbara as his surviving daughter.²² While Barbara was away in the Navy, she and Lula frequently wrote letters

11. *See id.* at 121, 489 S.E.2d at 607.

12. *See infra* notes 17-72 and accompanying text.

13. *See infra* notes 73-134 and accompanying text.

14. *See infra* notes 135-62 and accompanying text.

15. *See infra* notes 163-209 and accompanying text.

16. *See infra* notes 210-39 and accompanying text.

17. *See Lankford*, 347 N.C. at 117, 489 S.E.2d at 605.

18. *See id.*

19. *See id.* The court's opinion failed to reveal whether or not the Newtons ever legally changed Barbara's name.

20. *See id.*

21. *See id.* Examples of such records recognizing Barbara as Barbara Ann Newton included her school records and high school diploma. *See id.* The record also stated that Lula and Barbara obtained a Social Security card for Barbara under the name Barbara Ann Newton. *See id.*

22. *See id.*

in which they referred to each other as mother and daughter.²³ Lula continually deposited money, sent to her by Barbara, into joint bank accounts that were set up for Lula and Barbara.²⁴

Lula Newton prepared a will in 1975 designating Barbara as co-executrix and granting specific bequests to her.²⁵ After Lula died in 1994, Barbara attempted to probate the will, but the probate court rejected the will because an unknown person had defaced it.²⁶ Consequently, Lula Newton died intestate.²⁷ Upon the ruling of intestacy, Barbara filed for a declaratory judgment seeking a declaration of her rights and status as an heir for purposes of inheritance.²⁸ Barbara claimed that despite not fulfilling the legal procedures necessary for a formal adoption, Clarence and Lula Newton had always held her out as their daughter,²⁹ and she urged the court to recognize her as the adopted daughter of Lula Newton.³⁰ The administrators and named heirs of Lula Newton, the defendants in this action, responded by filing a motion for summary judgment.³¹

When the trial court granted the defendants' motion for summary judgment, Barbara Newton appealed,³² but the court of appeals affirmed the trial court's ruling.³³ Writing for the court of appeals,³⁴ Judge Greene narrowed the decision to one crucial issue—whether North Carolina recognized equitable adoption.³⁵ Relying on North Carolina Supreme Court precedent that North Carolina did not recognize the doctrine of equitable adoption,³⁶ and determining

23. *See id.* While serving in the Navy, Barbara returned to her home several times to take care of Lula when she was ill. *See id.*

24. *See id.*

25. *See id.*

26. *See id.*

27. *See id.*

28. *See id.*

29. *See Lankford v. Wright*, 122 N.C. App. 746, 747, 472 S.E.2d 31, 32 (1996), *rev'd*, 347 N.C. 115, 489 S.E.2d 604 (1997).

30. *See id.*

31. *See Lankford*, 347 N.C. at 117, 489 S.E.2d at 605.

32. *See Lankford*, 122 N.C. App. at 746, 472 S.E.2d at 32.

33. *See id.* at 746, 472 S.E.2d at 31.

34. Judge Greene wrote the majority opinion in which Judge Martin and Judge Walker concurred. *See id.* at 747, 472 S.E.2d at 32. Judge Walker wrote a separate opinion. *See id.* at 748, 472 S.E.2d at 32-33 (Walker, J., concurring); *see also infra* notes 38-40 and accompanying text (discussing Judge Walker's concurrence).

35. *See Lankford*, 122 N.C. App. at 747, 472 S.E.2d at 32.

36. *See id.* Judge Greene relied on *Ladd v. Estate of Kellenberger*, 64 N.C. App. 471, 307 S.E.2d 850 (1983), *aff'd on other grounds*, 314 N.C. 477, 334 S.E.2d 751 (1985), in which the supreme court stated that North Carolina had not yet recognized the doctrine of equitable adoption. *See Ladd*, 314 N.C. at 480-81, 334 S.E.2d at 754. For a discussion of *Ladd* and how *Lankford* affected it, *see infra* notes 114-29 and accompanying text. The

that Barbara Newton was not adopted in accordance with the North Carolina statutes, Judge Greene upheld the granting of defendants' motion for summary judgment.³⁷

Concurring in the opinion of the appellate court, Judge Walker urged the legislature to work towards recognizing the doctrine of equitable adoption.³⁸ Judge Walker felt that Barbara Newton's struggle clearly demonstrated the need for recognition of the doctrine.³⁹ Noting that similar cases would inevitably arise, Judge Walker voiced his concern about the harshness of requiring strict compliance with the adoption statutes.⁴⁰

The North Carolina Supreme Court reversed the court of appeals and remanded the case to be heard on the merits.⁴¹ Justice Frye, writing for the court, began by declaring that North Carolina would now recognize the doctrine of equitable adoption.⁴² To support this holding, the court first set forth the scope of its equity power.⁴³ The court stated that the principles of equity form the doctrine of equitable adoption and that the court has the duty to

court of appeals also relied on *Wilson v. Anderson*, 232 N.C. 212, 59 S.E.2d 836 (1950), in which the supreme court held that adoption occurs *only* after the adoptive parents satisfy all the statutory provisions of Chapter 48. *See id.* at 221, 59 S.E.2d at 843; *see also* N.C. GEN. STAT. §§ 48-1-100 to -10-105 (1995 & Supp. 1997) (stating the requirements for legal adoption).

37. *See Lankford*, 122 N.C. App. at 747, 472 S.E.2d at 32.

38. *See id.* at 748, 472 S.E.2d at 33 (Walker, J., concurring) ("I . . . write separately to urge the legislature to take action in recognizing this doctrine [of equitable adoption].").

39. *See id.* (Walker, J., concurring).

40. *See id.* (Walker, J., concurring).

41. *See Lankford*, 347 N.C. at 121, 489 S.E.2d at 607.

42. *See id.* at 116-18, 489 S.E.2d at 605-06.

43. *See id.* at 118, 489 S.E.2d at 606. The court addressed the issue of equity by stating, "[i]t is a fundamental premise of equitable relief that equity regards as done that which in fairness and good conscience ought to be done," *id.* (quoting *Thompson v. Soles*, 299 N.C. 484, 489, 263 S.E.2d 599, 603 (1980)), and "[e]quity regards substance, not form," *id.* (quoting *In re Will of Pendergrass*, 251 N.C. 737, 743, 112 S.E.2d 562, 566 (1960)). The court seemed to be attempting to refute a major argument of the dissent that an equitable remedy may not be applied when statutorily defined and established rights exist. *See id.*; *see also id.* at 122, 489 S.E.2d at 608 (Mitchell, C.J., dissenting) (noting that "no equitable remedy may properly be applied to disturb statutorily defined and established rights"). The majority noted that "acting in an equitable manner in this case does not interfere with the legislative scheme for adoption, contrary to the assertions of the dissent." *Id.* at 120, 489 S.E.2d at 607; *see also id.* at 122, 489 S.E.2d at 608 (Mitchell, C.J., dissenting) ("A court's notion of what is good or desirable does not determine what 'ought to be done' in applying equity."); Douglas Laycock, *The Triumph of Equity*, LAW & CONTEMP. PROBS., Summer 1993, at 53, 54 ("We should invoke equity just as we invoke law, without explanation or apology and without a preliminary showing that this is a case for equity."); *infra* notes 163-209 and accompanying text (discussing equity in more depth).

protect and to promote these equitable principles.⁴⁴ Thus, the court determined that it would rely on equitable remedies.⁴⁵

After establishing that North Carolina would now recognize equitable adoption, the court undertook the task of explaining the doctrine.⁴⁶ Relying on the case law of other jurisdictions, the court stated that "[e]quitable adoption is a remedy to 'protect the interest[s] of a person who was supposed to have been adopted as a child but whose adoptive parents failed to undertake the legal steps necessary to formally accomplish the adoption.'"⁴⁷ The court noted that it did not intend for equitable adoption to replace the formal (and legal) statutory requirements for adoption.⁴⁸ Rather, courts should utilize the doctrine only when a foster child is attempting to establish heirship for intestacy proceedings.⁴⁹ The court further noted that the right of the foster child to inherit arises out of equitable enforcement of contract principles.⁵⁰ The court recognized that the doctrine would work to grant inheritance rights to the child from the foster parents who had contracted to adopt the child and who honored that contract in every regard except in failing to follow formal statutory procedures.⁵¹ Furthermore, the court stated that as an equitable matter, the child also must honor the contract in all respects by faithfully performing the duties of a natural child before the child may benefit from the doctrine.⁵²

44. See *Lankford*, 347 N.C. at 118, 489 S.E.2d at 606.

45. See *id.*

46. See *id.*

47. *Id.* (quoting *Gardner v. Hancock*, 924 S.W.2d 857, 859 (Mo. Ct. App. 1996) (quoting 2 AM. JUR. 2D *Adoption* § 53 (1994))).

48. See *id.* at 118-19, 489 S.E.2d at 606.

49. See *id.* at 119-20, 489 S.E.2d at 607. The court specifically stated that the "doctrine acts only to recognize the inheritance rights of a child." *Id.* at 119, 489 S.E.2d at 607.

50. See *id.* at 119, 489 S.E.2d at 607; see also Christi Gill Baunach, Note, *The Role of Equitable Adoption in a Mistaken Baby Switch*, 31 U. LOUISVILLE J. FAM. L. 501, 503 (1992-1993) (noting that "[t]he doctrine applies when a legally competent person enters into a binding legal contract to adopt a child, but the performance falls short of statutory adoption"); Robert S. Gardner, Comment, *Equitable Adoption in Missouri*, 20 MO. L. REV. 199, 200 (1955) (stating that the enforcement of equitable adoption requires sufficient evidence that the contract to adopt the child existed and that enforcing the contract would serve equity and justice).

51. See *Lankford*, 347 N.C. at 119, 489 S.E.2d at 606.

52. See *id.* It is unclear what courts mean by stating that the child must also honor the contract. One court stated:

"The plaintiff [adoptee] carried out her part of the agreement made in her behalf by living with the [adoptive parents] as their child . . . and performing such services as a natural child would have performed under the circumstances. She continued to treat them as her father and mother until their respective

Finally, the court's decision provided guidelines to enable subsequent courts to use the doctrine.⁵³ Specifically, it presented six elements necessary to establish the existence of equitable adoption and stated that each element must be proved by clear and convincing evidence.⁵⁴ Applying the elements to Barbara Newton's claim, the court held that the record demonstrated that each element could be satisfied by clear, cogent, and convincing evidence.⁵⁵ In conclusion, the court again stressed the role that equity played by referring to the fairness and justice of the decision.⁵⁶

This attempt by the majority to "do good" and to be fair inspired Chief Justice Mitchell to dissent.⁵⁷ The Chief Justice criticized the majority for misapplying the maxims of equity.⁵⁸ According to the dissent, the majority disregarded the maxims of equity and used equity to "trump[]" another applicable extensive legislative scheme.⁵⁹ The Chief Justice disapproved of the majority's disregard for existing statutes that address intestate succession for adoptees.⁶⁰

deaths."

Taylor v. Coberly, 38 S.W.2d 1055, 1061 (Mo. 1931) (quoting Fisher v. Davidson, 195 S.W. 1024, 1026 (Mo. 1917)); see also Laney v. Roberts, 409 So. 2d 201, 203 (Fla. Dist. Ct. App. 1982) (exploring what satisfies the "performance" that is required of the alleged adoptee).

53. See *Lankford*, 347 N.C. at 119, 489 S.E.2d at 606-07.

54. See *id.* at 119-20, 489 S.E.2d at 606-07. The six elements identified by the court are:

- (1) an express or implied agreement to adopt the child,
- (2) reliance on that agreement,
- (3) performance by the natural parents of the child in giving up custody,
- (4) performance by the child in living in the home of the foster parents and acting as their child,
- (5) partial performance by the foster parents in taking the child into their home and treating the child as their own, and
- (6) the intestacy of the foster parents.

Id. at 119, 489 S.E.2d at 606-07.

55. See *id.* at 120, 489 S.E.2d at 607.

56. See *id.* at 121, 489 S.E.2d at 607.

57. See *id.* (Mitchell, C.J., dissenting). Justice Parker joined in Chief Justice Mitchell's dissenting opinion. See *id.* at 126, 489 S.E.2d at 610 (Mitchell, C.J., dissenting).

58. See *id.* at 122-23, 489 S.E.2d at 608-09 (Mitchell, C.J., dissenting). The dissent described these maxims as rules or principles created for equity courts to help guide them in the governing and regulating of matters using equity power. See *id.* at 121, 489 S.E.2d at 608 (Mitchell, C.J., dissenting); see also Kevin C. Kennedy, *Equitable Remedies and Principled Discretion: The Michigan Experience*, 74 U. DET. MERCY L. REV. 609, 616-17 (1997) ("The maxims of equity are short statements or rules of thumb that guide courts of equity in the exercise of their sound judicial discretion.").

59. *Lankford*, 347 N.C. at 123, 489 S.E.2d at 609 (Mitchell, C.J., dissenting); see also *infra* notes 163-209 and accompanying text (discussing the maxims of equity).

60. See *Lankford*, 347 N.C. at 122, 489 S.E.2d at 608 (Mitchell, C.J., dissenting). Under the North Carolina General Statutes, "[a] child, adopted in accordance with

He was sympathetic to Barbara Lankford's circumstances but felt

Chapter 48 of the General Statutes or in accordance with the applicable law of any other jurisdiction ... [is] entitled by succession to any property by, through and from his adoptive parents." N.C. GEN. STAT. § 29-17(a) (1984). The dissent argued that because the legislation is very specific, the procedures of Chapter 48 must be satisfied before a child is legally adopted and legally allowed to inherit through intestate succession. See *Lankford*, 347 N.C. at 122-23, 489 S.E.2d at 608-09 (Mitchell, C.J., dissenting); see also N.C. GEN. STAT. §§ 48-1-100 to -10-105 (1995 & Supp. 1997) (setting forth the statutory requirements and procedures for formal adoption).

Section 48-2-304 of the North Carolina General Statutes controls one of the most important procedural aspects of adoption. It states in pertinent part:

(a) The original petition for adoption must be signed and verified by each petitioner, and the original and two exact or conformed copies shall be filed with the clerk of court. The petition shall state:

- (1) Each petitioner's full name, current address, ... and whether each petitioner has resided or been domiciled in this State for the six months preceding the filing of the petition;
 - (2) The marital status and gender of each petitioner;
 - (3) The sex and, if known, the date and state or country of birth of the adoptee;
 - (4) The full name by which the adoptee is to be known ... ;
 - (5) That the petitioner desires and agrees to adopt and treat the adoptee as the petitioner's lawful child; and
 - (6) A description and estimate of the value of any property of the adoptee.
- (b) Any petition to adopt a minor shall also state:
- (1) The length of time the adoptee has been in the physical custody of the petitioner;
 - (2) If the adoptee is not in the physical custody of the petitioner, the reason why the petitioner does not have physical custody and the date and manner in which the petitioner intends to acquire custody;
 - (3) That the petitioner has the resources ... to provide for the care and support of the adoptee;

....

- (6) That all necessary consents, relinquishments, or terminations of parental rights have been obtained

Id. § 48-2-304 (1995). Sections 48-2-305 to -603 of the North Carolina General Statutes also detail further requirements for adoption procedures, such as requirements that petitioners give notice of pendency of adoption proceedings, that petitioners present a report to the court concerning petitioners' family life, mental health, income, and financial obligations, that petitioners file this report with the court, that petitioners participate in a hearing on the petition to adopt to determine if the adoption is in the best interest of the child, and that petitioners pay all fees necessary during the adoption process. See *id.* §§ 48-2-305 to -603 (1995 & Supp. 1997).

Several times in *Lankford*, the dissent reinforced that Chapter 48 of the North Carolina General Statutes must be strictly adhered to before adoption has occurred and sharply criticized the majority for not reading this language in the clear and unambiguous manner in which it was written. See *Lankford*, 347 N.C. at 122, 489 S.E.2d at 608 (Mitchell, C.J., dissenting); see also Kennedy, *supra* note 58, at 617 (explaining the maxim of "equity follows the law" and stating that in light of that principle, it is "obviously true" that a court in equity cannot disregard the substantive rules of law); *infra* notes 163-209 and accompanying text (examining the use of equity in more depth).

that the North Carolina General Statutes should bind the court.⁶¹ The dissent argued that an equity court, like a court of law, does not have the right to act according to its own idea of what is right; rather, established rules and precedents must guide a court of equity, and when legal rules define and establish rights, a court of equity cannot change these rights.⁶² The Chief Justice explained that “[a] court of equity is thus bound by any explicit statute or directly applicable rule of law, regardless of its view[] of the equities.”⁶³ The dissent suggested that the proper method for introducing equitable adoption is through the legislature and the procedures developed under the state adoption statutes.⁶⁴ Additionally, the dissent posited that many complex questions could arise under equitable adoption and that the legislature could address these issues in clear laws.⁶⁵

The Chief Justice also criticized the majority for misapplying the maxim “equity regards as done that which ought to be done.”⁶⁶ The dissent argued that the proper application of this maxim required an equal concern for the innocent third parties to the transaction as well as the plaintiff.⁶⁷ In this case, Chief Justice Mitchell defined the innocent third parties as the defendants, the prospective heirs under the laws of intestate succession, and stated that they were being injured unnecessarily by the majority’s application of equity.⁶⁸ He also argued that according to the court’s precedent, “equity regards as done that which ought to be done *ought not* to be and ‘will not be

61. See *Lankford*, 347 N.C. at 122, 125, 489 S.E.2d at 608, 610 (Mitchell, C.J., dissenting); see also *supra* note 60 (quoting the pertinent language of N.C. GEN. STAT. § 29-17 (1984)).

62. See *Lankford*, 347 N.C. at 122, 489 S.E.2d at 608 (Mitchell, C.J., dissenting).

63. *Id.* (Mitchell, C.J., dissenting) (quoting 27A AM. JUR. 2D *Equity* § 109, at 595 (1996)).

64. See *id.* at 124, 489 S.E.2d at 609 (Mitchell, C.J., dissenting).

65. See *id.* (Mitchell, C.J., dissenting). For example, the Chief Justice was concerned about whether the equitably adopted child would inherit from the natural parents or from a natural sibling who had not been equitably adopted, and whether the court should recognize for inheritance purposes the relationship between the equitably adopted child’s issue and the equitably adoptive parents. See *id.* (Mitchell, C.J., dissenting).

66. *Id.* at 125, 489 S.E.2d at 610 (Mitchell, C.J., dissenting); see also Thompson v. Soles, 299 N.C. 484, 489, 263 S.E.2d 599, 603 (1980) (“It is a fundamental premise of equitable relief that equity regards as done that which in fairness and good conscience ought to be done.”).

67. See *Lankford*, 347 N.C. at 125-26, 489 S.E.2d at 610 (Mitchell, C.J., dissenting); see also Kennedy, *supra* note 58, at 618-19 (discussing the maxim “he who seeks equity must do equity”); *infra* notes 163-209 and accompanying text (discussing equity in more depth).

68. See *Lankford*, 347 N.C. at 125, 489 S.E.2d at 610 (Mitchell, C.J., dissenting); see also *infra* notes 202-05 and accompanying text (explaining the injury that the defendants would suffer).

enforced to the injury of innocent third parties.' ”⁶⁹

Finally, the Chief Justice asserted that the *plaintiff* was also an innocent party.⁷⁰ He concluded that because both parties were innocent, the general principles of equity that concern “what ought to be done” did not even arise between the parties.⁷¹ Therefore, Chief Justice Mitchell stated that because the application of “what ought to be done” would injure both parties, equity should not apply in this case because “ ‘where equities are equal, “the law must prevail.” ’ ”⁷²

Nearly a decade before the court in *Lankford* recognized equitable adoption, courts in some parts of the country welcomed the doctrine as an equitable alternative to statutory adoption. The equitable adoption doctrine first appeared in the late nineteenth and early twentieth centuries in Missouri⁷³ and Wyoming⁷⁴ when these two pioneer states held that an agreement to adopt that did not fulfill the statutory provision of adoption could be enforced under the principles of equity.⁷⁵

The origins of equitable adoption coincide with the origins of adoption legislation generally.⁷⁶ In the mid-nineteenth century, widespread social welfare reform brought about adoption legislation.⁷⁷ Because the common law never recognized adoption,

69. *Id.* (Mitchell, C.J., dissenting) (emphasis added) (quoting *Hood ex rel. North Carolina Bank & Trust Co. v. North Carolina Bank & Trust Co.*, 209 N.C. 367, 381, 184 S.E. 51, 59 (1936)).

70. *See id.* (Mitchell, C.J., dissenting).

71. *Id.* at 125-26, 489 S.E.2d at 610 (Mitchell, C.J., dissenting).

72. *Id.* at 126, 489 S.E.2d at 610 (Mitchell, C.J., dissenting) (quoting 27A AM. JUR. 2D *Equity* § 139, at 616 (1996) (quoting *Sargent v. Coolidge*, 433 A.2d 738, 743 (Me. 1981))); *see also* Kennedy, *supra* note 58, at 620 (explaining, as an example of the maxim “equality is equity,” that when two persons are similarly situated, those two persons should be treated equally and that none should receive preferential treatment from a court sitting in equity); *infra* notes 163-209 and accompanying text (discussing equity in more depth).

73. *See Lynn v. Hockaday*, 61 S.W. 885, 889 (Mo. 1901).

74. *See Nugent v. Powell*, 33 P. 23, 31 (Wyo. 1893).

75. *See Lynn*, 61 S.W. at 888-89 (noting that the Statute of Frauds cannot invalidate an agreement to adopt when the agreement has otherwise been fully performed); *Nugent*, 33 P. at 25 (noting that the policy behind adoption compels the court to recognize a child as adopted as long as the court finds “that there was a substantial compliance with the [adoption] statute”).

76. Compare Timothy Hughes, Comment, *Intestate Succession and Stepparent Adoptions: Should Inheritance Rights of an Adopted Child Be Determined by Blood or by Law?*, 1988 WIS. L. REV. 321, 324-28 (tracing the history of adoption), with Edward W. Bailey, *Adoption “By Estoppel,”* 36 TEX. L. REV. 30, 30-43 (1957-58) (discussing the history of equitable adoption in Texas), and Christopher J. Petri, Note, *What’s in a Name? Not Much for Equitable Adoption in Missouri*, 63 MO. L. REV. 195, 198-218 (1998) (tracing the history of equitable adoption in Missouri).

77. *See* Jan Ellen Rein, *Relatives by Blood, Adoption, and Association: Who Should Get What and Why*, 37 VAND. L. REV. 711, 714-15 (1984). Care for children and other

courts around the country strictly construed the early statutes that created adoption.⁷⁸ One commentator has noted that the policy behind strict enforcement was to ensure that a child would not be placed in the hands of an incompetent adult.⁷⁹ The adoption statutes mandated judicial approval of those persons wishing to adopt, which served as a screening mechanism that greatly decreased the probability that minors would be raised by unfit adoptive parents.⁸⁰

Despite these concerns, courts in the late nineteenth and early twentieth centuries determined that strict enforcement of adoption statutes often resulted in grave injustice to the purportedly adopted child.⁸¹ During this time, if courts found any deviation from the adoption statutes, the controlling statutes forced the courts to declare the adoption invalid and thus deny any inheritance rights to the allegedly adopted child.⁸² Courts became discouraged with the

dependent people was relegated to almshouses (or orphanages) until the middle of the nineteenth century. See Stephen B. Presser, *The Historical Background of the American Law of Adoption*, 11 J. FAM. L. 443, 472 (1971). The ineffectiveness of this public child care system spawned private efforts to care for neglected children. See *id.* at 473. The private institutions focused on placing children in acceptable family environments and succeeded in responding to the changing social and economic conditions of America in the nineteenth century. See *id.* at 474. There were three central reasons for the shift to placing children in families: (1) the emergence of the public school system eliminated the responsibility of the almshouses to provide the children an education; (2) the industrialization of America created wage-earning opportunities in factories and made the apprenticeship obsolete, thus resulting in less children in the workplace and more children in need of family care; and (3) the influx to America of immigrants made the number of dependent children unmanageable for the public institutions who sought relief by placing the children in homes at an early age. See *id.* at 474-79; see also John Francis Brosnan, *The Law of Adoption*, 22 COLUM. L. REV. 332 (1922) (tracing the origins of adoption); Leo Albert Huard, *The Law of Adoption: Ancient and Modern*, 9 VAND. L. REV. 743, 743-49 (1956) (providing additional information regarding the history of adoption).

78. See George C. Sims, Comment, *Adoption by Estoppel: History and Effect*, 15 BAYLOR L. REV. 162, 164 (1963) (describing the treatment of adoption by the Texas courts); see also *Crompton v. Mitchell*, 303 N.C. 657, 664, 281 S.E.2d 1, 5 (1981) (construing strictly the North Carolina statutory provisions for formal adoption to provide that severance from the adoptee's natural family should be construed as complete severance).

79. See Harvey A. Schneider, Comment, *Equitable Adoption: A Necessary Doctrine?*, 35 S. CAL. L. REV. 491, 497 (1962).

80. See *id.*

81. See, e.g., *Taylor v. Coberly*, 38 S.W.2d 1055, 1061 (Mo. 1931); *Lynn v. Hockaday*, 61 S.W. 885, 888-89 (Mo. 1901); *Nugent v. Powell*, 33 P. 23, 30-31 (Wyo. 1893); Sims, *supra* note 78, at 164.

82. An example of a North Carolina case in which the court declared adoptions invalid because of deviations from the adoption statutes is *In re Shelton*, 203 N.C. 75, 164 S.E. 332 (1932). In *Shelton*, the mother of a young child went to live with a family in order to earn money and have child care for her newborn. See *id.* 203 N.C. at 76, 164 S.E. at 332. After the woman and her child lived there for six months, the mother left to go

frequency of this result and felt that equity and public policy demanded a more just solution.⁸³ Furthermore, the unfairness created by these cases caused courts to look for equitable relief to offer some protection to adopted children.⁸⁴ The solution these courts developed was to allow children to be deemed adopted even though the adoptive parents did not comply with all, or in some cases any, of the statutory requirements.⁸⁵

Although equitable adoption was more lenient than the statutory provisions for legal adoption, early courts did set guidelines for subsequent courts to follow.⁸⁶ The major provision established by these early courts was the requirement that a "contract to adopt" be

seek work. *See id.* Although the mother knew of the family's plans to adopt the little girl when she left, she did not want to be a party to the adoption proceedings because she did not want her parents to know that she had an illegitimate baby. *See id.* at 77-78, 164 S.E. at 333. The family adopted the baby girl, and they lived as a family for almost three years. *See id.* The young mother then sought to have the adoption declared void because she was not a party to the proceedings. *See id.* at 76, 164 S.E. at 332. Even though the court of appeals had determined that it was in the best interest of the child to stay with the family she had been living with for three years, the supreme court reversed, holding that the best interest of the child was *not controlling* but that because the statutes clearly required the mother to be a part of the proceedings, the adoption was invalid. *See id.* 203 N.C. at 79-80, 164 S.E. at 334; *see also* Truelove v. Parker, 191 N.C. 430, 436, 132 S.E. 295, 298 (1926) (requiring the parents to be parties to the proceedings).

According to one commentator who has addressed the struggle that early courts faced with strict statutory provisions, some jurisdictions had no alternative to statutory adoption, and no private agreements were recognized to bring the allegedly adopted child into the statutes of descent and distribution. *See* Note, *Equitable Adoption: They Took Him into Their Home and Called Him Fred*, 58 VA. L. REV. 727, 727-28 (1972) [hereinafter "*Equitable Adoption*"]. The commentator further states, "[o]ne may ask why any court would consider a claim of equitable adoption in the face of an unambiguous statutory scheme. The answer lies in the extraordinarily persuasive factual situations which may arise." *Id.* at 728; *see also* John S. Strahorn, Jr., *Adoption in Maryland*, 7 MD. L. REV. 275, 278 (1943) (providing examples of the Maryland judiciary's strict compliance with the statutory requirements for adoption).

83. *See* Sims, *supra* note 78, at 164 ("The inequity resulting from the many cases coming before the [Texas] court prompted that tribunal to search for some equitable grounds, upon which a decision could be based, to afford some degree of protection to the adopted child."); *see also* Moore v. Bryant, 31 S.W. 223, 225 (Tex. Civ. App. 1895, no writ) (holding that even though no records were recovered that showed a contract to adopt, the manner in which the foster parents treated the adoptee "were proper circumstances for the consideration of the jury in determining the entire issue of adoption").

84. *See* Sims, *supra* note 78, at 164.

85. *See* Butler v. Ross, 4 S.E.2d 21, 25 (Ga. 1939); Taylor, 38 S.W.2d at 1062; Jones v. Guy, 143 S.W.2d 906, 910 (Tex. 1940); Nugent, 33 P. at 30-31; *see also* Rein, *supra* note 77, at 767 (noting that early courts developed the doctrine of equitable adoption to "correct the injustice" that resulted from strictly applying adoption statutes).

86. *See infra* notes 87-103 and accompanying text (explaining the guidelines established by early equitable adoption cases).

in existence.⁸⁷ The policy behind requiring strict proof of intent to adopt, as evidenced by an established contract, was to remind the couples who took a child into their home that such beneficence would not automatically grant the child adopted status, unless the evidence was clear and convincing that adoption was intended.⁸⁸ Judges sitting in equity felt the contract to adopt was vital because it clarified the intention of the adoptive parents to make the allegedly adopted child an heir.⁸⁹ Furthermore, these judges felt that the existence of a contract made it more plausible that the parents intimated to the child the legitimacy of the adoption, thereby providing a stronger basis to estop others from denying the child's right to take.⁹⁰

87. See, e.g., *Keller v. Lewis County*, 134 S.W.2d 48, 51 (Mo. 1939). In *Keller*, the Missouri Supreme Court nullified an earlier decision handed down in *Holloway v. Jones*, 246 S.W. 587 (Mo. 1922), that had affirmed a decision granting an adoptee equitable adoption without finding a contract for adoption. See *Keller*, 134 S.W.2d at 51; *Holloway*, 246 S.W. at 593; see also *Equitable Adoption*, *supra* note 82, at 733 (discussing *Keller* and *Holloway*). The facts of *Keller* are as heartwrenching as most cases of this sort. The plaintiff was a young woman, Anna Elizabeth Draper (Keller), who had been taken from an orphans' home in 1872 at the age of seven. See *Keller*, 134 S.W.2d at 49. Anna remained at the home of her foster parents for 16 years. See *id.* She married in 1888, but returned to the home of her foster parents with her three children after the marriage failed in 1896. See *id.* In 1898, Anna remarried her husband and moved out of her foster parents' home. See *id.* While relations between Anna and her foster parents were tense for a while, the record showed a friendly lunch meeting in 1912 with Anna's son at which the foster father reminisced about getting Anna out of the orphanage. See *id.* at 50. After the death of her foster father, Anna sought to be declared an heir. See *id.* at 48. The court held that because there was not an express agreement to adopt Anna nor conduct sufficient to establish her adoption, she could not be recognized as an heir under the doctrine of equitable adoption. See *id.* The court stated that "the rule is definite and strict as to the requirements respecting the character and quantum of proof necessary to establish an oral contract to adopt This rule . . . is that such evidence must be clear, cogent, and convincing and such as to leave no reasonable doubt." *Id.* at 51.

Texas, another forerunner in the development of equitable adoption, also strictly required the existence of a contract. See *Howell v. Thompson*, 190 S.W.2d 597, 600 (Tex. Civ. App. 1945, no writ). In *Howell*, the adoptive parents failed to show a contract with the child, with her natural parent, or with some person representing the child. See *id.* at 599. Because "[i]t is the contract, either oral or written, . . . which gives rise to the doctrine of adoption by estoppel," the court refused to recognize the child as equitably adopted. *Id.* at 600 (emphasis added).

88. See *Benjamin v. Cronan*, 93 S.W.2d 975, 981 (Mo. 1936) ("No one, after he or she has passed on, should be adjudged to have adopted a child unless the evidence is clear, cogent, and convincing . . .").

89. See *House v. House*, 222 S.W.2d 337, 338-39 (Tex. 1949). In *House*, the foster family had never entered into a contract to adopt, despite holding out the foster child as their own daughter. See *id.* at 338. The court held that because a "contract to adopt" did not exist, the doctrine of equitable adoption could not be enforced to grant the child inheritance rights. See *id.* at 339; see also *Bailey*, *supra* note 76, at 41-42 (discussing the importance of the contract in equitable adoption proceedings).

90. See *Bailey*, *supra* note 76, at 41-42.

Early courts also struggled with what evidence would be required to prove that a contract existed. Courts allowed either oral or written contracts,⁹¹ which made fact-gathering a difficult task.⁹² Because the adoptive parents were usually dead when the foster child was seeking relief, courts required strong evidence to avoid fraud or deceit when the claimed contract was oral.⁹³ The most common standard among early courts was one of clear, cogent, and convincing evidence that left no reasonable doubt in the mind of the judge.⁹⁴ In these cases, the alleged adoptee carried the burden of proof.⁹⁵

91. One court has held that the Statute of Frauds does not invalidate an oral contract to adopt. See *Signaigo v. Signaigo*, 205 S.W. 23, 29 (Mo. 1918) (en banc). The Statute of Frauds requires that certain contracts be evidenced by a writing. See 3 SAMUEL WILLISTON, WILLISTON ON CONTRACTS § 448, at 340-41 (Walter H. E. Jaeger ed., 3d ed. 1960). The Statute of Frauds was designed to prevent the enforcement of fraudulent claims to a contract by requiring a writing to prove the existence of a contract. See *id.* The Missouri court in *Signaigo* held that an equity court could make a decree, based solely on the proof of the existence of an oral contract, despite the clear violation of the Statute of Frauds. See *Signaigo*, 205 S.W. at 29. Courts in Texas have made similar decrees. See, e.g., *Jones v. Guy*, 143 S.W.2d 906, 910 (Tex. 1940) (holding that the Statute of Frauds did not preclude the specific performance of an oral contract for adoption). But see *Marietta v. Faulkner*, 126 So. 635, 635-36 (Ala. 1930) (recognizing that the Statute of Frauds should prevent inheritance through the enforcement of an oral contract in equitable adoption); *Wright v. Green*, 119 N.E. 379, 380 (Ind. Ct. App. 1918) (stating that the Statute of Frauds invalidated an oral contract that provided for the sale of land as part of an equitable adoption).

92. See *Bailey*, *supra* note 76, at 39 (noting that absent an express agreement to adopt the child, the contract can be proven "by the acts, conduct, and admissions of the parties and other relevant facts and circumstances" (quoting *Cavanaugh v. Davis*, 235 S.W.2d 972, 974 (Tex. 1951))).

93. See *Jess T. Hay & Ronald M. Weiss*, Comment, *The Doctrine of Equitable Adoption*, 9 SW. L.J. 90, 100 (1955). Hay and Weiss further note that "the courts [were] very strict in considering the weight to be given circumstantial evidence It is well settled that the mere inter-vivos relationship of the alleged adopting parent and child, standing alone, is not sufficient to prove the contract." *Id.* at 101; see also *Rein*, *supra* note 77, at 780 ("Traditionally the courts have viewed these parole contracts with 'grave suspicion.'"). But see *Sims*, *supra* note 78, at 168 ("The courts lay great stress upon the acts and conduct of both the child and the adoptive parent, which may be indicative of the relationship enjoyed by a natural parent and child or legally adopted child.").

94. See *Mutual Life Ins. Co. v. Benton*, 34 F. Supp. 859, 862 (W.D. Mo. 1940) (stating that the plaintiff needed to show not only that a contract to adopt was made, but also its terms and conditions); *Hogane v. Ottersbach*, 269 S.W.2d 9, 11 (Mo. 1954) (noting the special strictness under which the court will review evidence of a contract to adopt); *Westlake v. Westlake*, 201 S.W.2d 964, 969 (Mo. 1947) (stating that an equitable adoption case required that the evidence be examined with "especial strictness"); *Burdick v. Grimshaw*, 168 A. 186, 189 (N.J. Ch. 1933) ("[C]ourts have come to regard . . . oral agreements [to adopt] with grave suspicion, have subjected them to close scrutiny, and have allowed them to stand only when established by evidence that is clear, cogent, and convincing.").

95. See *Niehaus v. Madden*, 155 S.W.2d 141, 144 (Mo. 1941); *Lamb v. Feehan*, 276 S.W. 71, 79 (Mo. 1925); *Sims*, *supra* note 78, at 167; see also *Petri*, *supra* note 76, at 203-04

Furthermore, although the alleged adoptee did not have to prove the contract by direct evidence, "evidence which merely raise[d] a surmise or suspicion of adoption [was not] sufficient to support a verdict."⁹⁶

After establishing the requirements of a contract to adopt, the early equitable adoption courts also established contract remedies, which included specific performance and promissory estoppel.⁹⁷ Specific performance, or the contract theory, presupposed that the foster parent had contracted to create a legal adoption and that by granting relief the court was specifically enforcing the contract.⁹⁸ Specific performance could only be granted against the foster parent's estate because the remedy was not enforceable during the lifetime of the promisors.⁹⁹ In order to rely on specific performance, the child had to show an adoption agreement and valid consideration for the promise of adoption.¹⁰⁰

The second remedy, the estoppel theory, was more informal than the contract theory and was perceived as a complete break from the rigors of the elements of specific performance.¹⁰¹ Estoppel did not

(discussing *Niehaus* and the burden of proof that the alleged adoptee must carry).

96. Sims, *supra* note 78, at 167-68.

97. See Hay & Weiss, *supra* note 93, at 105-08; see also Gaudio, *supra* note 6, at 826-27 (discussing the contract remedies of specific performance and estoppel); *Equitable Adoption*, *supra* note 82, at 730-38 (discussing specific performance and estoppel).

98. See Rein, *supra* note 77, at 770. In *Habecker v. Young*, 474 F.2d 1229 (5th Cir. 1973), the court listed elements that would support a finding of equitable adoption under specific performance: an agreement between the natural and adoptive parents; performance by the natural parents in relinquishing custodial rights; performance by the youth by residing with the adoptive parents; part performance by the adoptive parents by giving the child a home and acting like natural parents; and the intestacy of the adoptive parents. See *id.* at 1230. These elements are almost identical to those listed in *Lankford*, showing that the North Carolina court was also relying on a theory of specific performance. See *Lankford*, 347 N.C. at 119, 489 S.E.2d at 606-07; see also *In re Estate of Lamfrom*, 368 P.2d 318, 320-21 (Ariz. 1962) (en banc) (detailing the contractual elements required for relief under specific performance); *Williams v. Murray*, 236 S.E.2d 624, 625 (Ga. 1977) (same); *In re Estates of Williams*, 348 P.2d 683, 684 (Utah 1960) (same); *supra* note 54 (detailing the elements set out in *Lankford*).

99. See *Equitable Adoption*, *supra* note 82, at 730. The reason specific performance can only be awarded against the estate of a deceased promisor is equity will not force a parent to adopt a child during the parent's lifetime. See *id.* When courts have granted specific performance against the estate of the foster parent, the courts have not forced an intimate relationship between a parent and child, but in theory only compelled the estate to recognize the child as adopted. See *Besche v. Murphy*, 59 A.2d 499, 501-02 (Md. 1948).

100. See *Equitable Adoption*, *supra* note 82, at 731.

101. See Sims, *supra* note 78, at 164. The court in *Ricketts v. Scothorn*, 77 N.W. 365 (Neb. 1898), discussed the essential elements of estoppel as a promise or representation of fact, an actual and reasonable reliance on that promise, and a resulting detriment because of reliance. See *id.* at 367; see also *infra* notes 153-62 and accompanying text (discussing the modern applications of the estoppel theory).

require the existence of a contract, but only a showing that the child was led to believe that he would inherit from the adoptive parents.¹⁰² The courts viewed the child's belief in the adoption as reliance and determined that the adoptive parents' estate should be estopped from denying the child the inheritance on which the adoptee had relied.¹⁰³

While the development of equitable adoption was taking place in courts around the country, North Carolina avoided addressing the issue of equitable adoption on two occasions prior to *Lankford*. The first time was in the 1938 case of *Chambers v. Byers*.¹⁰⁴ In *Chambers*, the supreme court considered the status of Lucy Bowers Knight, a young woman who claimed that she was entitled to 108 acres of land from John R. Tucker's estate.¹⁰⁵ Ms. Knight relied on a written contract between Mr. Tucker and Ms. Knight's father,¹⁰⁶ which stated that she was Mr. Tucker's adopted daughter, that she would be raised by him, and that upon his death she would be his only heir.¹⁰⁷ The court did not specifically address the issue of equitable adoption,¹⁰⁸ but instead held that Ms. Knight sufficiently had proven the contract which granted her the land and that the contract appeared to be

102. See Hay & Weiss, *supra* note 93, at 107-08. A Texas court relying on estoppel for recovery described it as preventing adoptive parents and others from denying the status of the adopted child when "by performance upon the part of the child, the adoptive parents have received all the benefits and privileges accruing from such performance, and they . . . induced such performance under the belief of the existence of the status of adopted child." *Jones v. Guy*, 143 S.W.2d 906, 908 (Tex. 1940) (emphasis added). But see Hay & Weiss, *supra* note 93, at 109 (stating that Texas courts purportedly relied on estoppel, but required an express contract to adopt or an attempt to comply with statutory provisions).

103. See Rein, *supra* note 77, at 776.

104. 214 N.C. 373, 199 S.E. 398 (1938).

105. See *id.* at 374, 199 S.E. at 399.

106. See *id.* at 375, 199 S.E. at 399-400. In the contract, C.M. Bowers acknowledged that he was the father of Lucy Bowers, a minor, and gave his full consent to her adoption by John and Laura Isabelle Tucker, who were to take Lucy "as their own child and sole and only heir." *Id.* In return, the Tuckers covenanted and agreed to adopt Lucy as their own child, to provide for her wants and needs, and "to make said Lucy Bowers . . . [their] sole and only heir to what . . . [they] may die possessed of." *Id.* at 375, 199 S.E. at 400.

107. See *id.* at 374-75, 199 S.E. at 399-400.

108. The facts of *Chambers* presented a perfect case for the court to address equitable adoption. All of the necessary elements were present: an existing contract, performance on the part of the natural parents, the foster parents, and the child to fulfill the contract, and the intestate death of the foster parents. See *id.* at 374-77, 199 S.E. at 399-401. These equitable adoption elements had been established in several jurisdictions by 1938. See, e.g., *Tuttle v. Winchell*, 178 N.W. 755, 757 (Neb. 1920); *Beach v. Bryan*, 133 S.W. 635, 643 (Mo. Ct. App. 1911). Furthermore, the *Chambers* court used equity jurisprudence, the same jurisprudence it would have used to decide the case on the basis of equitable adoption, to grant specific enforcement of the contract. See *Chambers*, 214 N.C. at 378, 199 S.E.2d at 401. Despite this opportunity, the court failed to address equitable adoption in *Chambers*.

binding on the decedent.¹⁰⁹ The court only addressed the issue of the adoption in dictum, noting that the agreement did not meet the statutory requirements for adoption as required under chapter two of the North Carolina Code.¹¹⁰ Finally, the court dismissed the issue by comparing the facts of *Chambers* to the facts of a similar Missouri case, *Sharkey v. McDermott*,¹¹¹ in which the Missouri court held that the contract to adopt was not enforceable, but that the conveyance of land designated in the contract was enforceable.¹¹² Following the Missouri court, the court in *Chambers* also declared that the contract for adoption was not valid, but the court determined that the conveyance of land was enforceable because it gave effect to the promise upon which the parties had agreed.¹¹³

Almost five decades later, the North Carolina Supreme Court again avoided addressing equitable adoption in *Ladd v. Estate of Kellenberger*.¹¹⁴ Unlike the alleged adoptee in *Chambers*, the plaintiffs in *Ladd* affirmatively asked the court to declare them equitably adopted so that they could take under their foster parent's will.¹¹⁵ The plaintiffs were three women, Elizabeth Coffey Ladd, Margaret Coffey Graddy, and Marion Coffey Hensley,¹¹⁶ whose

109. See *Chambers*, 214 N.C. at 378-79, 199 S.E. at 401-02.

110. See *id.* at 377, 199 S.E. at 401 ("The parties to the agreement in this case did nothing as required by the Adoption statute."). The major deviations from the statute were that the Bowers did not have the state investigate their living conditions and they did not file any of the papers stating the agreement to adopt. See N.C. CODE § 191(3), (9) (1935); *Chambers*, 214 N.C. at 376-77, 199 S.E.2d at 401.

111. 4 S.W. 107 (Mo. 1887).

112. See *id.* at 110. In *Sharkey*, the plaintiff was a young woman who was given away at the age of four to a couple. See *id.* at 107. The couple agreed to raise her and to adopt her legally, making her their sole heir. See *id.* The young woman's foster father did name her as the sole heir in his will, but he had revoked that bequest by codicil and had left everything to his wife. See *id.* at 108. After the foster father's death, the young woman continued to live with her foster mother. See *id.* The adoptee gave all her earned wages to the mother, sewed for her, cleaned for her, and "yielded all of the affection and obedience due from a child to a parent." *Id.* After her foster mother died intestate, the adoptee realized she had never been formally adopted and that she was not entitled to any of her foster parents' property. See *id.* The court did not recognize her as the adopted daughter of the deceased because they had not complied with the adoption statutes. See *id.* at 110. However, the court held that because the failed adoption was no fault of the adoptee, she should be entitled to enforce the contract which granted her property because the "agreement was not merely and solely one to adopt the plaintiff, but was in part to leave the plaintiff the property at their death." *Id.* Note, however, that Missouri actively recognizes the doctrine of equitable adoption and that it was one of the first states to do so. See *Lynn v. Hockaday*, 61 S.W. 885, 889 (Mo. 1901).

113. See *Chambers*, 214 N.C. at 378, 199 S.E. at 402.

114. 314 N.C. 477, 334 S.E.2d 751 (1985).

115. See *id.* at 478, 334 S.E.2d at 753.

116. See *id.* at 479, 334 S.E.2d at 753.

natural father had taken them in 1933 to the home of May Gordon Latham Kellenberger, a distant relative who was wealthy and childless.¹¹⁷ Mr. and Mrs. Kellenberger agreed to take the children and raise them as their own,¹¹⁸ and, when the natural father visited the Kellenbergers some fifteen years later, they repeated their agreement to adopt his daughters and to continue to support them.¹¹⁹ During this visit, the Kellenbergers asked the father to cease contact with the children, and in return, the Kellenbergers agreed to finance higher education for the young women.¹²⁰

In 1978, Mrs. Kellenberger, predeceased by her husband, died testate.¹²¹ Her will provided gifts for many charities, but it contained only one clause for bequests to family members, stating that forty percent of her residuary estate should go to her "various relatives, both on my father's and my mother's sides of the family, who would inherit from me if I died intestate."¹²² After the distribution of the proceeds of the estate, the three sisters sought specific performance of the contract for their adoption.¹²³ The North Carolina Court of Appeals affirmed the trial court's dismissal of the case for failure to state a claim upon which relief could be granted¹²⁴ and stated that equitable adoption was not a recognized doctrine in North Carolina because it was "contrary to public policy and the prevailing law" of the state.¹²⁵

On appeal, the supreme court was presented with the opportunity to address the question of equitable adoption, and while

117. *See id.*

118. *See id.* at 479, 334 S.E.2d at 753-54. The record indicates that the children did not stay in the home of the Kellenbergers, but were sent to school at the Barium Springs Home for Children. *See id.* at 479, 334 S.E.2d at 754. The Kellenbergers provided the girls with gifts, clothes, toys, and music lessons throughout childhood, and the couple made all parental decisions. *See id.*

119. *See id.* The record does not indicate how often Mr. Coffey visited the Kellenbergers, or if he ever visited the girls, but the visit in 1948 was his last visit to the Kellenberger's home. *See id.* at 480, 334 S.E.2d at 754. However, at the time of the foster parents' death, Mr. Coffey was still alive. *See id.*

120. *See id.* at 479-80, 334 S.E.2d at 754.

121. *See id.* at 480, 334 S.E.2d at 754.

122. *Id.* (quoting from Mrs. Kellenberger's will).

123. *See id.* The daughters filed this action against the co-executors and the distributees who received estate proceeds. *See id.* The trial court dismissed for lack of personal jurisdiction and for failure to state a claim upon which relief could be granted. *See id.*

124. *See Ladd v. Estate of Kellenberger*, 64 N.C. App. 471, 307 S.E.2d 850 (1983), *aff'd*, 314 N.C. 477, 334 S.E.2d 751 (1985).

125. *Id.* at 473-74, 307 S.E.2d at 851.

the court recognized the issue, it did not resolve it.¹²⁶ Writing for the court, Justice Exum explicitly stated that it was "unnecessary to decide whether we shall recognize the equitable adoption doctrine in this state."¹²⁷ The court held that the intent of the testator controlled, and, relying on the language "'on my father's and my mother's side of the family,'" the court determined that Mrs. Kellenberger's intent was to divide her estate among her collateral relatives and not her lineal relatives.¹²⁸ The court thus concluded that this language necessarily excluded all children.¹²⁹

While North Carolina courts declined to recognize equitable adoption as a means of intestate inheritance, the General Assembly had included adopted children in the class for intestate succession in the first adoption statutes.¹³⁰ Noting that adoption conferred all the

126. See *Ladd*, 314 N.C. at 481, 334 S.E.2d at 754.

127. *Id.* at 481, 334 S.E.2d at 755.

128. *Id.* at 482-83, 334 S.E.2d at 755-56 (quoting from Mrs. Kellenberger's will).

129. See *id.* It is generally accepted in the United States that testators may exclude their children from their wills. See generally Russell G. Donaldson, Annotation, *Pretermitted Heir Statutes: What Constitutes Sufficient Testamentary Reference to, or Evidence of Contemplation of, Heir to Render Statute Inapplicable*, 83 A.L.R.4TH 779 (1991) (collecting and analyzing statutes and cases dealing with the exclusion of heirs from wills). In North Carolina, a testator may exclude a child from his estate. See N.C. GEN. STAT. § 31-5.5 (Supp. 1997). The statute entitles the child to the portion of the testator's estate that she would have received had the testator died intestate, unless the testator has either provided for the child in his will in any manner, or in judging from the language of the will, it is apparent that the testator intentionally omitted the child. See *id.*

States have passed pretermitted heir statutes to protect children from the testators' inadvertent exclusion of issue in their wills. See Donaldson, *supra*, at 790-91. North Carolina adopted a pretermitted heir statute in 1869. See Act of April 6, 1869, ch. 113, § 62, 1868 N.C. Sess. Laws 257, 273 (codified as amended at N.C. GEN. STAT. § 31-5.5 (Supp. 1997)). In simple terms, the North Carolina statute states that the child is entitled to a share of the testator's estate as if the testator had died intestate, unless: (1) the testator made some provision for the child; or (2) it is apparent from the will that the testator intentionally meant to leave the child out of the will. See *Wachovia Bank & Trust Co. v. McKee*, 260 N.C. 416, 418, 132 S.E.2d 762, 764 (1963). The intent of the testator to exclude the child must be unmistakable in order for the court to deny the child the protection of the statutes. See *id.* The North Carolina Supreme Court has expressed dismay in having to deny a child his share of an estate, so the burden of proving "unmistakable" intent is a difficult one. See *id.* at 418-19, 132 S.E.2d at 764 ("The members of the Court enter with reluctance a judgment which excludes [a child] from sharing in her father's estate.").

130. See 1 N.C. REVISAL, ch. 2, § 177 (1905). The original adoption statutes remained basically unchanged until the Revisal of 1905, which specifically stated that adoption established a parent-child relationship between a petitioner and a child. See Act of March 3, 1873, ch. 155, § 1, 1872-73 N.C. Pub. Laws 254, 255 (providing the original adoption statutes) (codified as amended in various sections of N.C. GEN. STAT. §§ 48-1-100 to -105 (1995 & Supp. 1997)); 1 N.C. REVISAL, ch. 2, § 177. Furthermore, if the petitioner died intestate, the order for adoption would "enable such child to inherit the real estate and entitle it to the personal estate of the petitioner in the same manner and to the same

privileges of a natural child onto the adopted child, the North Carolina General Assembly determined that the statutes of adoption and distribution should be read together.¹³¹ The current statute states that a child who has been adopted in accordance with Chapter 48 of the North Carolina General Statutes, or in accordance with the laws of another jurisdiction, is "entitled by succession to any property by, through and from his adoptive parents and their heirs the same as if he were the natural legitimate child of the adoptive parents."¹³² The statute also states that the adopted child cannot inherit from a natural parent unless the adopted parent is a step-parent who is married to a natural parent of the child.¹³³ Because equitable adoption places the adoptee in the same position as a legally adopted child for intestate purposes, the equitably adopted child in North

extent such child would have been entitled to if such child had been the actual child of the person adopting it." 1 N.C. REVISAL, ch. 2, § 177, at 42. By recognizing the doctrine of equitable adoption in North Carolina, *Lankford* provides the rights of intestate succession to another group of children. See *Lankford*, 347 N.C. at 121, 489 S.E.2d at 607.

131. See N.C. GEN. STAT. § 48-1-106(b) (1995); 1 N.C. REVISAL, ch. 2, § 177.

132. N.C. GEN. STAT. § 29-17(a) (1984).

133. See *id.* § 29-17(b), (e); see also *Crumpton v. Mitchell*, 303 N.C. 657, 664, 281 S.E.2d 1, 5 (1981) (interpreting the statute pertaining to the legal effects of adoption to provide that the adoptee is completely severed from her natural family for purposes of intestate taking).

Severing all ties from the adoptee's natural parents for purposes of intestate succession is termed the "modern" view. See Donald G. Cohen, *Adoption Can Have Unexpected Effects on Inheritance and Overall Estate Plan*, 18 EST. PLAN. 8, 8 (1991). Both the Uniform Adoption Act and the Uniform Probate Code follow the modern approach. See UNIF. ADOPTION ACT § 14, 9 U.L.A. 58-59 & cmt. (1988); UNIF. PROBATE CODE § 2-114(a)-(b) (amended 1993), 8 U.L.A. 91-92 & cmts. (1998). Six states have enacted the Uniform Adoption Act: Arkansas, Montana, New Mexico, North Dakota, Ohio, and Oklahoma. See Cohen, *supra*, at 8 & n.1.

States that have enacted the Uniform Probate Code include: Alaska, Arizona, Colorado, Florida, Hawaii, Idaho, Maine, Michigan, Minnesota, Montana, North Dakota, and Utah. See Cohen, *supra*, at 9 & n.2. The most "modern" aspect of these statutes is that they allow the adopted child to inherit from other members of the adopted parent's family. See Cohen, *supra*, at 9. North Carolina did not allow an adopted child to inherit from the family members of the adoptive parents until 1947, 12 years after it approved intestate inheritance for a child from the adopted parents. See Act of April 4, 1947, ch. 832, § 1, 1947 N.C. Sess. Laws 1131, 1131 (repealed 1959; current version at N.C. GEN. STAT. § 29-17(a) (1984)).

The other view of intestate succession for adopted children is the "conservative view," which does not recognize the adoptee's right to inherit from any other members of the adoptive parent's family. See Cohen, *supra*, at 9. Furthermore, some states—Alabama, Illinois, Louisiana, Texas, Vermont, and Wyoming—allow the adoptee to inherit from both the biological and adoptive families. See *id.* & n.3. A popular trend in adoption statutes is to sever all ties with the natural parents and the natural parents' families. See Hughes, *supra* note 76, at 321. However, some concerns are expressed that this objective neutralizes strong traditional notions that rely upon blood relations for intestate succession. See *id.*

Carolina will also inherit pursuant to state statutes.¹³⁴

By the time the court in *Lankford* recognized equitable adoption, the doctrine had been examined and reexamined by other courts. Although many of the same principles from the late nineteenth to early twentieth centuries still form the basis of equitable adoption, those early courts left many questions unanswered.¹³⁵ One of the first dilemmas facing courts that sought to recognize equitable adoption was whether to recognize the doctrine as based on contract theory or estoppel theory.¹³⁶ Courts electing to rely on the contract theory of specific performance encountered problems when attempting to incorporate contract principles into an equitable remedy,¹³⁷ especially with the concept of consideration.¹³⁸

The accepted assumption that developed concerning the consideration for the foster parents was twofold: "(a) the promisee parents must turn the child over to the promisor, and (b) the child must give filial affection, devotion, association and obedience to the promisor during the latter's lifetime."¹³⁹ This rule meant that courts assumed the contract was between the natural parents and the foster parents, which relegated the child to the role of third party

134. See N.C. GEN. STAT. §§ 29-15, -17 (1984); *Lankford*, 347 N.C. at 121, 489 S.E.2d at 607.

135. See Rein, *supra* note 77, at 768. Some questions left unanswered concerned inheritance from other members of the adoptive parents' family, child support, wrongful death actions, and inheritance tax issues. See *id.* at 768-69. Because of lingering questions such as these, Professor Rein comments that "[l]ike most doctrines designed to provide relief in an appealing case, the equitable adoption doctrine has become a Pandora's Box, emitting . . . [a] host of perplexing questions." *Id.* at 768.

136. See *id.* at 770-80.

137. See *id.* at 771-72.

138. See *Jones v. O'Neal*, 20 S.E.2d 585, 586-87 (Ga. 1942); *Taylor v. Boles*, 13 S.E.2d 352, 352-57 (Ga. 1941). The court in *Taylor* attempted to clarify the concept of consideration, stating:

The problem of want of a present moving consideration between the parties, ordinarily required in matters of contract [has been disposed of], as indeed in all other cases of virtual adoption, by reliance upon allegations and proof that there had been performance by the parties to such an extent that an equitable status had been acquired by the child. That has been the test on the question of consideration. . . . Requirements as to consideration have usually been met by facts showing surrender of the child by the natural parent to the adopting parent and performance on the part of the child by taking the new domestic status thus created by his surrender and his being taken into a new home, by services rendered to the adopting parent by the child in the changed status, by the filial love and affection bestowed on the adopting parent in the new relation.

Taylor, 13 S.E.2d at 353-54.

139. *In re Estate of Lamfrom*, 368 P.2d 318, 321 (Ariz. 1962) (en banc); see also *Laney v. Roberts*, 409 So. 2d 201, 203 (Fla. Dist. Ct. App. 1982) (discussing performance as consideration in equitable adoption).

beneficiary.¹⁴⁰ Treating the child as an integral part of the consideration and then relegating the child to the role of third party beneficiary was a very “peculiar feature[]” that was contrary to established contract principles that recognized the child’s services as performance for which the adoptive parents bargained.¹⁴¹

Another issue courts encountered in using the contract theory was finding a means to enforce specific performance.¹⁴² Because courts can only grant relief against the estate of a dead foster parent, and because true specific performance of the contract would require the adoptee to be adopted by the promisors,¹⁴³ there is never really an order of specific performance.¹⁴⁴ The problem is obvious: “A corpse cannot adopt anyone.”¹⁴⁵ One commentator has argued that the real remedy involved is “quasi-specific performance” because equitable adoption contracts involve a personal matter and equity avoids granting specific performance for personal contracts.¹⁴⁶

California addressed the issue of quasi-specific performance in the context of wills¹⁴⁷ in which the testator and the petitioner contracted with each other regarding bequests they vow to make in

140. See *Hilt v. Hooper*, 203 S.W.2d 334, 338 (Tex. Civ. App. 1947, no writ); see also *Rein*, *supra* note 77, at 772 (discussing the role of the child as a third party beneficiary).

141. *Bailey*, *supra* note 76, at 35 n.19.

142. See *Rein*, *supra* note 77, at 774; *Hay & Weiss*, *supra* note 93, at 105-07; *Equitable Adoption*, *supra* note 82, at 731.

143. See *Laney*, 409 So. 2d at 202 (“Such an action seeks the specific performance of an agreement to adopt after the death, intestate, of the last surviving putative foster parent, when, paradoxically, the agreement can no longer be specifically enforced.”). The New Mexico Supreme Court addressed the problem of specific performance by stating that granting specific performance of a contract to adopt is impossible if the parties who made the promise have died. See *Wooley v. Shell Petroleum Corp.*, 45 P.2d 927, 931 (N.M. 1935). Furthermore, the court noted that “[e]quity was driven to the fiction that there had been an adoption. That fiction being indulged, the case was not one of specific performance. It remained merely to apply the statutes of descent and to decree the succession.” *Id.* at 931-32.

144. See *Equitable Adoption*, *supra* note 82, at 731.

145. *Rein*, *supra* note 77, at 774.

146. See *Schneider*, *supra* note 79, at 495-96. *Schneider* states that courts in equity from time immemorial have refused specific enforcement of agreements that result in the parties taking on personal or intimate relations with each other. See *id.* at 496 n.21; see also *infra* notes 163-209 and accompanying text (discussing equity in more depth).

147. See, e.g., *Ludwicki v. Guerin*, 367 P.2d 415, 417-18 (Cal. 1961) (en banc) (addressing the statute of limitations for a cause of action for quasi-specific performance of a contract to make a will); *Bank of Cal. Nat’l Ass’n v. Superior Court*, 106 P.2d 879, 884 (Cal. 1940) (utilizing equity to impose a constructive trust for the enforcement of a contract to make a will); *Notten v. Mensing*, 45 P.2d 198, 200 (Cal. 1935) (stating that if two parties agree to execute reciprocal wills and one party dies before the wills are revoked, and the surviving party benefits from the decedent’s will but then revokes the bequests that would pass to the decedent’s heirs, equity permits the court to hold that the survivor is estopped from revoking the benefits to the decedent’s heirs).

their wills, a situation very similar to equitable adoption. In the wills situation, the petitioner performs her part of the contract, but when the testator's will is probated, the petitioner's bequests do not materialize.¹⁴⁸ The California Supreme Court stated that because a person cannot be forced to make a will, a court will not be able to grant specific performance in the strictest sense of the remedy.¹⁴⁹ However, recognizing the inequity of the circumstance, the California court said that "under certain circumstances equity will give relief equivalent to specific performance by impressing a constructive trust upon the property which decedent had promised to leave to plaintiff."¹⁵⁰ Equitable adoption provides a very similar set of circumstances for two reasons: (1) the adoption of a child cannot be compelled;¹⁵¹ and (2) specific performance is being requested after the promisor has died. Taking these similarities into account, quasi-specific performance appears to be the proper contract remedy.¹⁵²

Courts choosing the estoppel theory also faced dilemmas. The principle underlying the estoppel theory is that because the child has relied to her detriment on the belief that she is adopted, the adoptive parents and her privies should be estopped from asserting the invalidity of the relationship.¹⁵³ The major difficulty with this theory has been how to prove actual reliance on the part of a child.¹⁵⁴ Courts

148. See *Ludwicki*, 367 P.2d at 417.

149. See *id.*

150. *Id.*

151. See *Merrick v. Merrick*, 639 N.Y.S.2d 818, 818 (App. Div.) (mem.) (holding that a party who decided not to go through with the adoption of two minor children could not be forced to proceed with the adoption), *leave to appeal dismissed*, 672 N.E.2d 609 (N.Y. 1996).

152. See *Schneider*, *supra* note 79, at 495-96.

153. See *Cubley v. Barbee*, 73 S.W.2d 72, 79-80 (Tex. 1934) (noting that foster parents are precluded from asserting the invalidity of an alleged adoption when the child has performed and the adoptive parents have received all of the benefits and privileges accruing from the child's performance).

154. See *Rein*, *supra* note 77, at 776. Courts also had a problem determining what the resulting detriment was to the child. See *id.* Detriment may be defined generally in an economic sense, but the equitably adopted child receives a home, an education, and support—a far cry from an economic detriment. See *id.* Additionally, in many circumstances the adoptive parents assure that the child does not grow up in an orphanage or in a home where the parents do not want or cannot afford the child, and therefore it is hard to see how any real harm to the child could exist. See *Equitable Adoption*, *supra* note 82, at 732. At one point, a Texas court dispensed with the detriment element altogether. See *Treme v. Thomas*, 161 S.W.2d 124, 133 (Tex. Civ. App. 1942, writ *ref'd w.o.m.*) ("Where an abandoned child has been taken from an orphan's home and given a good home, raised in love and tenderly nurtured, . . . a jury could not find that he had suffered detriment by reason of the performance of his duties to those who had [raised him] in their keeping."). However, a later Texas court regarded the lack of evidence showing a detriment as one factor in dismissing a claim. See *Price v. Price*, 217

struggled to determine whether the child must have relied on the contract per se or on the perceived status of being adopted.¹⁵⁵ Recognizing that the children were usually very young when the agreements were made, many courts have held that reliance on the actual agreement (or contract) was not plausible.¹⁵⁶ Courts also have determined, however, that reliance on status was not plausible.¹⁵⁷ If courts chose strictly to require children to prove reliance on the belief that they were adopted, children who discovered they were not adopted yet continued to live in the foster home would be denied relief.¹⁵⁸ One commentator has summarized the absurdity of this reasoning by stating that “[i]t seems safe to assume that most children, even if they knew of their lack of status, would remain in the foster home and continue to act as dutiful children simply because they would have no other viable option.”¹⁵⁹

Concerned that a strict requirement for showing reliance would defeat many worthy claims, modern courts have relaxed the requirement of reliance.¹⁶⁰ One court explicitly pointed out the

S.W.2d 905, 906 (Tex. Civ. App. 1949, writ ref'd n.r.e.) (stating that the alleged adoptee never presented evidence that he relied to his detriment upon the agreement to adopt).

155. See *Sims*, *supra* note 78, at 169. *Sims* comments that “[i]n either case, it would seem that the reliance element is fictitious.” *Id.* at 169-70.

156. See *id.* at 169-70 & n.39; see also *Rein*, *supra* note 77, at 776 (“Reliance on the agreement itself is usually impossible because a young child cannot comprehend the import of a contract.”).

157. See *Luna v. Estate of Rodriguez*, 906 S.W.2d 576, 580-81 (Tex. App. 1995, no writ). In *Luna*, the petitioner, Christopher Luna, sought to be declared the heir of his stepfather. See *id.* at 577-78. Christopher knew that his stepfather had never formally adopted him. See *id.* at 578. Therefore, there was no reliance on a contract or on the status of being actually adopted. See *id.* Nevertheless, the court ruled that Christopher was equitably adopted because “[a] child subject to an equitable adoption acts in reliance on its belief in its ‘status’ as a child, not necessarily in reliance on an agreement to adopt or on representations about adoptive status.” *Id.* at 581. The court also determined that reliance on the agreement or on the adoptive status was not essential. See *id.*

158. A claim of estoppel fails if a party cannot prove reliance. See E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 2.9, at 134 (1990). An example of a case in which a court did require strict proof of reliance on an agreement to adopt is *Garcia v. Saenz*, 242 S.W.2d 230, 230-31 (Tex. Civ. App. 1951, no writ). In *Garcia*, a boy was taken in by his aunt and uncle when he was five years old. See *id.* at 230. When he was 10 years old, he found out that he had not been legally adopted by his foster parents. See *id.* Despite this knowledge, the young boy continued to be the dutiful son of the couple, and upon their death, he sought declaration as an heir to their estate. See *id.* at 230-31. The Texas court, which relied only on estoppel for a theory of recovery, denied him relief because “[t]here was no evidence presented which would show that [he] had performed his tasks by reason of any reliance upon representations made to him which induced such performance under the belief that he was an adopted child.” *Id.*

159. *Rein*, *supra* note 77, at 776.

160. See *id.* at 777. Two landmark cases on the issue of reliance are *Laney v. Roberts*, 409 So. 2d 201 (Fla. Dist. Ct. App. 1982), and *Ramsay v. Lane*, 507 S.W.2d 905 (Tex. Civ.

unfairness in requiring a child cared for and nurtured by the foster family to prove reliance on something as material as a contract or the right to inherit.¹⁶¹ Moreover, another court has eliminated the requirement of reliance after becoming frustrated with evidentiary difficulties.¹⁶²

Besides concerns with the contract and estoppel theories, courts also are concerned with the use of equity power more generally.¹⁶³ Equity is "the power to do justice in a particular case by exercising discretion to mitigate the rigidity of strict legal rules."¹⁶⁴ Although equity began as its own separate court system,¹⁶⁵ over time the two systems were merged.¹⁶⁶ The limited equitable remedies available to

App. 1974, writ ref'd n.r.e.). In *Laney*, the child admitted that she knew that she was not adopted, but nevertheless, the court held that "there is absolutely no evidentiary value in the fact that Irene knew she was not formally adopted." *Laney*, 409 So. 2d at 203. In *Ramsay*, the claimant testified that she discussed the financial constraints that her adoption would have on her foster parents and agreed with their decision not to adopt her legally because of the cost. *See Ramsay*, 507 S.W.2d at 906. Even so, the court in *Ramsay* held that there was sufficient evidence of reliance based on the manner in which the claimant was regarded by the family and the community. *See id.* at 907. The court stated that the foster family "represented that Jo Ann was their child by their words and actions. An inference can be drawn that by such conduct Jo Ann was led to believe that she had been adopted, and that she continued the family relationship in reliance on the agreement." *Id.*; *see also Luna*, 906 S.W.2d at 581 (noting that proof of an agreement to adopt may be enough to establish the element of reliance); *supra* note 157 (discussing *Luna*).

161. *See Mize v. Sims*, 516 S.W.2d 561, 566 (Mo. Ct. App. 1974) ("We do not cast a burden upon a child of tender age to remember events beyond his little comprehension.").

162. *See Calista Corp. v. Mann*, 564 P.2d 53, 62 & n.22 (Alaska 1977) (stating that because there were too many evidentiary problems with proving reliance, the element is no longer mandatory in a proceeding for equitable adoption). It could be argued that Texas has eliminated the requirement for reliance, based on the decision in *Luna*, but because the court in *Luna* determined that the child had relied on his belief in his "status" as a child, it does not directly follow that the court altogether abandoned the reliance requirement. *See Luna*, 906 S.W.2d at 581.

163. *See Rich v. Baer*, 238 S.W.2d 408, 411 (Mo. 1951). The court in *Baer* stated:
Equitable adoption is a principle and rule of equity only. . . . If the rule is so relaxed as to become one of law (instead of equity) childless couples will be more than ever reluctant to take into their homes orphan or other unfortunate children, as is so often done, purely for the welfare of such children, and not for the purpose of adoption.

Id.

164. Kennedy, *supra* note 58, at 609.

165. *See id.* at 609-10.

166. The federal courts merged law and equity in 1938. *See* CHARLES ALAN WRIGHT, LAW OF FEDERAL COURTS § 62, at 427-28 (5th ed. 1994); *see also id.* § 67, at 465-66 (discussing the merger of law and equity by the federal courts). New York paved the way for procedural reform when it merged law and equity in 1848. *See id.* § 67, at 465. Delaware is the only state that still has separate courts of law and equity. *See Laycock, supra* note 43, at 53.

courts include: an injunction, an order reforming a contract, an order of specific performance of a contract, or a cancellation of a contract.¹⁶⁷ Whatever the remedy chosen, however, judges sitting in equity adhere to their principled discretion.¹⁶⁸

In *Lankford*, Chief Justice Mitchell argued in dissent that the majority did not use equity properly to decide the case, and his criticism of the majority focused on several maxims of equity that he believed the majority misapplied.¹⁶⁹ The first maxim the Chief Justice addressed was "equity regards as done that which in fairness and good conscience ought to be done."¹⁷⁰ The goal of this maxim is to prevent the unjust enrichment of one party at the expense of another.¹⁷¹ Courts rely on this maxim to treat actions that "were promised, intended, or agreed upon between parties *as done*, if in good conscience the actions should have been done and there was a duty to perform the actions."¹⁷² The majority in *Lankford* regarded this maxim as the cornerstone of its decision, treating the agreement to adopt between the Newtons (the adoptive parents) and Mary Winebarger (the adoptee's natural mother) as *done*.¹⁷³

The problem, according to Chief Justice Mitchell, was that the maxim of "equity follows the law" trumps the maxim that "equity regards as done that which ought to be done."¹⁷⁴ Equity was not created to undermine the law,¹⁷⁵ and one commentator has noted that

167. See Laycock, *supra* note 43, at 53, 54-64.

168. See Kennedy, *supra* note 58, at 614-15.

169. See *Lankford*, 347 N.C. at 121-26, 489 S.E.2d at 607-10 (Mitchell, C.J., dissenting).

170. *Id.* at 122, 489 S.E.2d at 608 (Mitchell, C.J., dissenting).

171. See *Kent v. Klein*, 91 N.W.2d 11, 13-14 (Mich. 1958) ("[C]hancery will not permit one to enrich himself at the expense of another by closing his eyes to what is clear to the rest of mankind. Equity, to paraphrase, regards that as seen which ought to be seen, and, having so seen, as done that which ought to be done.").

172. Howard W. Brill, *The Maxims of Equity*, 1993 ARK. L. NOTES 29, 33 (emphasis added).

173. See *Lankford*, 347 N.C. at 118, 489 S.E.2d at 606 (noting that this maxim "form[s] the essence of the doctrine of equitable adoption, and it is the duty of this Court to protect and promote [this maxim]").

174. See *id.* at 122, 489 S.E.2d at 608 (Mitchell, C.J., dissenting) (asserting that "no equitable remedy may properly be applied to disturb statutorily defined and established rights"). Chief Justice Mitchell also stated that equity was created to soften some of the inflexible rules of the common law but that it was not meant to be a "means of avoiding legislation that courts deemed unwise or inadequate." *Id.* at 121, 489 S.E.2d at 608 (Mitchell, C.J., dissenting).

175. See Brill, *supra* note 172, at 32; see also *Miles v. Andress*, 493 S.E.2d 233, 235 (Ga. App. 1997) ("[T]he trial court had no jurisdiction to invoke 'equity' in this case, but rather was being called on to apply the law as written."); *In re Estate of Voeller*, 534 N.W.2d 24, 26 (N.D. 1995) ("[The petitioner] asks for an equitable remedy to aid approval of the 1988 codicil, since the principal purpose of the statute is to establish the intent of the

"equity follows the law" is the most important maxim because "it expresses a significant barrier to the grant of equitable relief: Equity cannot be used to deprive a person of a legal right."¹⁷⁶ Even though the facts of cases in which a party seeks equitable relief are often heartwrenching, courts have had to abide by the maxim that law controls.¹⁷⁷ Furthermore, commentators have warned of the dangers of falling into the trap of equitable remedies when clear and dispositive law exists.¹⁷⁸

In interpreting the maxim "equity follows the law," Chief Justice Mitchell argued that § 29-17(a), combined with Chapter 48 of the North Carolina General Statutes, should have controlled the decision in *Lankford*.¹⁷⁹ The Chief Justice bolstered his argument by asserting that the intent of the legislature in passing the adoption statutes was to establish "clear judicial process for adoptions, [and] to promote the integrity and finality of adoptions . . ."¹⁸⁰ Therefore, the Chief Justice argued, the majority was wrong in putting aside the formalism of the law and allowing equity to control.¹⁸¹

decendent. . . . But an equitable remedy cannot avoid the meaning of an unambiguous statute.").

176. Kennedy, *supra* note 58, at 622.

177. For example, in *Ramirez v. Bureau of State Lottery*, 463 N.W.2d 245 (Mich. Ct. App. 1990), the plaintiff sought equitable relief after he lost his winning lottery ticket by asking the court to invoke equity power and establish the ticket by judicial declaration. *See id.* at 249-50. Clear and dispositive lottery statutes stated that payment of prizes would only be awarded to "holders" of winning tickets. *See id.* at 248. Additionally, terms on the back of the lottery tickets stated that the ticket must be presented to collect the prize. *See id.* The court expressly stated that it felt discomfort about denying the long-time lotto player his winnings, commenting that "[w]hile plaintiff's predicament in the instant case is heartbreaking, we are unable to afford him the [equitable] relief he requests because the law is clear." *Id.* at 250. The court concluded by quoting Judge Robert M. Toms, who stated: "The court fervently hopes the petitioner in this case will appeal his decision and that it will be promptly and definitely reversed by the Supreme Court in which event the court will join a host of others in dancing in the streets." *Id.* (quoting *In re Detroit Edison Co.*, 87 N.W.2d 126, 130 (Mich. 1957)).

178. *See* Kennedy, *supra* note 58, at 617.

179. *See Lankford*, 347 N.C. at 122-24, 489 S.E.2d at 608-09 (Mitchell, C.J., dissenting); *see also supra* note 60 (detailing some of the procedural aspects of Chapter 48).

180. *Lankford*, 347 N.C. at 124, 489 S.E.2d at 609 (Mitchell, C.J., dissenting) (emphasis added) (quoting N.C. GEN. STAT. § 48-1-100(a) (1995)).

181. *See id.* at 125, 489 S.E.2d at 610 (Mitchell, C.J., dissenting) ("[I] am persuaded that the majority improperly 'trumps' clear legislative intent in the name of equity."). Douglas Laycock, a strict defender of the power of equity, concedes that equity should not override established constitutions. *See* Douglas Laycock, *Taking Constitutions Seriously: A Theory of Judicial Review*, 59 TEX. L. REV. 343, 352 (1981) (book review). Laycock also asserts that judges should not have unlimited discretion in deciding what, and whose, rights they will enforce. *See* Douglas Laycock, *Notes on the Role of Judicial Review, the Expansion of Federal Power, and the Structure of Constitutional Rights*, 99 YALE L.J. 1711, 1745 (1990) (book review). *See generally* ZECHARIAH CHAFEE, SOME

Chief Justice Mitchell provided further support that the majority was using equity in spite of the law by noting that because common law did not recognize adoption, it can be accomplished only through statutory means.¹⁸² He first cited *Wilson v. Anderson*,¹⁸³ stating that adoption “‘can be accomplished only in accordance with provisions of statutes enacted by the legislative branch of the State government.’”¹⁸⁴ Next, the Chief Justice noted that in *Ladd v. Estate of Kellenberger*,¹⁸⁵ the court concluded that “[a] mere contract to adopt a child . . . is not a contract to devise or bequeath property to that child.”¹⁸⁶ According to the dissent, because these two cases along with the statutory provisions provided ample guidance for the court to decide the issue in *Lankford*, granting an equitable remedy was improper.¹⁸⁷

Despite the maxim “equity follows the law,” the majority bypassed statutory authority and controlling precedent, thus bolstering the already existing exceptions to the maxim that are both powerful and numerous.¹⁸⁸ A number of courts have recognized that the maxim exists, yet denied its application due to the weight of equity in light of the facts and the unjust enrichment of a legal remedy.¹⁸⁹ Equity grants a court the power to remedy highly unjust

PROBLEMS OF EQUITY (1950) (addressing many dilemmas within equity that have arisen as courts have used their equity jurisprudence). Chafee focuses on the problems of strictly applying the maxim “equity follows the law,” but he admits that there may be a generally positive effect of uniformity to be achieved by following statutes if applicable. *See id.* at 108-09.

182. *See Lankford*, 347 N.C. at 123, 489 S.E.2d at 609 (Mitchell, C.J., dissenting).

183. 232 N.C. 212, 59 S.E.2d 836 (1950).

184. *Lankford*, 347 N.C. at 123, 489 S.E.2d at 609 (Mitchell, C.J., dissenting) (quoting *Wilson*, 232 N.C. at 215, 59 S.E.2d at 839).

185. 314 N.C. 477, 334 S.E.2d 751 (1985).

186. *Lankford*, 347 N.C. at 125, 489 S.E.2d at 610 (quoting *Ladd*, 314 N.C. at 486, 334 S.E.2d at 758).

187. *See id.* at 123, 125-26, 489 S.E.2d at 609-10 (Mitchell, C.J., dissenting).

188. *See id.* at 121, 489 S.E.2d at 607; CHAFEE, *supra* note 181, at 103-48 (noting many situations where equity does not follow the law); *see also* 55 N.Y. JUR. 2D *Equity* § 95, at 525 (1986) (“While equity follows the law, it does not do so at all times or in a craven dependence upon the law.”).

189. *See, e.g., Thompson v. Soles*, 299 N.C. 484, 489, 263 S.E.2d 599, 603 (1980) (recognizing the maxim that equity regards as done that which in fairness ought to be done). In *Thompson*, the plaintiffs were four sisters seeking an adjudication that the defendant, their brother, had received his share of their father’s estate when he accepted an advancement of one tract of land. *See id.* at 485, 263 S.E.2d at 601. The defendant claimed that the paper failed for want of a signature and therefore was not an advancement. *See id.* at 490, 263 S.E.2d at 603-04. The court held that the substance of the transaction should control and not the form, thereby disregarding the statutory authority and allowing equity to grant a remedy. *See id.* at 489, 263 S.E.2d at 603.

Chafee argues that of all equity maxims, equity follows the law “is least entitled to be

situations, and in some cases, to disregard the law so that justice may prevail.¹⁹⁰ Illustrating that certain circumstances require the maxim to be cast aside for a more equitable solution, Justice Cardozo wrote that "[e]quity follows the law, but not slavishly nor always."¹⁹¹ The stark fact is that a judge may often set aside the law for equity when the judge feels that equity should control.¹⁹²

The majority in *Lankford* stated that recognizing the doctrine of equitable adoption did not disregard the maxim "equity follows the law" because the new doctrine did not disrupt or impair the statutory procedures that the legislature has created for adoption.¹⁹³ The court proclaimed that its "unique role" was to grant equitable remedies which protect and advance equitable issues such as the ones involved in *Lankford*.¹⁹⁴ Furthermore, the majority declared that it did not disregard existing precedent because the prior North Carolina Supreme Court cases, *Chambers* and *Ladd*, did not foreclose the possibility of North Carolina adopting the equitable alternative to statutory adoption.¹⁹⁵ The majority asserted that the decision in *Ladd* clearly stated that there was no occasion to address the issue of

transformed from a concise expression of a tendency of judicial thought into a hard and fast rule. Exceptions to it are so numerous and well known that judges and text writers state it with great qualifications." CHAFEE, *supra* note 181, at 103 (footnote omitted).

190. For example, the Iowa Supreme Court permitted equity to trump the law in *In re Marriage of Harvey*, 523 N.W.2d 755, 757 (Iowa 1994). In that case the petitioner was seeking back payment for child support owed by respondent, her ex-husband. *See id.* at 756. Upon the divorce of the parties, the petitioner retained primary custody of the child and received monthly child support. *See id.* at 755-56. Sometime later the child asked if he could go and live with the respondent. *See id.* at 756. Petitioner and respondent agreed that the child support payments would stop while the child lived with his father. *See id.* However, the divorce decree was not modified, and the petitioner brought a garnishment action for the alleged delinquent child support that she did not receive while the child was living with respondent. *See id.* Iowa law states: "A modification of a support order entered . . . between parties to the order is void unless the modification is approved by the court . . . and entered as an order of the court." IOWA CODE ANN. § 598.21(8) (West 1996). Because there was no court-authorized modification, petitioner argued that the agreement was void and thus that the support was delinquent. *See Harvey*, 523 N.W.2d at 756. The court recognized, however, that the equities of the case strongly favored respondent and that despite the clear law on the matter, it would not let the equities be ignored. *See id.* at 756-57.

191. *Graf v. Hope Bldg. Corp.*, 171 N.E. 884, 887 (N.Y. 1930) (Cardozo, C.J., dissenting).

192. *See CHAFEE, supra* note 181, at 107-08 ("With respect to equitable rights, then, . . . [equity follows the law] is only a brief and inaccurate description of what sometimes happens and oftener does not.").

193. *See Lankford*, 347 N.C. at 120, 489 S.E.2d at 607; *see also supra* note 60 (detailing the statutory adoption procedures).

194. *See Lankford*, 347 N.C. at 120, 489 S.E.2d at 607.

195. *See id.*; *see also supra* notes 104-29 and accompanying text (discussing *Chambers* and *Ladd*).

equitable adoption, and the *Chambers* decision was limited to whether there was an enforceable contract to make a will.¹⁹⁶ Thus, by distinguishing *Chambers* and *Ladd*, the majority weakened one of the dissent's major arguments.¹⁹⁷

Chief Justice Mitchell further criticized the *Lankford* majority's interpretation of "equity regards as done that which ought to be done" by arguing that the majority misapplied this maxim because it allowed an equitable remedy to injure innocents.¹⁹⁸ The dissent stated that the object of equity is to do what is just, and harming innocent parties is not the proper application of equity.¹⁹⁹ In essence, the Chief Justice referred to the maxim "he who seeks equity must do equity," which means that one who seeks equitable relief may receive that relief only if the remedy is able to return the other party to the status quo.²⁰⁰ Practically speaking, the maxim requires that the party seeking relief must allow the other party "all the equitable rights, claims, and demands growing out of the subject matter of the controversy to which the opposing party is entitled."²⁰¹

The dissent asserted that the majority's decision injured the defendants, thus violating the maxim "he who seeks equity must do equity."²⁰² The Chief Justice felt that the injury inflicted on the defendants was the decrease in the share of the estate that the defendants could receive if Barbara Lankford were declared an heir.²⁰³ By declaring Barbara the equitably adopted child of the

196. See *Lankford*, 347 N.C. at 120, 489 S.E.2d at 607.

197. See *supra* notes 57-72 and accompanying text (discussing the dissent's major arguments).

198. See *Lankford*, 347 N.C. at 125, 489 S.E.2d at 610 (Mitchell, C.J., dissenting).

199. See *id.* (Mitchell, C.J., dissenting). The dissent cited several cases in which courts have refused to apply equity because of the injury to an innocent party that would result. See *id.* (Mitchell, C.J., dissenting); see also *Riganti v. McElhinney*, 56 Cal. Rptr. 195, 199-200 (Ct. App. 1967) (granting the plaintiffs quasi-specific performance to prevent the unjust enrichment of the defendants and noting that "equitable relief should not be granted where it would work a gross injustice upon innocent third parties"); *Bedal v. Johnson*, 218 P. 641, 649 (Idaho 1923) (concluding that the contract to make the alleged adoptee the sole heir could not be enforced in equity because to do so would be "harsh, offensive, and unjust" to the innocent person to the transaction); *Crahane v. Swan*, 318 P.2d 942, 945 (Or. 1957) (en banc) ("It is an almost universal rule of equity not to grant relief by way of reformation to the injury of innocent third persons . . . [including those] who without notice have acquired intervening or vested rights and who cannot be placed in statu quo.").

200. See *Kennedy*, *supra* note 58, at 618 (stating that the maxim was "designed to prevent the unjust enrichment of the plaintiff at the expense of the defendant").

201. Brill, *supra* note 172, at 38.

202. See *Lankford*, 347 N.C. at 125, 489 S.E.2d at 608 (Mitchell, C.J., dissenting).

203. See *id.* at 123, 489 S.E.2d at 608 (Mitchell, C.J., dissenting) ("[T]he application of the doctrine of equitable adoption denies other rightful heirs their statutory intestate

Newtons for intestate purposes, the court may have taken away the defendants' award completely.²⁰⁴ Therefore, by awarding an equitable remedy to Barbara Lankford, the court permitted her unjust enrichment at the cost of harming the innocent defendants, and thus disregarded the maxim that "he who seeks equity must do equity."²⁰⁵

While the dissent viewed the defendants as the innocent victims,²⁰⁶ the majority sided with the plaintiff.²⁰⁷ The majority's response to the dissent's argument was that the defendants, those claiming under and through the deceased, should be estopped from asserting that the equitably adopted child was not legally adopted or that she did not deserve the same protections as a legally adopted child.²⁰⁸ Thus, the majority felt that the defendants were the ones unjustly enriched by the original grant and that it was acting to ensure that the defendants did not harm the innocent equitably adopted child.²⁰⁹

In spite of the concerns of the Chief Justice, the majority welcomed equitable adoption to North Carolina.²¹⁰ The majority went to great lengths to state that equitable adoption would apply only to cases of intestate succession in North Carolina,²¹¹ but it is likely that in the wake of *Lankford*, many new issues will arise in which parties will seek coverage under the new equitable remedy. For instance, many questions remain regarding whether an equitably adopted child should be granted the full status of an adopted child or

shares . . .").

204. *See id.* at 121, 489 S.E.2d at 607; *see also* N.C. GEN. STAT. § 29-17(a) (1984) (stating that an adopted child shall be entitled to any property from the adoptive parents the same as if the adopted child were a natural child). Likewise, the equitably adopted child shall take the same as the adopted child. *See Lankford*, 347 N.C. at 118, 489 S.E.2d at 606 (stating that equitable adoption "is predicated upon . . . 'securing the benefits of adoption that would otherwise flow from the adoptive parent under the laws of intestacy' " (quoting 2 AM. JUR. 2D *Adoption* § 53, at 930 (1994))). Therefore, because the court treated the equitably adopted child as the natural child for intestate purposes, North Carolina General Statutes § 29-15(1) controlled because Lula Newton was not survived by a spouse or by any natural or other adopted children. *See Lankford*, 347 N.C. at 117-18, 489 S.E.2d at 605-06; *see also* N.C. GEN. STAT. § 29-15 (1984) (stating that when one child, but no spouse, survives the intestate, the child receives the entire estate).

205. *See Lankford*, 347 N.C. at 125-26, 489 S.E.2d at 610 (Mitchell, C.J., dissenting).

206. *See id.* (Mitchell, C.J., dissenting).

207. *See id.* at 121, 489 S.E.2d at 607.

208. *See id.* at 118, 489 S.E.2d at 606.

209. *See id.*

210. *See id.* at 121, 489 S.E.2d at 607.

211. *See id.* at 119, 489 S.E.2d at 606-07.

be limited to intestate situations.²¹² Additional issues that have arisen in other jurisdictions and that may arise also in North Carolina include: whether the equitably adopted child can inherit from other members of the foster family;²¹³ whether child support is available;²¹⁴ whether the equitably adopted child has standing in wrongful death actions;²¹⁵ whether equitably adopted children may reap the benefits of favorable state inheritance tax statutes;²¹⁶ whether foster parents can recover worker's compensation death benefits for the death of an equitably adopted child;²¹⁷ whether Social Security benefits can be dispersed to equitably adopted children;²¹⁸ and even whether an

212. See Rein, *supra* note 77, at 787-806 (discussing the consequences of equitable adoption and what rights should flow from declaring a child equitably adopted).

213. See, e.g., *First Nat'l Bank v. Phillips*, 344 S.E.2d 201, 205 (W. Va. 1985) (allowing an equitably adopted child to inherit from the other child of the foster parents). But see *In re Estate of Jenkins*, 904 P.2d 1316, 1320 (Colo. 1995) (en banc) (holding that equitable adoption claims are limited to those made by an equitably adopted child against the estate of an adoptive parent and not allowing the alleged adoptee to inherit through the adoptive parents' estate from a remote ancestor).

214. See, e.g., *Geramifar v. Geramifar*, 688 A.2d 475, 479 (Md. Ct. Spec. App. 1997) (compelling a foster father to provide child support to an equitably adopted child). But see *Ellison v. Thompson*, 242 S.E.2d 95, 97 (Ga. 1978) (holding that the theory of virtual adoption did not make a foster parent responsible for support).

215. See, e.g., *Bower v. Landa*, 371 P.2d 657, 661 (Nev. 1962) (allowing an equitably adopted child to maintain an action for the wrongful death of his foster father). But see *In re Estate of Edwards*, 435 N.E.2d 1379, 1382 (1982) (stating that a foster parent does not fit within the term "next of kin" as required by the wrongful death statute when the contract to adopt has not been performed).

216. See, e.g., *Estate of Radovich*, 308 P.2d 14, 26-27 (Cal. 1957) (en banc) (holding that an equitably adopted child was not subject to inheritance tax at the rate of a stranger but was a Class D transferee within inheritance tax law). But see *McGarvey v. State*, 533 A.2d 690, 695 (Md. 1987) (holding that only formally adopted children and natural children could benefit from favorable inheritance tax statutes).

217. See, e.g., *Tarver v. Evergreen Sod Farms, Inc.*, 533 So. 2d 765, 767 (Fla. 1988) (denying a foster parent's claim for worker's compensation after the accidental death of his equitably adopted son); *Consolidated Underwriters v. Ward*, 57 S.W.2d 964, 966 (Tex. Civ. App. 1933, writ ref'd) (same). But see *Jones v. Loving*, 363 P.2d 512, 514-15 (Okla. 1961) (allowing a natural parent to obtain death benefits of an equitably adopted child under the worker's compensation statutes).

218. See, e.g., *Davis v. Celebrezze*, 239 F. Supp. 608, 610-11 (S.D. W. Va. 1965) (holding that the term "legally adopted" within the meaning of a provision in the Social Security Act included an equitable adoption that complied with state law). But see *Craig v. Finch*, 425 F.2d 1005, 1010 (5th Cir. 1970) (stating that equitable adoption was not within the definition of the Social Security Act because the statute specifically required a formal "legal" adoption). See generally David A. Johns, Annotation, *Construction and Application of § 202(d)(8)(D) and 202(d)(9)(B) of Social Security Act (42 U.S.C. § 402(d)(8)(D) and 402(d)(9)(B)) Respecting Award of Child Benefits to Child Legally Adopted by Individual Within 24 Months After Individual Has Become Entitled to Disability or Old Age Insurance Benefits*, 10 A.L.R. FED. 903 (1972) (collecting federal cases that have construed "legally adopted" and the problems that accompany trying to decide what constitutes "legal adoption" within the Social Security Act).

equitably adopted child can qualify for benefits under social welfare legislation.²¹⁹

Although many of these issues are likely to arise in North Carolina, the issue of child support in particular has been widely litigated in other jurisdictions.²²⁰ Because North Carolina's child-support statute specifies that support is available only for formally adopted or biological children,²²¹ a problem arises when two parents divorce after having equitably adopted a child and one parent seeks support for the child from the other parent.²²² Some courts have readily granted child support for the equitably adopted child, focusing on the harm that would result if the support was not granted.²²³ Recently, the Court of Appeals of Maryland allowed a

219. See, e.g., *Blair ex rel. Brown v. Califano*, 650 F.2d 840, 843 (6th Cir. 1981) (allowing welfare benefits). But see *King v. Schweiker*, 647 F.2d 541, 547 (5th Cir. 1981) (refusing to permit an allegedly equitably adopted child to collect welfare benefits because Louisiana did not recognize equitable adoption).

220. See *infra* notes 223-29 and accompanying text (detailing cases involving the issue of child support).

221. See, e.g., N.C. GEN. STAT. § 50-13.4(b) (1995 & Supp. 1997). The North Carolina General Statutes state that in a child support action a judge may not require child support to be paid "by a person who is not the child's parent or an agency, organization or institution standing in loco parentis." See *id.* The only exception is if the person or agency has agreed in writing to support the minor child. See *id.*

222. See Stuart A. Markus & Michael Metta, *Virtual Adoption: Contractual Estoppel of Parental Rights and Responsibilities*, FLA. B.J., May 1997, at 90, 91-93 (1997).

223. See *In re Marriage of Valle*, 126 Cal. Rptr. 38, 41 (Ct. App. 1975) (awarding support for an equitably adopted child); *Clevenger v. Clevenger*, 11 Cal. Rptr. 707 (Ct. App. 1961). In *Clevenger*, Mrs. Clevenger became pregnant while her husband was away in the military service, making it impossible for the son to be the natural child of Mr. Clevenger. See *Clevenger*, 11 Cal. Rptr. at 709. Nevertheless, when Mr. Clevenger returned, he accepted the boy and raised him as his own son. See *id.* The child was never legally adopted by Mr. Clevenger, and he never agreed to adopt the boy. See *id.* at 714. Eleven years after Mr. Clevenger's return, Mrs. Clevenger filed for divorce and sought child support from her ex-husband. See *id.* at 709-10. Mr. Clevenger asserted that he had no duty to support the child because the boy was not his legal or natural son. See *id.* at 710 & n.1. The California Court of Appeals stated there is an "innate immorality" when an adult cares for and loves a child while the family is intact, but then as soon as the family separates, the same adult declares the child a bastard in an effort to relieve himself of the obligation to support the child. See *id.* at 710. The court further noted that declaring an equitably adopted child a bastard is "a cruel weapon, which works a lasting injury to the child and . . . should garner no profit to the welder; the putative father should earn no premium by the assertion of the illegitimacy of the child. If any legal hypothesis can prevent such an inducement . . . , we should adopt that theory." *Id.* at 710. Unfortunately, the evidence in *Clevenger* did not show an agreement to adopt the child, so the court refused to order the husband to pay child support. See *id.* at 717. However, the court's decision established the right to child support claims for equitably adopted children in California. See *id.*; see also *Valle*, 126 Cal. Rptr. at 41 (relying on *Clevenger* to award support for an equitably adopted child).

New York also has recognized the claim for child support in equitable adoption. See

claim for child support based on the child's best interest.²²⁴ Conversely, another court has determined that a claim for child support has no place in an equitable adoption situation.²²⁵ One court concluded that the foster parents have no parental rights or parental obligations to the equitably adopted child after divorce,²²⁶ and another court stated that equitable adoption does not apply to a dispute over who is responsible for the support of a minor child.²²⁷ Inevitably, the issue of child support, and many others, will appear before the North Carolina courts seeking clarification under the new doctrine of equitable adoption.²²⁸ The question that remains is whether the Supreme Court of North Carolina will continue to limit the doctrine to cases of intestate inheritance, or whether it will begin

Wener v. Wener, 312 N.Y.S.2d 815, 818 (App. Div. 1970). In *Wener*, Mrs. Wener obtained a young child, and when the Weners later divorced, Ms. Wener sought child support. *See id.* at 816-17. The court granted child support and stated that "[h]aving agreed to adopt the child and support her, and having treated her as his own prior to the parties' separation, the plaintiff [father] may not now disavow all obligation and shift the entire burden onto the defendant." *Id.* at 818.

224. *See* *Geramifar v. Geramifar*, 688 A.2d 475, 479 (Md. Ct. Spec. App. 1997). The *Geramifars*, an Iranian couple living in Maryland, were unable to have children so they went to the Republic of Iran and brought back a child of Iranian heritage. *See id.* at 476. One year after they returned with the infant boy, the couple separated and a vigorous custody battle ensued. *See id.* On the eve of the custody hearing, Mr. *Geramifar* abandoned his quest for custody. *See id.* The Maryland Court of Special Appeals granted child support, disregarding an agreement in which the parties declared the adoptive father not liable for the child's support. *See id.* at 479. The court expressed a strong public policy concern to protect the best interest of the child and stated that the best interest of the child was "to be supported by those who were permitted to bring him to the United States," and therefore, "having equitably adopted [the child], appellee [the father] has a duty to contribute to his support. This duty could neither be bargained away, nor ... abrogated." *Id.*

225. *See In re Marriage of Fenn*, 847 P.2d 129, 133 (Ariz. Ct. App. 1993). In *Fenn*, the husband and wife went through all of the preliminary proceedings in an adoption agency in an effort to adopt a little girl. *See id.* at 131. Approximately six months after the couple assumed responsibility but not legal custody of the child, they separated. *See id.* After the separation, the parties agreed that the wife would rear the child, and the wife kept the child because the agency did not want to disrupt the baby's home life. *See id.* The wife sought support from the husband, and the husband asserted that he had no legal obligation to support the baby. *See id.* On the issue of equitable adoption, the court held that equitable adoption in Arizona is limited to cases of inheritance, and the court did not deem it appropriate to extend that doctrine on the facts in *Fenn*. *See id.* at 133-35.

226. *See In re Marriage of Pierce*, 645 P.2d 1353, 1357 (Mont. 1982). In *Pierce*, the Montana Supreme Court stated that the stepfather who had equitably adopted a young boy had no duty to continue to pay support after the stepfather and his wife divorced. *See id.* at 1357. The court also stated that the stepfather had no parental rights. *See id.* at 1356-57.

227. *See Ellison v. Thompson*, 242 S.E.2d 95, 97 (Ga. 1978).

228. *See supra* notes 213-19 and accompanying text (noting some of the other issues that may arise).

to grant equitably adopted children some of the rights that North Carolina courts and legislatures have afforded legally adopted children.²²⁹

Although equitable adoption seems to be a favorable doctrine to the thousands of parents seeking children and to children seeking stable homes, there are some concerns that circumventing statutory adoption procedures will do more harm than good.²³⁰ Adoption regulations are in place to ensure that children are placed in a suitable environment.²³¹ If the public becomes aware that they can achieve the equivalent of legal adoption without following the time-consuming and expensive legislative mandates, then the statutes, and the safeguards the statutes were designed to promote, will falter.²³²

Equitable adoption has been praised for being a fair and understanding alternative to statutory adoption.²³³ Before the decision in *Lankford*, North Carolina required strict adherence to the adoption statutes in order for children to claim a right of inheritance in the intestate estate of their foster parents.²³⁴ With the decision in *Lankford*, North Carolina has joined a majority of states that seek to prevent the injustice that would result if laws were always "woodenly applied."²³⁵ If the North Carolina Supreme Court expands equitable adoption beyond the parameters of *Lankford*, it will undoubtedly be breaking out of the mold it created with this precedential decision.²³⁶ However, if the court does allow children to benefit from equitable adoption beyond intestate taking, it is very likely that Chief Justice

229. See N.C. GEN. STAT. §§ 48-1-106, -107 (1995) (detailing the legal effects that result from an order of adoption).

230. See Rein, *supra* note 77, at 803-04.

231. See *id.* at 803.

232. See *id.* at 803-04. Professor Rein explores the typical procedures involved in securing a child through an adoption agency and through independent adoption. See *id.* at 801-03. She also chronicles some of the dangerous alternatives to going through those regulated procedures, such as the black market where desperate couples can buy a child. See *id.* at 804. Professor Rein concludes: "Why should prospective adoptors endure the investigations, trial periods, red-tape, reporting requirements, and expenses involved in formal adoption when they can achieve all the consequences of formal adoption by informal means?" *Id.* at 803.

233. See *Calista Corp. v. Mann*, 564 P.2d 53, 61 (Alaska 1977) ("After examining extensively the doctrine of equitable adoption, we conclude that it is a sound, equitable tool which, when utilized properly, allows courts to avoid unjust and often intolerable results."); see also *Titchenal v. Dexter*, 693 A.2d 682, 692 (Vt. 1997) (Morse, J., dissenting) (stating that applying equitable adoption would have achieved a more just result in the case).

234. See *Ladd v. Estate of Kellenberger*, 314 N.C. 477, 481, 334 S.E.2d 751, 754 (1985); see also *supra* notes 114-29 and accompanying text (discussing *Ladd*).

235. Rein, *supra*, note 77, at 767.

236. See *Lankford*, 347 N.C. at 119, 489 S.E.2d at 606-07.

Mitchell's vociferous concerns will materialize.²³⁷ But the most terrifying concern of expanding equitable adoption beyond intestate taking is one that the Chief Justice did not address—the concern that equitable adoption may replace statutory adoption and throw out all of the protections that statutory adoption provides.²³⁸ One commentator offers a piece of wisdom for courts to consider when thinking about expanding equitable adoption beyond intestate taking by noting that the “sympathies for the equitably adopted child cannot be indulged without risking erosion of formal adoption procedures and thus sacrificing the larger good of ensuring suitable placement for all children to the exigencies of the individual case.”²³⁹

BETH ANN YOUNT

237. *See id.* at 124-26, 489 S.E.2d at 609-10 (Mitchell, C.J., dissenting); *see also supra* note 65 and accompanying text (discussing Chief Justice Mitchell's concerns).

238. *See Rein, supra* note 77, at 803-04. Professor Rein explains that in most equitable adoption cases the placement of the child does not come to the attention of any official until after the child has reached adulthood and the foster parents have died. *See id.* at 803. Without official intervention, natural parents could agree to give their child to anyone willing to take a child because the process would be completely unregulated. *See id.* Unfortunately, in today's world, people desire children for less than pure reasons, making an unregulated process of allowing parents to give their children away replete with dangerous consequences.

239. *Id.* at 805.

***North Carolina Farm Bureau v. Bost*: Does a Covenant Not to Enforce Judgment Compromise a Claim for Underinsured Motorists Benefits?**

In 1953, the North Carolina General Assembly enacted the Motor Vehicle Safety and Financial Responsibility Act¹ (“the Act”) to protect innocent victims injured by financially irresponsible motorists.² While the original Act included uninsured motorist (“UM”) coverage to protect persons injured by a tortfeasor who had no liability insurance,³ the General Assembly later added underinsured motorist (“UIM”) coverage to the Act to protect against tortfeasors with inadequate insurance,⁴ perhaps because of the high number of accidents in which serious injuries were left uncompensated as a result of negligent motorists who lacked sufficient insurance coverage.⁵

1. Act of Apr. 30, 1953, ch. 1300, 1953 N.C. Sess. Laws 1262 (codified as amended at N.C. GEN. STAT. §§ 20-279.1 to -279.39 (1993 & Supp. 1997)).

2. See *Hartford Underwriters Ins. Co. v. Becks*, 123 N.C. App. 489, 492, 473 S.E.2d 427, 429 (1996); *Nationwide Mut. Ins. Co. v. Baer*, 113 N.C. App. 517, 522, 439 S.E.2d 202, 205 (1994); *South Carolina Ins. Co. v. Smith*, 67 N.C. App. 632, 636, 313 S.E.2d 856, 860 (1984); see also *infra* note 77 and accompanying text (noting the remedial purpose of the Act and citing additional cases).

3. See Act of Apr. 30, 1953, ch. 1300, § 21, 1953 N.C. Sess. Laws 1262, 1271-72 (codified as amended at N.C. GEN. STAT. § 20-279.21 (Supp. 1997)).

4. See Act of May 29, 1979, ch. 675, § 1, 1979 N.C. Sess. Laws 720, 720-21 (codified as amended at N.C. GEN. STAT. § 20-279.21(b)(4) (Supp. 1997)); see also *infra* notes 69-80 and accompanying text (discussing statutory provisions).

5. See GEORGE L. SIMPSON, III, NORTH CAROLINA UNINSURED AND UNDERINSURED MOTORIST INSURANCE § 3:2, at 74 (1996) (explaining that the “basic purpose of UIM coverage is to provide the insured with an additional source of compensation when the liability insurance coverage available to the tortfeasor is insufficient to compensate the insured fully”); 3 ALAN I. WIDISS, UNINSURED AND UNDERINSURED MOTORIST INSURANCE § 31.4, at 7 (2d ed. 1995) (noting that UIM statutes arose in response to “accidents involving insured motorists with liability coverages that were not sufficient to provide complete compensation for claimants who were entitled to recover”). See generally 3 WIDISS, *supra*, §§ 31.1-31.6, at 3-13 (discussing the origins and development of UIM coverage). Uninsured motorist coverage “compensates the insured when the tortfeasor has no insurance or when the tortfeasor’s insurance company is bankrupt.” John F. Buckley, Note, *Underinsured Motorist Coverage: Legislative Solutions to Settlement Difficulties*, 64 N.C. L. REV. 1408, 1409 (1986). In contrast, UIM coverage “only becomes significant when the victim’s damages exceed the tortfeasor’s liability coverage,” thus making the tortfeasor an underinsured motorist. *Id.* at 1408 n.4; see also *infra* note 29 (discussing UIM insurance). Although UM and UIM coverage may involve similar issues, this Note focuses primarily on UIM insurance.

The General Assembly amended the Act in 1997 to allow an injured party to execute a covenant not to enforce judgment against the tortfeasor in exchange for a settlement agreement and to preserve the injured party's claim for UIM recovery unless the agreement expressly states otherwise.⁶ Prior to the 1997 amendments, however, the North Carolina Court of Appeals, in accordance with previous North Carolina cases involving UIM claims,⁷ had held in *North Carolina Farm Bureau Mutual Insurance Co. v. Bost*⁸ that a settlement agreement and release signed by the injured motorist did not constitute a general release of all claims and therefore did not preclude her claim for UIM benefits.⁹ Although the court of appeals decided *Bost* without the assistance of a specific statutory provision to guide its interpretation on the settlement issue,¹⁰ the General Assembly's latest amendment to the Act codifies the court's holding, thereby substantiating the court's decision in *Bost* that a covenant not to enforce judgment does not preclude a claim for UIM recovery.¹¹

The litigation concerning UIM coverage has produced differing results over the years,¹² perhaps due to the complexity that numerous

6. See Act of Aug. 14, 1997, ch. 396, § 2, 1997 N.C. Adv. Legis. Serv. 52, 52-55 (codified at N.C. GEN. STAT. § 20-279.21(b)(4) (Supp. 1997)). The General Assembly also added a new section making the same provisions applicable in situations involving UM coverage. See *id.* § 3, 1997 N.C. Adv. Legis. Serv. 52, 55 (codified at N.C. GEN. STAT. § 20-279.21(f) (Supp. 1997)).

7. See, e.g., *Silvers v. Horace Mann Ins. Co.*, 324 N.C. 289, 296, 378 S.E.2d 21, 26 (1989) (holding that the insured plaintiff who had entered into a consent judgment with the tortfeasor and the tortfeasor's liability insurance company could receive the benefits of UIM coverage); *Gurganious v. Integon Gen. Ins. Corp.*, 108 N.C. App. 163, 168, 423 S.E.2d 317, 320 (1992) (holding that the plaintiffs could proceed with their UIM claim after dismissing the underlying claim against the primary tortfeasor); *North Carolina Farm Bureau Mut. Ins. Co. v. Hilliard*, 90 N.C. App. 507, 511, 369 S.E.2d 386, 389 (1988) (holding that when insurance policies contained identical "excess" clauses in the UIM provisions, the clauses were mutually repugnant and unenforceable); *infra* notes 81-113, 121-53 and accompanying text (discussing cases involving UIM claims).

8. 126 N.C. App. 42, 483 S.E.2d 452, *disc. rev. denied*, 347 N.C. 138, 492 S.E.2d 25 (1997).

9. See *id.* at 47, 483 S.E.2d at 456.

10. The statute was amended in August 1997. See Act of Aug. 14, 1997, ch. 396, § 3, 1997 N.C. Adv. Legis. Serv. 52, 56 (codified at N.C. GEN. STAT. § 20-279.21(f)). *Bost* was decided in April 1997. See *Bost*, 126 N.C. App. at 42, 483 S.E.2d at 452.

11. See N.C. GEN. STAT. § 20-279.21(b)(4) (providing that "[a] covenant not to enforce judgment shall not preclude the injured party from pursuing available underinsured motorist benefits, unless the terms of the covenant expressly provide otherwise").

12. Compare *Spivey v. Lowery*, 116 N.C. App. 124, 126, 446 S.E.2d 835, 837 (1994) (holding that an injured party who executed a general release cannot subsequently assert claims arising out of the same accident), and *Buchanan v. Buchanan*, 83 N.C. App. 428,

amendments have added to the Act.¹³ On a couple of occasions, after the court of appeals had interpreted the most recent amendment in one case, the General Assembly either superseded or codified that interpretation by making further amendments to the Act.¹⁴ *Bost* provides an example of a case in which the General Assembly further amended the Act shortly following, and perhaps in response to, the court's decision.¹⁵ The court in *Bost* both allowed the claim for UIM benefits, even though the claimant had settled with the tortfeasor's insurance company,¹⁶ and permitted interpolicy stacking of UIM

430, 350 S.E.2d 175, 177 (1986) (holding that a plaintiff cannot pursue UM benefits after signing a general release), *with Silvers*, 324 N.C. at 296, 378 S.E.2d at 26 (holding that a plaintiff who had entered into a consent judgment releasing the tortfeasors and their insurance company could pursue UIM benefits), *and Gurganious*, 108 N.C. App. at 168, 423 S.E.2d at 320 (holding that a plaintiff can proceed with a UIM claim after dismissing the underlying claim against the tortfeasor).

13. The General Assembly passed the Act in 1953. *See* Act of Apr. 30, 1953, ch. 1300, 1953 N.C. Sess. Laws 1262 (codified as amended at N.C. GEN. STAT. §§ 20-279.1 to -279.39 (1993 & Supp. 1997)). Throughout the past two decades, the General Assembly frequently has amended the UIM provisions of the Act. *See* Act of July 18, 1983, ch. 777, § 1, 1983 N.C. Sess. Laws 958 (clarifying the law concerning UIM coverage) (codified as amended at N.C. GEN. STAT. § 20-279.21(b)(4) (Supp. 1997)); Act of July 10, 1985, ch. 666, § 74, 1985 N.C. Sess. Laws 851, 862 (providing that when more than one policy applies, the owner receives "the benefit of all limits of liability of underinsured motorist coverage under all such policies") (codified as amended at N.C. GEN. STAT. § 20-279.21(b)(4)); Act of July 12, 1991, ch. 646, § 2, 1991 N.C. Sess. Laws 1550, 1556 (prohibiting the intrapolicy stacking of UIM coverage) (codified as amended at N.C. GEN. STAT. § 20-279.21(b)(4)); Act of Aug. 14, 1997, ch. 396, §§ 2, 3, 1997 N.C. Adv. Legis. Serv. 52, 54-55 (allowing an injured person to execute a covenant not to enforce judgment as consideration for payment of the applicable limits of liability by a tortfeasor's liability carrier and still pursue UIM or UM benefits) (codified at N.C. GEN. STAT. § 20-279.21(b)(4), (l)).

14. *See, e.g., Bost*, 126 N.C. App. at 51, 483 S.E.2d at 458 (noting that the 1991 amendment prohibited stacking of UIM claims within a policy and thus overturned *Harris v. Nationwide Mut. Ins. Co.*, 332 N.C. 184, 195, 420 S.E.2d 124, 130 (1992), *superseded by statute as stated in Bost*, 126 N.C. App. at 51, 483 S.E.2d at 458, which had permitted intrapolicy stacking of UIM claims); *Mitchell v. Nationwide Mut. Ins. Co.*, 335 N.C. 433, 435, 439 S.E.2d 110, 111 (1994) (permitting both intrapolicy and interpolicy stacking of UIM coverage for a case involving an automobile accident that occurred prior to the 1991 amendment to the Act that prevents intrapolicy stacking); *Onley v. Nationwide Mut. Ins. Co.*, 118 N.C. App. 686, 689, 456 S.E.2d 882, 884 (1995) (same). Following the court's decision in *Bost* in April 1997, the General Assembly added another section to the Act in August 1997 that essentially codified the court's holding in *Bost* that a covenant not to enforce judgment does not preclude a UIM claim. *See* Act of Aug. 14, 1997, ch. 396, § 2, 1997 N.C. Adv. Legis. Serv. 52, 54-55 (codified at N.C. GEN. STAT. § 20-279.21(b)(4)); *Bost*, 126 N.C. App. at 47, 483 S.E.2d at 456.

15. *See supra* note 10 (noting that the court decided *Bost* in April 1997 and that the legislature amended the Act in August 1997).

16. *See Bost*, 126 N.C. App. at 47, 483 S.E.2d at 456; *see also infra* notes 37-44 and accompanying text (discussing the issue of settlement in *Bost*).

coverage,¹⁷ results seemingly consistent with the cases leading up to *Bost* that had interpreted the UIM statutory provisions.¹⁸

After summarizing the facts of *Bost* and the court's opinion,¹⁹ this Note explores the relevant cases leading up to the court's decision,²⁰ including a review of cases that interpreted the effect of settlement²¹ and cases that addressed the issue of interpolicy stacking of UIM coverage.²² The Note also points out the inconsistencies among these cases and the effect of the amendments to the Financial Responsibility Act on the issue of a settlement agreement with a tortfeasor in UIM claims.²³ The Note then compares *Bost* to its precedent²⁴ and concludes that the court appropriately interpreted the then-current version of the Act and correctly decided the case.²⁵

On June 24, 1994, Carrie Bost sustained personal injuries when a car negligently driven by William Earl Ezzelle struck the car owned and operated by her son, Larry Bost, in which she was a passenger.²⁶ Allstate Insurance Company ("Allstate") had insured Ezzelle's vehicle under a liability policy with a limit of \$100,000, while North Carolina Farm Bureau Mutual Insurance Company ("Farm Bureau") had insured Mr. Bost's vehicle and provided UIM coverage in the amount of \$100,000 per person, with a \$300,000 limit for each accident.²⁷ Because Ms. Bost was a family member and a resident in both her son's and her daughter's households at the time of the accident,²⁸ she sought UIM recovery under her son's policy with Farm Bureau as well as under her daughter's policy with Allstate,

17. See *Bost*, 126 N.C. App. at 51, 483 S.E.2d at 458. "Stacking" is a method of combining coverages to obtain more compensation. See *infra* note 54 (describing stacking); *infra* notes 55-61 and accompanying text (discussing the issue of interpolicy stacking in *Bost*).

18. See N.C. GEN. STAT. § 20-279.21; *infra* notes 81-153 and accompanying text (examining cases interpreting North Carolina's UIM statute).

19. See *infra* notes 26-68 and accompanying text.

20. See *infra* notes 69-153 and accompanying text.

21. See *infra* notes 114-53 and accompanying text.

22. See *infra* notes 69-113 and accompanying text.

23. See *infra* notes 114-53 and accompanying text.

24. See *infra* notes 154-83 and accompanying text.

25. See *infra* notes 184-96 and accompanying text.

26. See *Bost*, 126 N.C. App. at 44, 483 S.E.2d at 454.

27. See *id.* The parties stipulated that Ms. Bost's damages were equal to or in excess of \$200,000. See *id.*

28. Family members of a named insured may qualify for coverage if the family member is a resident of the same household as the named insured. See N.C. GEN. STAT. § 20-279.21(b)(3) (Supp. 1997) (describing "persons insured"); 3 WIDISS, *supra* note 5, § 33.2, at 63 (noting that coverage may extend to family members); *id.* § 33.4, at 71 (same); see also *infra* notes 64-65 and accompanying text (explaining the importance of "persons insured").

which also provided UIM coverage in the amount of \$100,000 per person, with a \$300,000 limit per accident.²⁹ After having notified both Farm Bureau and Allstate of an offer received for the limits of Ezzelle's liability policy with Allstate, Ms. Bost subsequently accepted payment and executed a limited release and settlement agreement with Ezzelle.³⁰ The document she signed released Ezzelle from further personal liability, and it specifically preserved her right to pursue compensation under the UIM provisions of her children's insurance policies.³¹

Farm Bureau subsequently filed an action for declaratory judgment in order to determine its obligations to Ms. Bost under the UIM policy it had issued in the name of her son.³² The trial court granted Bost's motion for summary judgment and denied Farm Bureau's summary judgment motion, concluding that the document signed by Bost did not bar her claim for UIM recovery against either Allstate or Farm Bureau.³³ According to the trial court, the vehicle operated by Ezzelle was underinsured because the total coverage available to Bost under the UIM provisions of her children's policies (\$200,000) exceeded the limit of Ezzelle's liability coverage (\$100,000).³⁴ Furthermore, the trial court found that the amount of UIM coverage available from each insurance company was \$100,000, for a total of \$200,000, and that each company was entitled to receive credit for a pro-rata share of the \$100,000 paid by Allstate under Ezzelle's liability policy.³⁵ Therefore, after subtracting the

29. See *Bost*, 126 N.C. App. at 44, 483 S.E.2d at 454. Under the Act, UIM coverage protects a person injured by a tortfeasor whose liability insurance fails to afford adequate compensation for the injured person's damages by compensating an injured person for the difference between the injured person's UIM coverage and the total amount of the tortfeasor's liability coverage awarded to the injured person. See N.C. GEN. STAT. § 20-279.21(b)(4); see also 12A MARK S. RHODES, COUCH CYCLOPEDIA OF INSURANCE LAW § 45:649, at 202 (2d ed. rev. vol. 1981) (noting that UIM coverage protects an insured motorist injured by an underinsured motorist).

30. See *Bost*, 126 N.C. App. at 44, 483 S.E.2d at 454. Ms. Bost was required by statute to notify in writing the UIM carriers of the settlement agreement and limited release and of her intent to pursue UIM benefits. See *id.* at 48, 483 S.E.2d at 456; see also N.C. GEN. STAT. § 20-279.21(b)(4) (detailing the notice requirements).

31. See *Bost*, 126 N.C. App. at 44, 483 S.E.2d at 454.

32. See *id.* at 43-44, 483 S.E.2d at 454.

33. See *id.* at 44, 483 S.E.2d at 454.

34. See *id.*; see also N.C. GEN. STAT. § 20-279.21(b)(4) (describing how to determine if an automobile is an "underinsured highway vehicle"); *infra* note 55 (discussing the meaning of an "underinsured highway vehicle"). The trial court thus "stacked," or combined, the policies of Bost's children. See *infra* notes 54-60 and accompanying text (discussing stacking).

35. See *Bost*, 126 N.C. App. at 45, 483 S.E.2d at 454-55. Because Ms. Bost received \$100,000 from Ezzelle's liability carrier and because all of the UIM coverage available to

appropriate credits of \$50,000 for each company, each company had coverage remaining in the amount of \$50,000, which was available on a pro-rata basis to satisfy Bost's claim.³⁶

On appeal, the North Carolina Court of Appeals first addressed whether the settlement agreement and limited release signed by Bost precluded any recovery by her under the UIM provisions of her son's policy with Farm Bureau.³⁷ Farm Bureau asserted that because UIM coverage derives from the liability of the tortfeasor,³⁸ Bost's settlement with Ezzelle and his insurance company prevented her claim for UIM recovery.³⁹ The court disagreed, determining that the language in the agreement expressly reserved Bost's right to pursue recovery both against Farm Bureau and Allstate.⁴⁰ The document signed by Bost⁴¹ stated that she relieved Ezzelle from any further liability arising out of the accident and that she would enforce all other judgments against Allstate or Farm Bureau as the UIM carriers for her children.⁴² Furthermore, the agreement expressly certified that she was not releasing or discharging Allstate or Farm Bureau from any duty arising out of UIM coverage applicable to claims arising out of the accident on June 24, 1994, and it also stated that Bost "specifically preserve[d] her underinsured motorist claims against Allstate Insurance Company and North Carolina Farm Bureau Insurance Company."⁴³ Therefore, the court concluded that because the document signed by Bost constituted a "covenant not to enforce judgment and not a general release," it did not preclude as a

her was \$200,000, the remaining amount owed to her as a result of the UIM coverage was \$100,000. *See id.*

36. *See id.* at 45, 483 S.E.2d at 455; *see also* N.C. GEN. STAT. § 20-279.21(b)(4) (providing that in a UIM claim, "payment upon the judgment . . . shall be applied *pro-rata* to the claimant's claim beyond payment by the insurer of the owner . . . of the underinsured highway vehicle and the claim of the underinsured motorist insurer" (emphasis added)).

37. *See Bost*, 126 N.C. App. at 45, 483 S.E.2d at 455.

38. *See id.*; *infra* note 107 and accompanying text (explaining the derivative nature of UIM claims).

39. *See Bost*, 126 N.C. App. at 45, 483 S.E.2d at 455. In its argument concerning the effect of the document, Farm Bureau relied on *Spivey v. Lowery*, 116 N.C. App. 124, 446 S.E.2d 835 (1994), in which the court held that a general release precludes any further claims arising out of the accident, including a claim for UIM benefits. *See Bost*, 126 N.C. App. at 46, 483 S.E.2d at 455; *Spivey*, 116 N.C. App. at 126, 446 S.E.2d at 837; *see also infra* notes 144-53 and accompanying text (discussing *Spivey*).

40. *See Bost*, 126 N.C. App. at 46-47, 483 S.E.2d at 455.

41. The document was entitled "Settlement Agreement and Limited Release." *See id.* at 46, 483 S.E.2d at 455.

42. *See id.* at 45-46, 483 S.E.2d at 455.

43. *Id.* at 46, 483 S.E.2d at 455.

matter of law her UIM claim against Farm Bureau.⁴⁴ The court next considered Farm Bureau's argument that Bost's acceptance and endorsement of the check from Allstate as Ezzelle's liability carrier established a final settlement of all claims she may have had as a result of the automobile accident, including her UIM claim against Farm Bureau.⁴⁵ While the court agreed with Farm Bureau that Bost's conduct established an accord and satisfaction,⁴⁶ it held that the accord and satisfaction did not terminate her claim against Farm Bureau for UIM recovery.⁴⁷

The court pointed out an ambiguity shared by the UIM provisions of the Act and the insurance policy, both of which seemed to demand that the insured preserve her claim against the tortfeasor but resolve the claim prior to pursuing UIM coverage.⁴⁸ The court noted that while UIM coverage derives from a tortfeasor's liability,⁴⁹ the internally conflicting provisions in the statute and the policy should be resolved in favor of Bost.⁵⁰ Moreover, Bost properly notified Farm Bureau according to the provisions of its policy concerning the settlement agreement and her intent to seek UIM

44. *Id.* at 47, 483 S.E.2d at 456. A general release usually extinguishes all claims between the parties to the release. See *Spivey*, 116 N.C. App. at 126, 446 S.E.2d at 837. In contrast, a "covenant not to enforce judgment" is a more limited agreement in which the claimant agrees that if he receives a judgment against the tortfeasor for an amount that exceeds the limits of the tortfeasor's liability insurance, the claimant will not try to enforce the judgment against the tortfeasor's personal assets. See *SIMPSON*, *supra* note 5, § 4:3, at 171; see also *infra* text accompanying note 113 (quoting Simpson's definition of a covenant not to enforce judgment).

45. See *Bost*, 126 N.C. App. at 47, 483 S.E.2d at 456.

46. See *id.* According to the court, an "accord" is an agreement in which one party agrees to give or to perform and the other party agrees to accept "in satisfaction of a claim . . . something other than or different from what he is, or considered himself[,] entitled to; and a "satisfaction" is the execution or performance of such agreement.'" *Id.* (quoting *Sharpe v. Nationwide Mut. Fire Ins. Co.*, 62 N.C. App. 564, 565, 302 S.E.2d 893, 894 (1983)).

47. See *id.*

48. See *id.* at 47-48, 483 S.E.2d at 456. Farm Bureau's insurance policy stated that it would pay UIM coverage "only after the limits of liability under any applicable liability bonds or policies have been [sic] exhausted by payments of judgments or settlements.'" *Id.* (alteration in original) (quoting Farm Bureau's policy). According to the Act, "[u]nderinsured motorist coverage is deemed to apply when, by reason of payment of judgment or settlement, all liability bonds or insurance policies providing coverage for bodily injury caused by the ownership, maintenance, or use of the underinsured highway vehicle have been exhausted." N.C. GEN. STAT. § 20-279.21(b)(4) (Supp. 1997).

49. See *Bost*, 126 N.C. App. at 47, 483 S.E.2d at 456; see also *Silvers v. Horace Mann Ins. Co.*, 324 N.C. 289, 294, 378 S.E.2d 21, 25 (1989) (stating that UIM liability is derivative); *infra* note 107 and accompanying text (explaining the meaning of "derivative"); cf. *Buchanan v. Buchanan*, 83 N.C. App. 428, 429-30, 350 S.E.2d 175, 176-77 (1986) (noting the "derivative nature" of UM coverage).

50. See *Bost*, 126 N.C. App. at 47, 483 S.E.2d at 456.

coverage.⁵¹ Because Farm Bureau failed to preserve its statutory right to approve Bost's settlement,⁵² and because Bost exhausted the tortfeasor's available liability coverage, she had the right to pursue her UIM claim against Farm Bureau.⁵³

The court of appeals also resolved whether the 1991 amendment to the Act precluded the interpolicy stacking⁵⁴ of applicable UIM limits in order to determine if a tortfeasor's automobile was an "underinsured highway vehicle."⁵⁵ The court noted that although the

51. See *id.* at 48, 483 S.E.2d at 456; see also N.C. GEN. STAT. § 20-279.21(b)(4) (requiring a claimant to give the insurance company written notice of the settlement offer).

52. See N.C. GEN. STAT. § 20-279.21(b)(4); *Bost*, 126 N.C. App. at 48, 483 S.E.2d at 456-57.

53. See *Bost*, 126 N.C. App. at 48, 483 S.E.2d at 456-57. The court again noted that in the settlement agreement and covenant not to enforce judgment, Bost had *expressly* preserved her right to pursue her UIM claim against Farm Bureau. See *id.* at 48, 483 S.E.2d at 457.

54. One commentator describes stacking as a case in which an injured insured may claim coverage under more than one insurance policy, even if the claimant is not the owner of the policy under which he seeks recovery. See PAUL W. PRETZEL, UNINSURED MOTORISTS § 25.5(B), at 87-88 (1972). Another commentator defines stacking as "a situation where all available policies are added together to create a larger pool from which the injured party may draw in order to compensate him for his actual loss where a single policy is not sufficient to make him whole." 12A RHODES, *supra* note 29, § 45:628, at 77; see also Douglas R. Richmond, *Issues and Problems in "Other Insurance," Multiple Insurance, and Self-Insurance*, 22 PEPP. L. REV. 1373, 1418 (1995) (defining stacking as "the recovery of damages by an insured under multiple policies in succession until all damages have been satisfied, or until the total limits of all policies are exhausted"); cf. JAMES E. SNYDER, JR., NORTH CAROLINA AUTOMOBILE INSURANCE LAW § 33-1, at 256 (2d ed. 1994) (declaring "stacking" to be one of the most important features of UM coverage and describing it as a tool through which insurance companies try to preclude the aggregation of UM coverage). The Act does not use the term "stacking," but instead refers to the "combining" of UIM limits available under different policies. See N.C. GEN. STAT. § 20-279.21(b)(4) ("[T]he total limits of the claimant's underinsured motorist coverages [are] determined by *combining* the highest limit available under each policy." (emphasis added)); *id.* ("The underinsured motorist limits applicable to any one motor vehicle under a policy shall not be *combined* with or added to the limits applicable to any other motor vehicle under that policy." (emphasis added)). However, courts, as do commentators, usually use the term "stacking." See, e.g., *Bass v. North Carolina Farm Bureau Mut. Ins. Co.*, 332 N.C. 109, 113 n.2, 418 S.E.2d 221, 223 n.2 (1992) (noting that intrapolicy stacking is not permissible under the Act); *Bost*, 126 N.C. App. at 49-51, 483 S.E.2d at 457-58 (discussing the issue of stacking); *Honeycutt v. Walker*, 119 N.C. App. 220, 224, 458 S.E.2d 23, 26 (1995) (same).

55. See *Bost*, 126 N.C. App. at 49, 483 S.E.2d at 457. The Act defines an "underinsured motorist vehicle" as a "highway vehicle" in which the total of the liability limits "under all bodily injury liability bonds and insurance policies applicable at the time of the accident is less than the applicable limits of underinsured motorist coverage for the vehicle involved in the accident and insured under the owner's policy." N.C. GEN. STAT. § 20-279.21(b)(4); see also *Bost*, 126 N.C. App. at 49-50, 483 S.E.2d at 457 (quoting the statutory definition of an "underinsured highway vehicle"). Stacking affects the determination of an underinsured highway vehicle by allowing multiple policies with UIM

statute prior to the 1991 amendment had been interpreted to permit both intrapolicy and interpolicy stacking of UIM coverage to decide if a tortfeasor's vehicle was underinsured,⁵⁶ the statute as amended in 1991⁵⁷ prevented intrapolicy stacking to determine whether a vehicle was underinsured.⁵⁸ In its holding, however, the court emphasized that the 1991 amendment did not preclude interpolicy stacking.⁵⁹ Thus, the court permitted Bost to stack the UIM coverage under both her son's Farm Bureau policy and her daughter's Allstate policy to determine if Ezzelle's vehicle was an "underinsured highway vehicle."⁶⁰

After determining that interpolicy stacking was appropriate for purposes of defining an "underinsured highway vehicle," the court addressed Farm Bureau's contention that it provided the primary

provisions to be combined in the determination of the maximum amount of underinsured motorist benefits available to the injured claimant. See N.C. GEN. STAT. § 20-279.21(b)(4).

56. See *Bost*, 126 N.C. App. at 49, 483 S.E.2d at 457; see also *Harris v. Nationwide Mut. Ins. Co.*, 332 N.C. 184, 192, 420 S.E.2d 124, 129 (1992) (interpreting the language in the pre-1991 statute to permit intrapolicy stacking of UIM coverage), *superseded by statute as stated in Bost*, 126 N.C. App. at 51, 483 S.E.2d at 458; *Onley v. Nationwide Mut. Ins. Co.*, 118 N.C. App. 686, 689, 456 S.E.2d 882, 884 (1995) (interpreting the language in the pre-1991 statute to permit interpolicy and intrapolicy stacking of UIM coverage).

57. See Act of July 12, 1991, ch. 646, § 2, 1991 N.C. Sess. Laws 1550, 1556 (codified as amended at N.C. GEN. STAT. § 20-279.21(b)(4)).

58. See *Bost*, 126 N.C. App. at 50, 483 S.E.2d at 458; see also *Bass*, 332 N.C. at 113 n.2, 418 S.E.2d at 223 n.2 (noting that the 1991 amendment seems to prevent intrapolicy stacking); *Honeycutt*, 119 N.C. App. at 224, 458 S.E.2d at 26 (stating that "the main purpose of the 1991 amendment to G.S. 20-279.21(b)(4) appears to be the prohibition of intrapolicy stacking of UIM coverage"); *Maryland Cas. Co. v. Smith*, 117 N.C. App. 593, 597, 452 S.E.2d 318, 320 (1995) (concluding that the 1991 amendment permits stacking of UIM coverage "only between policies"). "Intrapolicy" stacking occurs when a single policy provides UIM coverage for multiple vehicles and the claimant under the policy attempts to "multiply the policy's stated UIM limits by the number of insured vehicles . . . to determine the UIM insurer's limit of liability." SIMPSON, *supra* note 5, § 3:13, at 123.

59. See *Bost*, 126 N.C. App. at 51, 483 S.E.2d at 458. The court further supported its reasoning by indicating that the Act, provisions of which are incorporated as a matter of law into all automobile liability policies, requires a liberal construction in order to effectuate the primary purpose of "compensat[ing] innocent victims who have been injured by financially irresponsible motorists." *Id.* at 50-51, 483 S.E.2d at 458 (quoting *South Carolina Ins. Co. v. Smith*, 67 N.C. App. 632, 636, 313 S.E.2d 856, 860 (1984)); see also *infra* note 72 and accompanying text (noting that the provisions of the Act are incorporated as a matter of law into automobile insurance policies); *infra* notes 77-78 and accompanying text (noting the liberal construction of the Act afforded by its broadly compensatory purpose).

60. See *Bost*, 126 N.C. App. at 51, 483 S.E.2d at 458. If the court had held that Bost was not allowed to stack, Ezzelle's vehicle would not have been "underinsured," as his liability limit was the same as each child's UIM limit. See *id.* at 44, 483 S.E.2d at 454. In that event, Bost would have received only the limits of Ezzelle's liability insurance (\$100,000). See *id.*

UIM coverage because it insured the vehicle owned by Bost's son.⁶¹ Both Farm Bureau's and Allstate's insurance policies included identical provisions pertaining to "other insurance,"⁶² which stated that if similar insurance applied, they would only pay their

61. See *id.* at 51, 483 S.E.2d at 458. A problem that arises in connection with "other insurance" provisions is the necessity of determining which insurance coverage is "primary" and which insurance coverage is "excess." See PRETZEL, *supra* note 54, § 25.5(A), at 87. "Primary" liability often falls on the insurer of the vehicle involved in the accident, while "excess" liability falls on the insurer of the injured claimant. See *id.* § 25.5, at 82; SIMPSON, *supra* note 5, § 3:15, at 141; see also SNYDER, *supra* note 54, § 33-1, at 256 (noting that "the primary insurance coverage is always provided by the owner's policy, and any insurance provided with respect to a vehicle not owned is excess over any other collectible insurance"). The Act fails to address either the issue of which insurance carrier has primary or excess coverage or the issue of pro-rata allocation. See SIMPSON, *supra* note 5, § 3:16, at 145 (noting that the statute does not state "whether one insurer will be required to exhaust its policy limit before any other insurance will be required to pay, or what part of the claim each insurer will be required to pay if all the policies have the same relative status"). In at least some situations involving primary and excess coverage, however, the primary insurer pays first, up to the limits of its policy, and then the insurer providing excess coverage pays any remainder of the loss. See *id.* § 3:16, at 146. If neither insurance carrier is primary, then the court will give the carriers the same status and prorate the loss. See *id.* While the court's opinion did not expressly state why Farm Bureau wanted to be the primary UIM carrier, Farm Bureau probably sought the designation of primary insurer in order to take full advantage of the total credit created by the \$100,000 payment from Ezzelle's liability insurance policy. See generally *id.* § 3:16, at 145-47 (discussing the issues of prorating and primary/excess coverage).

Because the owner of an underinsured highway vehicle presumably has liability insurance that will pay for some but not all of an injured person's damages, a UIM carrier does not have to pay all of the damages sustained by a UIM claimant; rather, the UIM carrier will pay the difference between the insufficient liability coverage and the available amount of UIM coverage, thus bridging the gap for the injured claimant. See *id.* § 3:15, at 140. The amount the claimant receives from the tortfeasor's liability insurer serves as a credit and will reduce only once the amount that the claimant can recover from all UIM carriers, see *id.* at 142, because the statute states that UIM coverage applies "to the first dollar of an underinsured motorist coverage claim beyond amounts paid to the claimant pursuant to the exhausted liability policy," *id.* (quoting N.C. GEN. STAT. § 20-279.21(b)(4) (1989) (emphasis added)). Thus, when an insured engages in interpolicy stacking of UIM policies, a question arises about the allocation between UIM insurers of the credit for the tortfeasor's liability coverage. See *id.*

62. Insurance companies attempt to limit their liability by using "other insurance" provisions. See 3 WIDISS, *supra* note 5, § 40.2, at 239. For example, "other insurance" provisions usually contain an "excess" clause, stating, for example, that "any insurance we provide with respect to a vehicle you do not own shall be excess over any other collectible insurance." INSURANCE SERVICES OFFICE, INC., UNDERINSURED MOTORIST COVERAGE FORM PP 03 11 (Ed. 6-80), reprinted in 3 WIDISS, *supra* note 5, app. H, at 5. By using an "excess" clause, insurance companies try to make the coverage of the policy in which the clause appears "excess coverage over any other 'collectible insurance'—including liability insurance." 3 WIDISS, *supra* note 5, § 40.5, at 265. While courts usually follow other insurance provisions in determining primary and secondary coverage, courts may refuse to enforce the provisions when they create conflicts. See 3 *id.* § 40.5, at 265-66; *infra* notes 88-105 and accompanying text (explaining "other insurance" provisions and also discussing cases that involved such provisions).

proportionate share of the loss and that any insurance they provided with respect to a vehicle not owned by the claimant would be "‘excess over any other collectible insurance.’"⁶³ In determining Bost's right to receive UIM benefits, the court first characterized her as a "person insured" under the Act⁶⁴ because she was a resident of the same household as her son, the named insured.⁶⁵ Then, the court noted that when two policies contain identical "excess" provisions, the clauses are mutually repugnant and have no effect.⁶⁶ Instead, the insured's claim is pro rated between the separate policies in accordance with the policies' respective limits.⁶⁷ The court thus concluded that Farm Bureau and Allstate had to share the settlement on a pro-rata basis.⁶⁸

To understand the significance of *Bost*, a brief overview of the statutory and common law development of UIM law in North Carolina provides a useful framework. In 1979, the North Carolina General Assembly extended the UM provisions of the Act to encompass UIM coverage⁶⁹ because of accidents involving motorists

63. *Bost*, 126 N.C. App. at 51, 483 S.E.2d at 458 (quoting the insurance contract).

64. The importance of the court's recognition of *Bost* as a person insured lies in the fact that once a person qualifies as a "person insured," the person has the right to stack UIM coverage. See SNYDER, *supra* note 54, § 33-4, at 270. Under § 20-279.21(b)(3) of the North Carolina General Statutes, uninsured and underinsurance coverage creates two distinct classes of insureds. See N.C. GEN. STAT. § 20-279.21(b)(3) (Supp. 1997); North Carolina Farm Bureau Mut. Ins. Co. v. Hilliard, 90 N.C. App. 507, 509, 369 S.E.2d 386, 388 (1988); Crowder v. North Carolina Farm Bureau Mut. Ins. Co., 79 N.C. App. 551, 554, 340 S.E.2d 127, 129-30 (1986). The first class of "persons insured" includes "the named insured and, while resident of the same household, the spouse of any named insured and relatives of either, while in a motor vehicle or otherwise," while the second class includes any person who uses or is a guest in the motor vehicle to which the policy applies. N.C. GEN. STAT. § 20-279.21(b)(3); see also *Hilliard*, 90 N.C. App. at 510, 369 S.E.2d at 388 (quoting the statutory definition of "persons insured"); SIMPSON, *supra* note 5, § 3:7, at 96-106 (discussing the meaning and different classes of "persons insured").

65. See N.C. GEN. STAT. § 20-279.21(b)(3); *Bost*, 126 N.C. App. at 52, 483 S.E.2d at 458-59.

66. See *Bost*, 126 N.C. App. at 52, 483 S.E.2d at 458-59.

67. See *id.* at 52, 483 S.E.2d at 459.

68. See *id.*; see also *supra* notes 61-62 (discussing the concepts of primary and excess coverage).

69. See Act of May 29, 1979, ch. 675, § 1, 1979 N.C. Sess. Laws 720, 720-21 (codified as amended at N.C. GEN. STAT. § 20-279.21(b)(4) (Supp. 1997)). By carrying "uninsured" motorist coverage, an injured person stands in the place she would have been if the tortfeasor, whose negligent operation of an uninsured motor vehicle caused an accident, had liability insurance with limits that satisfied the statutory minimum requirements. See 3 WIDISS, *supra* note 5, § 31.1, at 3. A policy that provides "underinsured" motorist insurance offers remuneration to an injured insured if a tortfeasor's liability insurance does not pay for all of the damages sustained by an injured person. See 3 *id.* § 31.4, at 7. See generally Paul J. Osowski, Note, *Underinsured Motorist Coverage: North Carolina's Multiple Claimant Wrinkle*—Ray v. Atlantic Casualty

with liability insurance that failed to provide adequate compensation for claimants entitled to recover.⁷⁰ A person insured under an insurance policy that provides for UIM coverage qualifies for an "extra layer of insurance protection designed to kick in after the insured has recovered from the liability insurer."⁷¹ In North Carolina, the statute is written into every liability policy as a matter of law⁷² and requires insurers to offer UIM coverage.⁷³ If the insured does not reject or alter the UIM coverage,⁷⁴ the amount of UIM coverage is "equal to the highest limit of bodily injury liability coverage for any one vehicle in the policy,"⁷⁵ but the liability coverage in the policy containing UIM coverage has to be more than the amount of minimum compulsory coverage in order for UIM coverage to be included.⁷⁶

Insurance Co., 17 CAMPBELL L. REV. 147, 152-54 (1995) (describing the statutory development of UIM law in North Carolina).

70. See 3 WIDISS, *supra* note 5, § 31.4, at 7.

71. SIMPSON, *supra* note 5, § 3:2, at 74.

72. See N.C. GEN. STAT. § 20-279.21(d) (Supp. 1997) (describing the requirements for a motor vehicle liability policy and stating that such a policy "is subject to all the provisions of this Article"); *id.* § 20-279.21(f) (stating that "[e]very motor vehicle liability policy shall be subject to [specified provisions] which need not be contained therein"); *Nationwide Mut. Ins. Co. v. Chantos*, 293 N.C. 431, 441, 238 S.E.2d 597, 604 (1977) (noting that the Act is written into insurance policies as a matter of law); *Bowser v. Williams*, 108 N.C. App. 8, 12, 422 S.E.2d 355, 358 (1992) (same); *North Carolina Farm Bureau Mut. Ins. Co. v. Hilliard*, 90 N.C. App. 507, 509, 369 S.E.2d 386, 388 (1988) (same); *Ohio Cas. Ins. Co. v. Anderson*, 59 N.C. App. 621, 622, 298 S.E.2d 56, 57 (1982) (same); SNYDER, *supra* note 54, § 33-4, at 269 (same). Furthermore, when a policy provision conflicts with the statute, the statute will prevail despite the fact that the insured technically agreed in the insurance contract to the language of the policy. See N.C. GEN. STAT. § 20-279.21(f)(4) (stating that the insurance policy is the entire contract between the insured and the insurance company to the extent that the policy "does not conflict with the provisions of the Article"); *Baxley v. Nationwide Mut. Ins. Co.*, 115 N.C. App. 718, 721, 446 S.E.2d 597, 598 (1994); *Bray v. North Carolina Farm Bureau Mut. Ins. Co.*, 115 N.C. App. 438, 442-44, 445 S.E.2d 79, 81 (1994), *cert. improvidently granted in part, aff'd in part and rev'd in part on other grounds*, 341 N.C. 678, 462 S.E.2d 650 (1995).

73. See N.C. GEN. STAT. § 20-279.21(b)(4). However, the Act also permits the insured to reject or to change the UIM coverage. See *id.*

74. Purchasers of UIM coverage usually have latitude in choosing the coverage limits, especially in a state that does not have a statute requiring UIM coverage. See 3 WIDISS, *supra* note 5, § 31.6, at 8-10. Because North Carolina requires a statutory minimum of automobile insurance, see N.C. GEN. STAT. § 20-279.21(b)(4), any amount in addition to the minimum requirement is voluntary and thus not subject to the provisions of the Act, see *Brown v. Truck Ins. Exch.*, 103 N.C. App. 59, 64, 404 S.E.2d 172, 175 (1991).

75. N.C. GEN. STAT. § 20-279.21(b)(4).

76. See *id.* The minimum amount of basic liability coverage required by statute is \$25,000 for bodily injury to or death of one person in one accident and \$50,000 for bodily injury to or death of two or more persons in one accident. See *id.* § 20-279.5(c) (Supp. 1997); see also *Sutton v. Aetna Cas. & Sur. Co.*, 325 N.C. 259, 264, 382 S.E.2d 759, 762 (1989) (noting the statutory requirement that UIM coverage has to be equal to the policy

The primary purpose of the statutory requirement for motor vehicle liability insurance under the Act is “ ‘to compensate innocent victims who have been injured by financially irresponsible motorists.’ ”⁷⁷ To effectuate this compensatory goal, the North Carolina courts have interpreted the Act to call for liberal construction,⁷⁸ and perhaps due to the wide latitude afforded to the courts through these broad principles, the General Assembly amended the statute in 1985.⁷⁹ While the 1985 amendment specifically permitted *interpolicy* stacking, however, it failed to clarify whether *intrapolicy* stacking was also acceptable.⁸⁰

In *Sutton v. Aetna Casualty & Surety Co.*,⁸¹ the North Carolina Supreme Court held that the Act as amended in 1985 allowed both *intrapolicy* and *interpolicy* stacking.⁸² In *Sutton*, the injured insured owned two insurance policies, each of which covered two vehicles and under which the insured paid four separate premiums for UIM

liability limits), *superseded by statute as stated in* North Carolina Farm Bureau Mut. Ins. Co. v. Stamper, 122 N.C. App. 254, 257, 468 S.E.2d 584, 585-86, *disc. rev. denied*, 343 N.C. 513, 472 S.E.2d 17 (1996).

77. *Bost*, 126 N.C. App. at 50-51, 483 S.E.2d at 458 (quoting South Carolina Ins. Co. v. Smith, 67 N.C. App. 632, 636, 313 S.E.2d 856, 860 (1984)); *see also* Hartford Underwriters Ins. Co. v. Becks, 123 N.C. App. 489, 492, 473 S.E.2d 427, 429 (1996) (stating that the central purpose of the Financial Responsibility Act is protection of innocent victims from financially irresponsible motorists); *Bray*, 115 N.C. App. at 443, 445 S.E.2d at 82 (same); *Nationwide Mut. Ins. Co. v. Baer*, 113 N.C. App. 517, 522, 439 S.E.2d 202, 205 (1994) (same).

78. *See Bost*, 126 N.C. App. at 51, 483 S.E.2d at 458; *see also* Moore v. Hartford Fire Ins. Co. Group, 270 N.C. 532, 535, 155 S.E.2d 128, 130-31 (1967) (noting that liberal construction of the Act is necessary to achieve its remedial purpose); *Gurganious v. Integon Gen. Ins. Corp.*, 108 N.C. App. 163, 168, 423 S.E.2d 317, 320 (1992) (same); *Smith*, 67 N.C. App. at 636, 313 S.E.2d at 860 (same).

79. *See* Act of July 10, 1985, ch. 666, § 74, 1985 N.C. Sess. Laws 851, 862-64 (codified as amended at N.C. GEN. STAT. § 20-279.21(b)(4)). *See generally* John F. Buckley, Note, *Underinsured Motorist Coverage: Legislative Solutions to Settlement Difficulties*, 64 N.C. L. REV. 1408, 1416-17 (1986) (discussing the 1985 amendment).

80. *See* Act of July 10, 1985, ch. 666, § 74, 1985 N.C. Sess. Laws 851, 862 (stating that the intent of the statutory UIM provision was “to provide to the owner, in instances where more than one policy may apply, the benefit of all limits of liability of underinsured motorist coverage under all such policies”) (codified as amended at N.C. GEN. STAT. § 20-279.21(b)(4)); *see also* Buckley, *supra* note 79, at 1416 (noting the express statutory permission of *interpolicy* stacking and the statutory ambiguity concerning the question of *intrapolicy* stacking).

81. 325 N.C. 259, 382 S.E.2d 759 (1989), *superseded by statute as stated in* Stamper, 122 N.C. App. at 257, 468 S.E.2d at 585-86.

82. *See id.* at 266-67, 382 S.E.2d at 764. The court noted that the compensation afforded by *interpolicy* and *intrapolicy* stacking was consistent with the compensatory purpose of the Act. *See id.* *See generally* Joseph H. Nanney, Jr., Note, *Sutton v. Aetna Casualty & Surety Co.: The North Carolina Supreme Court Approves Stacking of Underinsured Motorist Coverage—Will Uninsured Coverage Follow?*, 68 N.C. L. REV. 1281 (1990) (discussing *Sutton* and UIM coverage).

coverage.⁸³ The court allowed the insured to stack all four UIM coverages, despite the limitation of liability clauses in the insurance policies.⁸⁴ Thus, in accordance with *Sutton*, the courts' interpretations of the Act following the 1985 amendment, but prior to the 1991 amendment, permitted both interpolicy and intrapolicy stacking in order to determine whether a tortfeasor's automobile was an "underinsured highway vehicle."⁸⁵ However, because the 1991 amendment added a provision expressly precluding any intrapolicy stacking of UIM coverage,⁸⁶ the courts have interpreted the Act to prohibit all intrapolicy stacking but to permit interpolicy stacking.⁸⁷

83. See *Sutton*, 325 N.C. at 261, 382 S.E.2d at 761.

84. See *id.* at 261-63, 382 S.E.2d at 760-61.

85. See, e.g., *Mitchell v. Nationwide Mut. Ins. Co.*, 335 N.C. 433, 435, 439 S.E.2d 110, 111 (1994) (noting that the statute then applicable "required that a person living in the household with relatives be allowed to aggregate or stack, both interpolicy and intrapolicy, the underinsured motorist coverages of the relatives"); *Harris v. Nationwide Mut. Ins. Co.*, 332 N.C. 184, 194, 420 S.E.2d 124, 130 (1992) (holding that the intrapolicy stacking of UIM coverage was permissible when the injured party was a first-class insured), *superseded by statute as stated in Bost*, 126 N.C. App. at 51, 483 S.E.2d at 458; *Onley v. Nationwide Mut. Ins. Co.*, 118 N.C. App. 686, 687, 689, 456 S.E.2d 882, 882-84 (1995) (permitting both interpolicy and intrapolicy stacking of UIM coverage in a case involving an automobile accident that occurred in 1988).

Before the 1991 amendment, the statute expressly stated that the intent was to "provide to the owner, in instances where more than one policy may apply, the benefit of all limits of liability of underinsured motorist coverage under all such policies." N.C. GEN. STAT. § 20-279.21(b)(4) (Supp. 1989) (emphasis added); see also *Bost*, 126 N.C. App. at 49, 483 S.E.2d at 457 (quoting relevant portions of N.C. GEN. STAT. § 20-279.21 (Supp. 1989)). The statute also declared the limit of UIM coverage that was applicable to any claim was determined by "the difference between the amount paid to the claimant pursuant to the exhausted liability policy and the total limits of the owner's underinsured motorist coverages provided in the owner's policies of insurance." N.C. GEN. STAT. § 20-279.21(b)(4) (Supp. 1989); see also *Bost*, 126 N.C. App. at 49, 483 S.E.2d at 457 (quoting the statute).

86. See Act of July 12, 1991, ch. 646, § 2, 1991 N.C. Sess. Laws 1550, 1556 ("The underinsured motorist limits applicable to any one motor vehicle under a policy shall not be combined with or added to the limits applicable to any other motor vehicle under that policy.") (codified as amended at N.C. GEN. STAT. § 20-279.21(b)(4) (Supp. 1997)).

87. See *Bost*, 126 N.C. App. at 50, 483 S.E.2d at 458 (citing cases); *Maryland Cas. Co. v. Smith*, 117 N.C. App. 593, 597, 452 S.E.2d 318, 320 (1995) (deciding that the 1991 amendment permitted stacking of UIM coverage between policies but not within policies); *SIMPSON*, *supra* note 5, § 3:13, at 132 (stating that "although the current version of the statute preserves the right to stack interpolicy, it prohibits intrapolicy stacking across the board"); see also N.C. GEN. STAT. § 20-279.21(b)(4) ("The underinsured motorist limits applicable to any one motor vehicle under a policy shall not be combined with or added to the limits applicable to any other motor vehicle under that policy."); *Bass v. North Carolina Farm Bureau Mut. Ins. Co.*, 332 N.C. 109, 113 n.2, 418 S.E.2d 221, 223 n.2 (1992) (noting that the 1991 amendment appears to bar intrapolicy stacking); *Honeycutt v. Walker*, 119 N.C. App. 220, 224, 458 S.E.2d 23, 26 (1995) (stating that the primary purpose of the 1991 amendment was to prevent intrapolicy stacking of UIM coverage).

Against the background of frequent changes made by the General Assembly to the statutory provisions concerning UIM coverage, insurance companies have sought to prevent stacking and thus minimize their exposure by including certain provisions in their policies.⁸⁸ For example, an insurance company may attempt to create exclusionary provisions by using an "other insurance" clause.⁸⁹ Such a change tries to make the insurance company's policy coverage excess to every other policy available.⁹⁰ An insurer may also use an "other insurance" clause as an attempt to restrict or to prevent interpolicy stacking (1) by stating that other applicable insurance policies must first be exhausted first before its insurance will apply, or (2) by limiting the insurer's entire liability to the limits of a single policy.⁹¹ North Carolina courts traditionally have not honored "other insurance" provisions, however, when the provisions are in conflict with the statutory minimum coverage.⁹² For example, in *Sutton v.*

88. See, e.g., 8C JOHN ALAN APPLEMAN & JEAN APPLEMAN, *INSURANCE LAW AND PRACTICE* § 5106, at 522-23 (1981) (noting that an "anti-stacking result has been reached where the policy, or policies, in question used an 'other insurance' provision, or an excess or excess-escape clause" (footnotes omitted)); Nanney, *supra* note 82, at 1284 (noting that "insurers have devised a variety of policy provisions to preclude aggregated coverages"); cf. SNYDER, *supra* note 54, § 33-1, at 256 (asserting that insurance policies try to prevent the aggregation of UM coverage by using "other insurance" provisions); see also *supra* note 62 (explaining "other insurance").

89. In *Bost*, for example, Farm Bureau and Allstate's insurance policies contained identical "other insurance" clauses, which read:

"If this policy and any other auto insurance policy issued to you apply to the same accident, the maximum limit of liability for your injuries under all the policies shall not exceed the highest applicable limit of liability under any one policy.

In addition, if there is other applicable similar insurance we will pay only our share of the loss. Our share is the proportion that our limit of liability bears to the total of all applicable limits. However, *any insurance we provide with respect to a vehicle you do not own shall be excess over any other collectible insurance.*"

Bost, 126 N.C. App. at 51, 483 S.E.2d at 458 (quoting Farm Bureau and Allstate's insurance policies); see also *supra* note 62 (explaining "other insurance").

90. See 12A RHODES, *supra* note 29, § 45:628, at 70; 3 WIDISS, *supra* note 5, § 40.1, at 239.

91. See SNYDER, *supra* note 54, § 33-3, at 266; see also Nanney, *supra* note 82, at 1285 (describing "other insurance" clauses).

92. See, e.g., *Moore v. Hartford Fire Ins. Co. Group*, 270 N.C. 532, 543, 155 S.E.2d 128, 136 (1967) (holding that the Act does not allow "other insurance" clauses in an insurance policy if such clauses are adverse to the minimum amount of coverage required by statute); *Government Employees Ins. Co. v. Herndon*, 79 N.C. App. 365, 368, 339 S.E.2d 472, 473-74 (1986) (holding that while limiting clauses cannot prevent recovery up to the minimum amount allowed under the statute, they may apply to coverage that exceeds the statutory minimum in UM cases); Nanney, *supra* note 82, at 1285-88 (discussing the North Carolina courts' interpretation of "other insurance" clauses); cf. 12A RHODES, *supra* note 29, § 45:628, at 70 (noting that "[m]any jurisdictions have held that excess or other insurance clauses are invalid in the UM context"). See generally 12A

Aetna Casualty & Surety Co.,⁹³ the North Carolina Supreme Court held that UIM coverage can never be excess or additional coverage according to the Act.⁹⁴ In *Sutton*, the injured plaintiff paid separate premiums for four vehicles insured under two separate insurance policies.⁹⁵ The defendant argued that the Act should not be determinative "to the extent the policy coverages at issue exceed[ed] the mandatory minimum coverage required by the Financial Responsibility Act."⁹⁶ The court disagreed, however, because the statute compels UIM coverage in an amount equal to the insured's bodily injury liability coverage.⁹⁷ Therefore, the court concluded that because UIM coverage cannot be excess, insurance companies cannot prevent stacking through exclusionary clauses.⁹⁸

While the supreme court has established generally that "other insurance" clauses cannot preclude stacking, the court of appeals has addressed the more specific issue of the effect of identical "other insurance" clauses in one or more policies to be stacked.⁹⁹ In *North Carolina Farm Bureau Mutual Insurance Co. v. Hilliard*,¹⁰⁰ Hilliard had an automobile insurance policy that included UIM coverage up to \$50,000 per person.¹⁰¹ Furthermore, because she lived with her sister, she also claimed UIM coverage under her sister's automobile

RHODES, *supra* note 29, § 45:628 (discussing "other insurance" clauses and stacking).

93. 325 N.C. 259, 382 S.E.2d 759 (1989), *superseded by statute as stated in* North Carolina Farm Bureau Mut. Ins. Co. v. Stamper, 122 N.C. App. 254, 257, 468 S.E.2d 584, 585-86, *disc. rev. denied*, 343 N.C. 513, 472 S.E.2d 17 (1996).

94. *See id.* at 268, 382 S.E.2d at 765.

95. *See id.* at 261, 382 S.E.2d at 761.

96. *Id.* at 267, 382 S.E.2d at 764.

97. *See id.* at 268, 382 S.E.2d at 765.

98. *See id.*; *see also* Harris v. Nationwide Mut. Ins. Co., 332 N.C. 184, 194-95, 420 S.E.2d 124, 130 (1992) (following *Sutton* and noting that the stacking of multiple vehicles within one policy is not "excess" coverage within the meaning of the Financial Responsibility Act, and thus not controlled by the compulsory provisions of the Act), *superseded by statute as stated in* Bost, 126 N.C. App. at 51, 483 S.E.2d at 458.

99. *See* Onley v. Nationwide Mut. Ins. Co., 118 N.C. App. 686, 690, 456 S.E.2d 882, 884 (1995); North Carolina Farm Bureau Mut. Ins. Co. v. Hilliard, 90 N.C. App. 507, 511, 369 S.E.2d 386, 388 (1988); *see also* SIMPSON, *supra* note 5, § 3:15, at 143-44 (discussing interpolicy stacking in *Onley*). In *Onley*, the two insurance policies providing UIM coverage contained identical "other insurance" provisions, which stated that "any insurance we provide with respect to a vehicle you do not own shall be excess over any other collectible insurance." *Onley*, 118 N.C. App. at 690, 456 S.E.2d at 884 (quoting the insurance policies). Deeming the clauses to be mutually repugnant, the court refused to give them effect and therefore read the insurance policies as though the "excess" provisions were not there. *See id.*; *see also* SNYDER, *supra* note 54, § 33-5.1, at 62 (Supp. 1997) (noting that courts will refuse to give identical "other insurance" provisions effect, instead reading the policies as though the provisions are not included).

100. 90 N.C. App. 507, 369 S.E.2d 386 (1988).

101. *See id.* at 508, 369 S.E.2d at 387.

insurance policy.¹⁰² The "other insurance" provisions in Hilliard's policy limited the insurance company's coverage by making it "excess" when another policy applied to the same accident.¹⁰³ The court concluded, however, that because the provisions in the insurance policies were identical, the court would ignore the clauses, thus allowing Hilliard to stack the policies and to recover from both insurance companies on a pro-rata basis.¹⁰⁴ The identical clauses were mutually repugnant and consequently unenforceable.¹⁰⁵

In addition to deciding whether stacking is permissible in UIM claims, the courts have had to address the effect of a settlement agreement and release between an injured person and a tortfeasor or a tortfeasor's insurance company.¹⁰⁶ Under North Carolina law, an insured's right to UIM coverage derives from the insured's claim against an underinsured tortfeasor.¹⁰⁷ In order to receive UIM coverage, the injured claimant must exhaust all insurance policies that provide liability coverage for the tortfeasor.¹⁰⁸ In cases in which

102. *See id.*

103. *See id.* at 511, 369 S.E.2d at 388.

104. *See id.* at 512, 369 S.E.2d at 389; *cf.* 12A RHODES, *supra* note 29, § 45:628, at 70-71 (noting that "other insurance" clauses may provide for a pro-rata payment of an uninsured motorist claim up to the higher limit of liability according to the policies at issue).

105. *See Hilliard*, 90 N.C. App. at 511, 369 S.E.2d at 388.

106. *See, e.g., Silvers v. Horace Mann Ins. Co.*, 324 N.C. 289, 296, 378 S.E.2d 21, 26 (1989) (holding that the plaintiff's entering into a consent judgment with the tortfeasor and the tortfeasor's liability insurance carrier did not bar UIM recovery); *Spivey v. Lowery*, 116 N.C. App. 124, 126, 446 S.E.2d 835, 837 (1994) (holding that the plaintiff's entering into a general release with the tortfeasor precludes the subsequent assertion of any further claims arising out of the accident, including a claim against a UIM carrier); *Gurganious v. Integon Gen. Ins. Corp.*, 108 N.C. App. 163, 168, 423 S.E.2d 317, 320 (1992) (holding that the plaintiffs could proceed with their claim for UIM recovery even though the plaintiffs dismissed with prejudice the underlying claim against the primary tortfeasor); *see also Buchanan v. Buchanan*, 83 N.C. App. 428, 430, 350 S.E.2d 175, 177 (1986) (holding that the plaintiff could not recover UM benefits after signing a general release).

107. *See Silvers*, 324 N.C. at 294, 350 S.E.2d at 25 (acknowledging the derivative nature of a UIM claim); *Gurganious*, 108 N.C. App. at 167, 423 S.E.2d at 319 (citing the assertion in *Silvers* that a UIM claim derives from a claim against the tortfeasor); *cf. Buchanan*, 83 N.C. App. at 429, 350 S.E.2d at 176 (noting the derivative nature of an uninsured motorist claim); Kristen P. Sosnosky, Note, *Reconciling North Carolina's Interpretation of "Legally Entitled to Recover" with the Spirit of the Uninsured Motorist Statute: The Lessons of Grimsley v. Nelson*, 73 N.C. L. REV. 2474, 2481 (1995) (recognizing the derivative nature of uninsured motorist claims).

108. *See* N.C. GEN. STAT. § 20-279.21(b)(4) (Supp. 1997) (stating that UIM coverage applies following the exhaustion of, "by reason of payment of judgment or settlement, all liability bonds or insurance policies providing coverage for bodily injury caused by the ownership, maintenance, or use of the underinsured highway vehicle"). Furthermore, the Act states that "[e]xhaustion of that liability coverage for the purpose of any single

a tortfeasor's liability is undisputed and a plaintiff's injuries exceed the limits of the tortfeasor's liability coverage, the liability carrier will want to settle the case quickly by paying its limits and thus avoiding expensive or unsuccessful litigation.¹⁰⁹ While a plaintiff may agree to accept a settlement from the tortfeasor's liability carrier, a plaintiff must be careful not to compromise the UIM claim.¹¹⁰ The amendment to the Act in 1985 that allowed an insured to settle a claim without insurance company approval raised the question of whether a plaintiff could complete a settlement by giving a standard release to a tortfeasor, or to a tortfeasor's liability carrier, without

liability claim presented for underinsured motorist coverage is deemed to occur when . . . by reason of multiple claims, the aggregate per occurrence limit of liability has been paid." *Id.*; see also 8C STEPHEN L. LIEBO, APPLEMAN'S INSURANCE LAW AND PRACTICE § 5108, at 47 (Supp. 1997) (reviewing the use of exhaustion clauses); SIMPSON, *supra* note 5, § 3:2, at 74-75 (discussing the requirement that a claimant pursuing UIM recovery must exhaust the tortfeasor's liability coverage). The UIM insurance agreement states, in language similar to that of the statute, that the insurer will pay UIM coverage "only after the limits of liability under any applicable liability bonds or policies have been exhausted by payments of judgments or settlement," unless the insurer has received advance written notice of settlement between an insured and the tortfeasor and the insurer consents to the advance payment to the insured in an amount that is equal to the settlement. SIMPSON, *supra* note 5, § 3:2, at 74 (quoting the UIM provisions of a standard automobile insurance policy). However, the UIM carrier may choose to pay the claimant even if the claimant has not exhausted the tortfeasor's liability insurance. See N.C. GEN. STAT. § 20-279.21(b)(4).

109. See SIMPSON, *supra* note 5, § 4:3, at 168; SNYDER, *supra* note 54, § 12-1, at 117. For an example of a consent judgment stating the liability insurance carrier's desire to avert unnecessary litigation costs, see *Silvers*, 324 N.C. at 291-92, 378 S.E.2d at 23.

110. See SIMPSON, *supra* note 5, § 4:3, at 168. Before the 1985 amendment to the UIM provisions in the Act, two difficulties arose for a plaintiff who wanted to settle with a liability insurer and to preserve a UIM claim. See *id.* First, UIM policies issued before the 1985 amendment often required an insured to have the insurance company's consent before settling with a tortfeasor or a tortfeasor's liability carrier in order to obtain UIM coverage. See *id.* The second problem involved the plaintiff's right to settle with a tortfeasor, especially when the plaintiff provided the tortfeasor with a standard release. See *id.* at 169. While the statute prior to the 1985 amendment required a plaintiff to exhaust a tortfeasor's liability coverage, it also required that a plaintiff be "legally entitled to recover" from a tortfeasor. See *id.* Perhaps in an attempt to address the apparent contradiction between these two requirements, the 1985 amendment limited insurance companies' control by adding that an insurer does not have the right "to approve settlement with the original owner, operator, or maintainer of the underinsured highway vehicle under a policy providing coverage against an underinsured motorist" if the insurer has received advance written notice of a settlement between an underinsured motorist and its insured and "the insurer fails to advance a payment to the insured in an amount equal to the tentative settlement within 30 days following receipt of such notice." Act of July 10, 1985, ch. 666, § 74, 1985 N.C. Sess. Laws 851, 862-63 (codified as amended at N.C. GEN. STAT. § 20-279.21(b)(4)); see SIMPSON, *supra* note 5, § 4:3, at 169. In accordance with the statutory amendments, insurance companies similarly altered the provisions in personal automobile policies. See SIMPSON, *supra* note 5, § 4:3, at 170.

endangering a UIM claim.¹¹¹ Although some attorneys viewed the amended version of the statute as enabling a plaintiff to preserve a UIM claim in lieu of executing a standard release, other attorneys were more wary.¹¹² Therefore, more cautious attorneys prepared a "covenant not to enforce judgment," which is a "less comprehensive agreement in which the plaintiff does not 'release' the tortfeasor in the conventional sense but covenants that if he obtains a judgment against the tortfeasor for an amount greater than the liability insurance proceeds, he will not attempt to enforce the judgment against the tortfeasor's personal assets."¹¹³

While liability insurance carriers generally have been indifferent to the form of settlement agreements and have accepted covenants not to enforce judgments instead of standard releases,¹¹⁴ the courts have reached different results, depending on the type of agreement involved.¹¹⁵ For example, in *Buchanan v. Buchanan*,¹¹⁶ the court of appeals held that the plaintiff's signing of a general release precluded

111. See SIMPSON, *supra* note 5, § 4:3, at 170. Under the Act, an insurer loses the right to subrogation and the right to approve settlement between the owner of an underinsured highway vehicle and an injured person claiming UIM benefits if the insurer has received written notice prior to a settlement between the UIM claimant (the insurance company's insured) and the owner of the underinsured highway vehicle and has failed to advance payment to the insured in an amount equal to the proposed settlement within 30 days after receiving the notice. See N.C. GEN. STAT. § 20-279.21(b)(4); see also Williams v. Bowden, 128 N.C. App. 318, 320, 494 S.E.2d 798, 799-800 (1998) (holding that oral notice does not satisfy the statutory requirement of written notice); SIMPSON, *supra* note 5, § 4:3, at 170 ("[T]he 1985 amendment makes it clear that if the UIM insurer fails to make the required advance, the plaintiff is free to settle with the tortfeasor and the liability insurer."). The "right of subrogation" means the right of the insurance company to stand in the place of its insured, giving the insurance company, as substituted party, the same legal rights that the insured had. See BLACK'S LAW DICTIONARY 1325-26 (6th ed. 1990).

112. See SIMPSON, *supra* note 5, § 4:3, at 170-71.

113. *Id.* at 170.

114. See *id.* at 171.

115. See, e.g., Silvers v. Horace Mann Ins. Co., 324 N.C. 289, 296, 378 S.E.2d 21, 26 (1989) (holding that a plaintiff who had entered into a consent judgment releasing the tortfeasors and their insurance company could pursue UIM benefits); Spivey v. Lowery, 116 N.C. App. 124, 126, 446 S.E.2d 835, 837 (1994) (holding that an injured party who executed a general release could not subsequently assert a claim for UIM coverage); Gurganious v. Integon Gen. Ins. Corp., 108 N.C. App. 163, 168, 423 S.E.2d 317, 320 (1992) (holding that a plaintiff can proceed with a UIM claim after dismissing the underlying claim against the tortfeasor); Buchanan v. Buchanan, 83 N.C. App. 428, 430, 350 S.E.2d 175, 177 (1986) (holding that a general release precluded a claim for UIM benefits); see also *infra* notes 114-53 (discussing cases involving the effects of the 1985 amendment on the issue of settlement).

116. 83 N.C. App. 428, 350 S.E.2d 175 (1986). While *Buchanan* involved a UM claim, a discussion of the case is pertinent because the Act recognizes that an "uninsured motor vehicle" includes an "underinsured highway vehicle." See N.C. GEN. STAT. § 20-279.21(b)(4).

her claim for damages under her husband's UM coverage.¹¹⁷ When the plaintiff and her husband accepted payment from the tortfeasor's liability carrier, they also signed a general release discharging "all 'persons, firms or corporations liable or who might be claimed to be liable.'" ¹¹⁸ More than a year later, however, the plaintiff filed suit to recover under the UM provision in her husband's policy, claiming that she had not intended to release anyone but the tortfeasors.¹¹⁹ Because the defendant insurance company's UM coverage was derivative of Buchanan's underlying claim against the tortfeasors, the court rejected Buchanan's argument and concluded that the plaintiff's release of the tortfeasors also released the UM carrier as a matter of law.¹²⁰

The supreme court addressed a similar situation in *Silvers v. Horace Mann Insurance Co.*¹²¹ Silvers, who sued for the wrongful death of her son, had entered into a consent judgment with the tortfeasor and the tortfeasor's liability insurance carrier.¹²² Unlike a general release,¹²³ the consent judgment expressly recognized and specifically preserved the plaintiff's UIM benefits by stating that Silvers did " 'not release nor relinquish any rights that the Plaintiff's intestate has or might have' " against her UIM carrier.¹²⁴ The insurance company argued that the derivative nature of UIM coverage precluded Silvers from recovering UIM benefits,¹²⁵ claiming that because the judgment released the tortfeasors, it prevented Silvers from being "legally entitled to recover"¹²⁶ from the tortfeasors

117. See *Buchanan*, 83 N.C. App. at 430, 350 S.E.2d at 177.

118. *Id.* at 428, 350 S.E.2d at 176 (quoting the release signed by the plaintiff and her husband).

119. See *id.* at 428-29, 350 S.E.2d at 176. The plaintiff argued that her intent not to release anyone but the tortfeasors created a mutual mistake of fact. See *id.* at 429, 350 S.E.2d at 176.

120. See *id.* at 429-30, 350 S.E.2d at 176-77. In its analysis of the plaintiff's claim as being derivative, the court relied on the wording of the insurance policy, which stated that the insurance company was liable to the plaintiff only if she was "legally entitled to recover" from the owner or the operator of the uninsured motor vehicle. See *id.* See generally *Sosnosky*, *supra* note 107, at 2481-90 (discussing in detail the meaning of "legally entitled to recover").

121. 324 N.C. 289, 378 S.E.2d 21 (1989).

122. See *id.* at 290-91, 378 S.E.2d at 23.

123. See *supra* note 44 (defining a general release).

124. *Silvers*, 324 N.C. at 292, 378 S.E.2d at 23 (quoting the consent judgment).

125. See *id.* at 292-93, 378 S.E.2d at 24.

126. N.C. GEN. STAT. § 20-279.21(b)(3) (Supp. 1997) ("No policy of bodily injury liability insurance . . . shall be delivered or issued . . . unless coverage is provided therein . . . for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles . . ."); see also *Sosnosky*, *supra* note 107, at 2481-90 (discussing the meaning of "legally entitled to recover").

or from her insurance company.¹²⁷ While the court agreed that the claim was derivative, it noted that the statutory requirement that the plaintiff must be legally entitled to recover conflicted with the statutory requirement that the claimant must exhaust liability coverage before pursuing UIM benefits.¹²⁸ Because the language in the insurance contract incorporated the ambiguous statutory language,¹²⁹ the court attributed the fault to the insurance company and interpreted the language in favor of the insured.¹³⁰ The court further supported its reasoning by recalling the remedial purpose of the UIM statute¹³¹ and concluded that the consent judgment did not

127. See *Silvers*, 324 N.C. at 292-93, 378 S.E.2d at 24.

128. See *id.* at 294-95, 378 S.E.2d at 25; see also Act of July 18, 1983, ch. 777, § 1, 1983 N.C. Sess. Laws 958, 958-59 (setting forth the requirement that liability limits be exhausted before the insurer seeks UIM insurance coverage) (codified as amended at N.C. GEN. STAT. § 20-279.21(b)(4) (Supp. 1997)); SIMPSON, *supra* note 5, § 4:3, at 169 (asserting that the UIM statute "sent mixed signals concerning the plaintiff's right to settle with the tortfeasor and, in particular, concerning his right to give the tortfeasor a standard release from further liability").

Exhaustion clauses in insurance contracts typically provide that an insurer will not pay UIM benefits until the claimant has exhausted through judgment or settlement the limits of all available liability policies. See 8C LIEBO, *supra* note 108, § 5108, at 47. Thus, insurance companies use exhaustion clauses in an attempt to make sure that UIM coverage does not apply unless the insured is still undercompensated following receipt of the limits of the tortfeasor's liability policy. See *id.* Courts may refuse to enforce exhaustion clauses, however, if the clauses prevent an insured from settling with a tortfeasor for less than the full amount of the tortfeasor's liability limits. See *id.* Courts justify this result on the grounds that forcing the insured "to litigate every claim to obtain policy limits would defeat the policy favoring settlement of lawsuits and further would defeat the compensation purposes of underinsured motorists coverage by delaying the payment of claims and by increasing the costs and burdens borne by the insured in obtaining compensation." *Id.*

129. The court noted that "[a] reasonable reading of the policy . . . appears to require the insured both to preserve the cause of action against the tort-feasor and to settle the cause before seeking UIM benefits. This conflict must be resolved in favor of the insured." *Silvers*, 324 N.C. at 295, 378 S.E.2d at 25; see also SNYDER, *supra* note 54, § 30-5, at 236 (noting that a conflict in the statute and the insurance policy could lead a claimant to believe that he must approach the UIM carrier "with judgment or settlement in hand when seeking to recover").

130. See *Silvers*, 324 N.C. at 295, 378 S.E.2d at 25. In order to resolve ambiguous insurance policy provisions, courts can resort to the general rule that an ambiguous contract is to be construed against the drafter. See *Chavis v. Southern Life Ins. Co.*, 318 N.C. 259, 262, 347 S.E.2d 425, 427 (1986); *Mazza v. Medical Mut. Ins. Co.*, 311 N.C. 621, 631, 319 S.E.2d 217, 223 (1984); see also *Bost*, 126 N.C. App. at 47, 483 S.E.2d at 456 (citing the *Silvers* court in its resolution in favor of the insured when an internal conflict exists between the provisions in the Act and the insurance policy); SNYDER, *supra* note 54, § 30-5, at 236 (noting resolution in favor of the insured when the Act and the policy seem to mandate that the claimant exhaust all liability coverage through judgment or settlement before seeking UIM benefits).

131. See *Silvers*, 324 N.C. at 296, 378 S.E.2d at 26; see also *supra* note 77 and accompanying text (citing cases and discussing the remedial nature of the statute).

bar the plaintiff's claim for UIM benefits as a matter of law.¹³² Despite the fact that the plaintiff had entered into a consent judgment without giving notice to or obtaining the consent of the UIM carrier, the court nevertheless held that the insured was not barred from UIM coverage.¹³³

The court of appeals again addressed the consequences of settlement in *Gurganious v. Integon General Insurance Corp.*¹³⁴ Before the plaintiffs settled their suit against the tortfeasor by accepting the liability insurance company's check for the limits of the tortfeasor's policy, their attorney sent written notice to the UIM carrier of the initiation of a civil lawsuit against the tortfeasor, the settlement of the suit, and the plaintiffs' intent to pursue UIM benefits.¹³⁵ Despite such notice, the insurance carrier did not defend the action, and the plaintiffs filed and received a dismissal with prejudice in the action against the tortfeasor.¹³⁶ However, when the plaintiffs filed suit against the insurance company in order to receive UIM benefits, the insurance company claimed *res judicata*.¹³⁷ After recognizing the effect of the 1985 amendment to the UIM statute,¹³⁸ the court determined that the insurance company's failure to take advantage of the statutory procedures placed it in a situation similar to the one the supreme court faced in *Silvers*.¹³⁹ Relying on the

132. See *Silvers*, 324 N.C. at 296, 378 S.E.2d at 26; see also SNYDER, *supra* note 54, § 30-6, at 236 & n.1 (noting the holding in *Silvers*).

133. See *Silvers*, 324 N.C. at 290, 378 S.E.2d at 22-23, 26. The court permitted the plaintiff to pursue recovery even though the consent judgment violated the terms of the UIM policy. See *id.* at 297, 378 S.E.2d at 26. The plaintiff's UIM policy required that the plaintiff have the insurance company's written consent before settling a claim for bodily injury or property damage. See *id.* Because the plaintiff failed to obtain the insurer's consent before settling, the court remanded this part of the case to determine if the plaintiff's conduct materially prejudiced the defendant insurance company. See *id.* at 299, 378 S.E.2d at 27.

134. 108 N.C. App. 163, 423 S.E.2d 317 (1992).

135. See *id.* at 164-65, 423 S.E.2d at 318.

136. See *id.* at 165, 423 S.E.2d at 318.

137. See *id.*

138. See *id.* at 166, 423 S.E.2d at 318. The court noted that the 1985 amendment to § 20-279.21(b)(4) added extensive procedures that permitted a UIM carrier to protect itself. See *id.*; see also Act of July 10, 1985, ch. 666, § 74, 1985 N.C. Sess. Laws 851, 862-64 (setting forth protective measures) (codified as amended at N.C. GEN. STAT. § 20-279.21(b)(4) (Supp. 1997)); *supra* note 110 (quoting the 1985 amendment). The Act as amended requires a plaintiff to notify the UIM carrier when a plaintiff files a claim against the primary tortfeasor and also when the plaintiff receives a settlement offer. See N.C. GEN. STAT. § 20-279.21(b)(4); *Gurganious*, 108 N.C. App. at 166, 423 S.E.2d at 318.

139. See *Gurganious*, 108 N.C. App. at 167, 423 S.E.2d at 319. The court referred to the *Silvers* court's reasoning that "while a release of the tort-feasor acts to release the UIM insurance carrier of its derivative liability, the statute regarding UIM coverage appears 'to require the insured to exhaust all liability policies by judgment or settlement

decision in *Silvers*, the court of appeals noted a similar ambiguity in the 1985 version of the statute,¹⁴⁰ and decided to follow the *Silvers* court by construing the statute liberally to accomplish its remedial purpose of compensating the victims of underinsured motorists.¹⁴¹ Therefore, the court concluded that in spite of the derivative nature of a UIM claim,¹⁴² the plaintiffs' settlement with the insurance company and dismissal of the underlying suit against the primary tortfeasor did not bar their claim for UIM recovery.¹⁴³

In *Spivey v. Lowery*,¹⁴⁴ the court of appeals held that the plaintiff, who had signed a general release, could not subsequently pursue a claim against her UIM carrier.¹⁴⁵ After receiving permission from her UIM carrier to settle with the tortfeasor's liability carrier, Spivey accepted settlement and signed a general release.¹⁴⁶ In the document that she signed, Spivey released, acquitted, and forever discharged the tortfeasor, his insurance company, and "all other persons, firms, corporations, associations or partnerships of and from any and all claims of action, demands, rights, [and] damages . . . whatsoever" that she then had or that she may have in the future as a result of the accident at issue.¹⁴⁷ Therefore, when she filed a suit for UIM benefits against her insurance company and Lowery, the

before the insurer is obligated to pay under the UIM coverage." *Id.* (quoting *Silvers v. Horace Mann Ins. Co.*, 324 N.C. 289, 295, 378 S.E.2d 21, 25 (1989)); *see also supra* notes 121-33 and accompanying text (discussing the facts and the court's holding in *Silvers*); *supra* note 128 (explaining exhaustion clauses).

140. *See Gurganiou*, 108 N.C. App. at 167, 423 S.E.2d at 319. The apparent ambiguity resulted from the requirement that the plaintiff exhaust liability coverage before pursuing UIM benefits; yet if the plaintiff complied with that requirement and exhausted liability coverage first, then a question might arise whether the plaintiff was legally entitled to recover UIM benefits thereafter. *See id.*; *see also supra* note 107 (noting the meaning of "legally entitled to recover" in relation to the derivative nature of UIM claims).

141. *See Gurganiou*, 108 N.C. App. at 167-68, 423 S.E.2d at 319-20; *see also supra* notes 77-78 and accompanying text (describing the remedial purpose of the Act and the courts' liberal construction of the Act); *supra* notes 121-33 and accompanying text (discussing *Silvers*).

142. *See Gurganiou*, 108 N.C. App. at 167, 423 S.E.2d at 319.

143. *See id.* at 168, 423 S.E.2d at 320. While the court interpreted the case in light of the 1985 version of the statute, *see id.* at 165, 423 S.E.2d at 318, it determined that inconsistencies similar to those in the pre-1985 version remained, despite the legislative amendments, *see id.* at 168, 423 S.E.2d at 319. The court also noted that the amendments did not affect the applicability of its decision in *Silvers* to the present case. *See id.* at 165, 423 S.E.2d at 318; *see also supra* notes 121-33 and accompanying text (discussing *Silvers*).

144. 116 N.C. App. 124, 446 S.E.2d 835 (1994).

145. *See id.* at 126, 446 S.E.2d at 837; *see also* SNYDER, *supra* note 54, § 31-7, at 53 (Supp. 1997) (citing *Spivey* and discussing the effect of a tortfeasor's release by the insured).

146. *See Spivey*, 116 N.C. App. at 125, 446 S.E.2d at 836.

147. *Id.* (quoting the general release signed by the plaintiff) (alterations in original).

defendant insurance company argued that the general release barred Spivey's claim.¹⁴⁸

The court noted that a general release effectively discharges all claims between the parties to the release¹⁴⁹ and pointed out the general rule that a UIM carrier's liability derives from the tortfeasor's liability.¹⁵⁰ The court distinguished the present facts from both *Silvers* and *Gurganious* on the grounds that neither case involved a general release.¹⁵¹ Citing *Buchanan*, the court further stated that Spivey's intent regarding the release of her UIM carrier was irrelevant because as long as she intended to release the tortfeasor, she released the UIM carrier as well.¹⁵² The court concluded that the UIM carrier's consent to the plaintiff's settlement did not change the legal effect of the general release, nor did the carrier's consent circumvent the fact that UIM coverage derives from an underlying claim against a tortfeasor.¹⁵³ Thus, having signed a general release, the plaintiff was barred from pursuing her UIM benefits.

The court's holding in *Bost* is in accord with and helps to clarify precedent. The *Bost* court considered three issues: (1) whether Bost's entering into a settlement agreement and release and accepting a check for \$100,000 released Farm Bureau from having to provide UIM coverage to her; (2) whether the automobile owned by Ezzelle, the tortfeasor, was an "underinsured motor vehicle" in accordance with § 20-279.21(b)(4) of the North Carolina General Statutes; and (3) if the vehicle was an "underinsured motor vehicle,"

148. See *id.* The plaintiff did not question the validity of the release. See *id.* at 126, 446 S.E.2d at 837.

149. See *id.* at 126, 446 S.E.2d at 837; see also *McGladrey, Hendrickson & Pullen v. Syntek Fin. Corp.*, 92 N.C. App. 708, 710-11, 375 S.E.2d 689, 691 (1989) (noting that a general release usually has the effect of discharging all claims between the parties to the release).

150. See *Spivey*, 116 N.C. App. at 126, 446 S.E.2d at 837; *supra* note 107 (discussing the derivative nature of UIM coverage).

151. See *Spivey*, 116 N.C. App. at 127, 446 S.E.2d at 837. The court further noted that Spivey based her claim solely on the fact that her UIM carrier consented to the settlement, in contrast to the claimants in *Silvers* and *Gurganious*, who relied on ambiguities within the Act and insurance policies. See *id.*; see also *Silvers v. Horace Mann Ins. Co.*, 324 N.C. 289, 294-95, 378 S.E.2d 21, 25 (1989) (noting the conflict within the statute and the insurance policy); *Gurganious v. Integon Gen. Ins. Corp.*, 108 N.C. App. 163, 167, 423 S.E.2d 317, 319 (1992) (pointing out the conflict within the statute and the insurance policy); *supra* notes 121-33 and accompanying text (discussing the facts and the holding in *Silvers*); *supra* notes 134-43 and accompanying text (discussing the facts and the holding in *Gurganious*).

152. See *Spivey*, 116 N.C. App. at 127, 446 S.E.2d at 837-38.

153. See *id.* at 128, 446 S.E.2d at 838.

whether Farm Bureau's UIM coverage was "primary" as to the liability coverage of the Ezzelle's vehicle.¹⁵⁴ While Farm Bureau relied on *Spivey* for its contentions that an injured party who signs a general release cannot subsequently assert any claim arising out of the accident and that a UIM carrier's consent does not change the legal impact of the general release,¹⁵⁵ the court easily distinguished *Spivey* by pointing out that it involved a general release, not a limited release like the one at issue in *Bost*.¹⁵⁶ The court also noted that the *Spivey* court had relied on the general rule expressed by the court in *Buchanan* that a UIM carrier's liability derives from a tortfeasor's liability.¹⁵⁷ While a general release of a tortfeasor may preclude any claim for UIM coverage because UIM coverage derives directly from a claim against a tortfeasor,¹⁵⁸ the court correctly emphasized the specific limitations of the release signed by Bost.¹⁵⁹ Furthermore, the court appropriately concluded that the document was distinguishable from the release in *Spivey* as a covenant not to enforce judgment.¹⁶⁰ Thus, the court's conclusion that the covenant did not preclude Bost's claim as a matter of law for UIM benefits extends the compensatory purpose of the Act by allowing the claim to proceed.¹⁶¹

In a manner similar to other insurance companies in cases preceding *Bost*, Farm Bureau relied on the derivative nature of UIM coverage to argue that the signed settlement agreement barred Bost from pursuing UIM recovery.¹⁶² However, unlike previous cases in

154. See *Bost*, 126 N.C. App. at 45, 483 S.E.2d at 455.

155. See *id.* at 46, 483 S.E.2d at 455 (relying on *Spivey*, 116 N.C. App. at 126-28, 446 S.E.2d at 837).

156. See *id.* at 46-47, 483 S.E.2d at 455-56; see also *supra* notes 144-53 (discussing the facts and the holding in *Spivey*).

157. See *Bost*, 126 N.C. App. at 46, 483 S.E.2d at 455; see also *supra* notes 116-20 and accompanying text (discussing the facts and the holding of *Buchanan*); *supra* notes 144-53 and accompanying text (detailing the facts and the holding in *Spivey*). Although *Buchanan* involved a UM claim, the rule applies as well to UIM claims, because the Act recognizes that an "uninsured motor vehicle" includes an "underinsured highway vehicle." See N.C. GEN. STAT. § 20-279.21(b)(4) (Supp. 1997).

158. See *Spivey*, 116 N.C. App. at 126, 446 S.E.2d at 837; *Buchanan v. Buchanan*, 83 N.C. App. 428, 430, 350 S.E.2d 175, 177 (1986).

159. See *Bost*, 126 N.C. App. at 46-47, 483 S.E.2d at 455-56.

160. See *id.* at 47, 483 S.E.2d at 456; see also SIMPSON, *supra* note 5, § 4:3, at 171 (defining a "covenant not to enforce judgment"); *supra* note 44 and accompanying text (explaining the difference between a general release and a covenant not to enforce judgment).

161. See *supra* note 77 and accompanying text (citing cases and discussing the remedial goal of the Act).

162. See *Bost*, 126 N.C. App. at 46-47, 483 S.E.2d at 455-56; see also *supra* note 107 (explaining the derivative nature of UIM claims).

which insurance companies had argued against UIM recovery,¹⁶³ Farm Bureau also claimed that Bost's acceptance and endorsement of the settlement check from the tortfeasor's liability carrier established an accord and satisfaction in full and final settlement of all claims.¹⁶⁴ While the court noted that tendering a check as payment in full of a contested claim generally established an accord and satisfaction,¹⁶⁵ it determined that the accord and satisfaction created between Bost and the tortfeasor's liability carrier did not extinguish Bost's claim for UIM coverage, in spite of the fact that UIM claims are derivative.¹⁶⁶

Despite Farm Bureau's novel argument, the court looked to similar precedent for guidance in its interpretation of the facts and for support in its reasoning.¹⁶⁷ Relying directly on the supreme court's reasoning in *Silvers v. Horace Mann Insurance Co.*,¹⁶⁸ the court of appeals noted that when an internal conflict exists within the UIM statute and a policy providing UIM coverage, the resolution of the conflict should favor the insured.¹⁶⁹ Although the *Silvers* court interpreted the language of the 1983 version of the statute,¹⁷⁰ the *Bost* court believed that the prior reasoning in *Silvers* also applied to the current version of the Act.¹⁷¹ Because of the similarities in the language noted by each court¹⁷² and the similar provisions in the

163. See, e.g., *Silvers v. Horace Mann Ins. Co.*, 324 N.C. 289, 378 S.E.2d 21 (1989); *Spivey*, 116 N.C. App. 124, 446 S.E.2d 835; *Gurganious v. Integon Gen. Ins. Corp.*, 108 N.C. App. 163, 423 S.E.2d 317 (1992).

164. See *Bost*, 126 N.C. App. at 47, 483 S.E.2d at 456; see also *supra* note 46 (quoting the definition of an accord and satisfaction).

165. See *Bost*, 126 N.C. App. at 47, 483 S.E.2d at 456; see also *Canady v. Mann*, 107 N.C. App. 252, 257, 419 S.E.2d 597, 601 (1992) (noting that a check tendered as payment in full of a disputed claim constitutes an accord and satisfaction).

166. See *Bost*, 126 N.C. App. at 47, 483 S.E.2d at 456.

167. See *id.*

168. 324 N.C. 289, 378 S.E.2d 21 (1989).

169. See *Bost*, 126 N.C. App. at 47, 483 S.E.2d at 456; see also *Silvers*, 324 N.C. at 295, 378 S.E.2d at 25 (resolving conflicting provisions in the UIM statute and the insurance policy in favor of the insured); *supra* notes 121-33 and accompanying text (reviewing the facts and the holding in *Silvers*); cf. 12 RHODES, *supra* note 29, § 45:9, at 238 (advocating a liberal construction of automobile liability policies and noting that "[a]n automobile liability policy is governed by the general principle of strict construction of ambiguities in favor of the insured").

170. See *Silvers*, 324 N.C. at 293 n.3, 378 S.E.2d at 24 n.3 (noting that, in its analysis, the court was relying on the 1983 version of N.C. GEN. STAT. § 20-279.21); see also *supra* note 128 (referring to the 1983 version of the Act relied on by the court in *Silvers*).

171. See *Bost*, 126 N.C. App. at 47-48, 483 S.E.2d at 456; see also *supra* note 108 (quoting the current statutory requirement that an insured seeking UIM benefits must first exhaust the tortfeasor's liability coverage).

172. Compare *Bost*, 126 N.C. App. at 48, 483 S.E.2d at 456 ("Underinsured motorist coverage is deemed to apply when, by reason of payment of judgment or settlement, all

insurance policies in both cases,¹⁷³ the court's reliance on *Silvers* seems reasonable. The court further noted that Bost had properly notified both UIM carriers of her intent to enter into the settlement agreement and to pursue UIM benefits according to § 20-279.21(b)(4) of the North Carolina General Statutes,¹⁷⁴ and determined that she had correctly exhausted the tortfeasor's liability coverage as required both under the terms of the statute and under the UIM provisions of the insurance policy with Farm Bureau.¹⁷⁵ Therefore, the court's determination that the insurance company could not complain even though Bost had accepted a settlement check appears more than fair, especially because the limited release specifically preserved Bost's right to pursue UIM benefits.¹⁷⁶

In *Bost*, the court also clarified the issue of interpolicy stacking in UIM claims.¹⁷⁷ The court rejected Farm Bureau's contention that, while the 1991 amendment allowed interpolicy stacking in some situations,¹⁷⁸ it precluded interpolicy stacking of the UIM coverage available to Bost to determine if Ezzelle's car was an underinsured highway vehicle.¹⁷⁹ The court carefully analyzed the language of the Act both before and after the 1991 amendment, noting specifically

liability bonds or insurance policies providing coverage for bodily injury caused by the ownership, maintenance, or use of the underinsured highway vehicle have been exhausted. . . ." (quoting N.C. GEN. STAT. § 20-279.21(b)(4) (1993))), with *Silvers*, 324 N.C. at 294, 378 S.E.2d at 25 ("The insurer shall not be obligated to make any payment . . . to which underinsured motorist insurance coverage applies . . . until after the limits of liability under all bodily injury liability bonds or insurance policies applicable at the time of the accident have been exhausted by payment of judgments or settlements . . .") (quoting Act of July 18, 1983, ch. 777, § 1, 1983 N.C. Sess. Laws 958, 958 (codified as amended at N.C. GEN. STAT. § 20-279.21(b)(4) (Supp. 1997))).

173. Compare *Bost*, 126 N.C. App. at 48, 483 S.E.2d at 456 (quoting the insurance policy issued by Farm Bureau, which stated that it would pay UIM coverage "only after the limits of liability under any applicable liability bonds or policies have ben [sic] exhausted by payments of judgments or settlements" (alteration in original)), with *Silvers*, 324 N.C. at 294, 378 S.E.2d at 25 (quoting from an insurance policy providing UIM coverage that contained the very same language, without the misprint).

174. See *Bost*, 126 N.C. App. at 48, 283 S.E.2d at 456; see also *supra* note 30 (describing the notice requirements under the Act).

175. See *Bost*, 126 N.C. App. at 48, 483 S.E.2d at 457; see also *supra* note 110 (describing the procedural requirements).

176. See *Bost*, 126 N.C. App. at 48, 483 S.E.2d at 457; see also *Gurganious v. Integon Gen. Ins. Corp.*, 108 N.C. App. 163, 168, 423 S.E.2d 317, 320 (1992) (asserting that the insurance company could not complain when the insured took the necessary steps to recover UIM benefits); *supra* notes 134-43 and accompanying text (discussing the facts and the holding in *Gurganious*).

177. See *Bost*, 126 N.C. App. at 49-51, 483 S.E.2d at 457-58.

178. See, e.g., *supra* note 64 (discussing persons who may engage in interpolicy stacking).

179. See *Bost*, 126 N.C. App. at 50, 483 S.E.2d at 458.

that the 1991 amendment clearly states that a claimant can combine the UIM coverage available in different policies.¹⁸⁰ The court recognized that while the statutory language “‘vehicle involved in the accident’” could be interpreted to limit Bost’s UIM claim to her son’s policy with Farm Bureau because her son’s car was the one “involved in the accident,” the “limits” available to Bost included all UIM coverage benefits applicable to her.¹⁸¹ By broadly construing the term “limits,” the court furthered the general compensatory policy behind the Act,¹⁸² and its determination accords with the liberal construction of the Act traditionally afforded by the North Carolina courts in order to effectuate the remedial purpose of the Act.¹⁸³

Perhaps in an attempt to resolve any uncertainty in the area of settlements in UIM cases, the General Assembly recently amended the Act.¹⁸⁴ The Act now provides that a person who receives injuries as a result of an accident with an underinsured motor vehicle may, “[a]s consideration for payment of policy limits by a liability insurer on behalf of the owner, operator, or maintainer of an underinsured motor vehicle, . . . execute a contractual covenant not to enforce against the owner, operator, or maintainer of the vehicle any judgment that exceeds the policy limits.”¹⁸⁵ The Act further states that “[a] covenant not to enforce judgment shall not preclude the injured party from pursuing available underinsured motorist benefits,

180. See *id.* at 51, 483 S.E.2d at 458. Under the Act, the limit of UIM coverage applicable to a claimant who has coverage under more than one policy is “the difference between the amount paid to the claimant under the exhausted liability policy . . . and the total limits of the claimant’s underinsured motorist coverages as determined by combining the highest limit available under each policy.” N.C. GEN. STAT. § 20-279.21(b)(4) (Supp. 1997) (emphasis added).

181. See *Bost*, 126 N.C. App. at 50, 483 S.E.2d at 457 (quoting the Act following the 1991 amendment). The court thus determined that *Onley v. Nationwide Mutual Insurance Co.*, 118 N.C. App. 686, 456 S.E.2d 882 (1995), was on point. See *id.* at 689, S.E.2d at 884 (permitting interpolicy stacking to determine if a vehicle qualifies under the Act as an “underinsured highway vehicle”); *supra* note 99 (discussing *Onley*).

182. See *Sutton v. Aetna Cas. & Sur. Co.*, 325 N.C. 259, 265, 382 S.E.2d 759, 763 (1989) (noting that the “avowed purpose” of the Financial Responsibility Act is to protect innocent persons who are injured by financially irresponsible motorists), *superseded by statute as stated in* *North Carolina Farm Bureau Mut. Ins. Co. v. Stamper*, 122 N.C. App. 254, 257, 468 S.E.2d 584, 585-86, *disc. rev. denied*, 343 N.C. 513, 472 S.E.2d 17 (1996); *supra* notes 81-84, 93-98 (discussing the facts and the holding in *Sutton*).

183. See *supra* notes 77-78 and accompanying text (recognizing the courts’ liberal construction of the Act in order to effectuate the remunerative goal of the Act and citing cases supporting a liberal construction of the Act).

184. See Act of Aug. 14, 1997, ch. 396, § 2, 1997 N.C. Adv. Legis. Serv. 52, 52-55 (codified at N.C. GEN. STAT. § 20-279.21(b)(4) (Supp. 1997)).

185. N.C. GEN. STAT. § 20-279.21(b)(4).

unless the terms of the covenant expressly provide otherwise.”¹⁸⁶

The General Assembly also added a new section pertaining to the effect of a covenant not to enforce judgment in UM claims.¹⁸⁷ In language similar to the amended UIM provision, the new section permits a person injured as a result of an uninsured motor vehicle to “execute a contractual covenant not to enforce against the owner, operator, or maintainer of the uninsured vehicle any judgment that exceeds the liability policy limits, as consideration for payment of any applicable policy limits by the insurer where judgment exceeds the policy limits.”¹⁸⁸ Furthermore, according to the new provision, a covenant not to enforce judgment does not prevent an injured person from seeking UM benefits, unless the covenant specifically states otherwise.¹⁸⁹ Even though the court’s ruling in *Bost* pertained only to a UIM claim,¹⁹⁰ providing new rules concerning a covenant not to enforce judgment in both UIM and UM claims appears to be a logical response by the General Assembly.

The court’s determination that the agreement constituted a covenant not to enforce judgment seems to have paved the way for the latest addition to the Act.¹⁹¹ Interestingly, the General Assembly seems to have acted on the court’s holding in *Bost* in amending the Act to include express provisions detailing the effects of a covenant not to enforce judgment.¹⁹² While the insurance company argued that *Bost* should be prevented from pursuing her claim because she signed a settlement agreement,¹⁹³ the court accurately emphasized the narrowness of the agreement.¹⁹⁴ The limited release applied only to

186. *Id.* The Act also certifies that a covenant not to enforce judgment does not prevent an insurer who provides UIM coverage from seeking subrogation. *See id.*

187. *See* Act of Aug. 14, 1997, ch. 396, § 3, 1997 N.C. Adv. Legis. Serv. 52, 55 (codified at N.C. GEN. STAT. § 20-279.21(*l*) (Supp. 1997)).

188. N.C. GEN. STAT. § 20-279.21(*l*).

189. *See id.*

190. *See Bost*, 126 N.C. App. at 43-44, 483 S.E.2d at 454.

191. *See* Act of Aug. 14, 1997, ch. 396, §§ 2, 3, 1997 N.C. Adv. Legis. Serv. 52, 52-55 (codified at N.C. GEN. STAT. § 20-279.21(b)(4), (*l*) (Supp. 1997)).

192. *See* N.C. GEN. STAT. § 20-279.21(b)(4), (*l*).

193. *See Bost*, 126 N.C. App. at 45, 483 S.E.2d at 455.

194. *See id.* at 46-47, 483 S.E.2d at 455-56; *see also supra* notes 30-31 and accompanying text (describing the precise wording of the agreement in *Bost*). *But see* *Spivey v. Lowery*, 116 N.C. App. 124, 127, 446 S.E.2d 835, 837 (1994) (holding that the plaintiff’s intent to release the tortfeasor as evidenced through her signing a general release of the tortfeasor also released the UIM carrier); *Buchanan v. Buchanan*, 83 N.C. App. 428, 430, 350 S.E.2d 175, 177 (1986) (holding that a general release of the tortfeasors also released the insurance company as a matter of law and thus precluded any claim for uninsured motorist benefits); *supra* notes 144-53 and accompanying text (discussing *Spivey*); *supra* notes 116-20 and accompanying text (discussing *Buchanan*).

the tortfeasor, and the agreement specifically preserved Bost's right to pursue UIM benefits.¹⁹⁵ Moreover, the Act's long-standing purpose of compensating victims of inadequately insured tortfeasors offers an overriding principal to guide the courts in cases involving new circumstances or problems not yet apparent.¹⁹⁶ Thus, the result in *Bost* seems logical. Perhaps because the court of appeals formulated the rule, cases presenting similar issues will not cause courts as much trouble when interpreting the new amendments. With both case law and statutory provisions on point, the issue of settlement agreements would be seemingly less problematic or litigious. However, until attorneys and lower courts are aware of the exact effects of a covenant not to enforce judgment, it remains questionable whether a covenant not to enforce judgment will settle the issue of when an injured insured can pursue UIM benefits.

KATHRYN CAMERON WALTON

195. See *Bost*, 126 N.C. App. at 46-47, 483 S.E.2d at 455-56. *Bost* offers precise instruction about the correct wording of a covenant not to enforce judgment against the tortfeasor. See *id.* at 45-46, 483 S.E.2d at 455. The document, entitled "Settlement Agreement and Limited Release," should state expressly that the undersigned fully releases and discharges the tortfeasor from any personal liability arising out of the accident and also specifically reserve the undersigned's right to recover all available UIM benefits. See *id.*

196. See *supra* note 77 (citing cases that describe the remedial purpose of the Act).

