UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 78 | Number 6 Article 12

9-1-2000

Survey of Developments in North Carolina Law and the Fourth Circuit 1999

North Carolina Law Review

SURVEY

Clarifying North Carolina's Ethnic Intimidation Statute and Penalty Enhancement for Bias Crimes

"Government officials, advocacy groups, and citizens themselves must keep the pressure on legislatures and courts to prevent a withdrawal from the goal of protecting all victims of hate crimes everywhere."[1]

Almost every state, including North Carolina, has enacted criminal laws to counteract violent conduct based on characteristics such as race, ethnicity, religion, gender, sexual orientation, disability, and age.[2] These "hate crime" or "bias crime" laws vary widely in

---

1. JACK LEVIN & JACK MCDEVITT, HATE CRIMES: THE RISING TIDE OF BIGOTRY AND BLOODSHED 203 (1993); *see also* Thomas Ferry, *Community Involvement and Interagency Cooperation in the Prevention of Hate Crimes*, *in* BIAS CRIME: AMERICAN LAW ENFORCEMENT AND LEGAL RESPONSES 132, 141 (Robert J. Kelly ed., 2d ed. 1993) (noting that a "state legislature . . . becomes part of [the] . . . criminal justice system when it considers and debates any proposed law that might affect, even remotely, any area of criminal justice activities").

2. *See* Anti-Defamation League, *Hate Crimes Laws: Chart and Graphs: State Hate Crimes Statutory Provisions* (visited Sept. 1, 2000) <http://www.adl.org/frames/front_99hatecrime.html> [hereinafter *ADL State Provisions*] (charting the various hate crime laws enacted by the states); *see also* J. David Coldren, *Bias Crimes: State Policy Considerations*, *in* BIAS CRIME: AMERICAN LAW ENFORCEMENT AND LEGAL RESPONSES, *supra* note 1, at 163, 168 (noting the growth in state hate crimes laws in the 1980s and 1990s); Robert V. Ward, Jr., *Hate Crimes*, 32 GONZ. L. REV. 511, 513–14 (1997) (stating that more than forty states have adopted criminal bias crime laws).

In addition to criminal provisions, many states have enacted non-penal bias crime laws. *See generally* LU-IN WANG, HATE CRIMES LAW app. B (1999) (providing an annually-updated comparison of all states' bias crimes statutes); Staff Project, *Crimes Motivated by Hatred: The Constitutionality and Impact of Hate Crime Legislation in the United States*, 1 SYRACUSE J. LEGIS. & POL'Y 29 app. A at 68–84 (1995) (compiling all state bias crime legislation). Some of these statutes provide civil remedies against perpetrators. *See, e.g.*, COLO. REV. STAT. ANN. § 13-21-106.5 (West 1999) (allowing either the victim or the victim's family to recover damages); MASS. GEN. LAWS ANN. ch. 12, § 11H (West 1999) (granting a civil cause of action to the state attorney general); *see also* Michael A. Sandberg, *Bias Crime: The Problems and the Remedies*, *in* BIAS CRIME: AMERICAN LAW ENFORCEMENT AND LEGAL RESPONSES, *supra* note 1, at 193, 196–97 (explaining the civil actions available in Illinois); Morris Dees & Ellen Bowden, *Taking Hate Groups to Court*, TRIAL, Feb. 1995, at 22, 24 (1995) (describing the process of bringing civil suits for bias crimes). Other civil statutes require state and local agencies to compile statistics of bias crimes or to report incidents of bias-motivated conduct to central repositories. *See, e.g.*, FLA. STAT. ANN. § 877.19 (West 1994 & Supp. 2000) (requiring police departments to report monthly); OR. REV. STAT. § 181.550 (1997) (mandating annual reports). A few state statutes require bias crime training programs for law

detail, but each of them falls into one of several general categories.[3] The oldest category of statutes was enacted during the 1950s or earlier to curb the violent and intimidating conduct of the Ku Klux Klan.[4] These statutes, many of which are still in effect today, punish specific activities such as cross-burning, vandalism, wearing masks and hoods, and organizing secret societies.[5] While these "Klan laws" target conduct associated with racial, ethnic, or religious hostility, they have only been labeled "bias crime" laws in light of the newer generation of bias crime legislation.[6]

Compelled by the public's perception of a rise in hate violence, many states passed new types of laws during the 1980s and 1990s that criminalize bias-motivated conduct.[7] In contrast to the "Klan laws," which focus on particular acts, these statutes focus on the offender's motive and enumerate protected victim groups.[8] The first new type of

---

enforcement officials. *See, e.g.*, MINN. STAT. ANN. § 8.34 (West 1999) (requiring hate crime training for prosecutors); OR. REV. STAT. § 181.642 (1997) (requiring training for police officers). This Note, however, focuses only on certain statutes providing a *criminal* penalty for unlawful acts motivated by bias.

3. *See* VALERIE JENNESS & KENDAL BROAD, HATE CRIMES: NEW SOCIAL MOVEMENTS AND THE POLITICS OF VIOLENCE 39–40 (1997) (describing the types of statutes); BUREAU OF JUSTICE ASSISTANCE, U.S. DEPARTMENT OF JUSTICE, A POLICYMAKER'S GUIDE TO HATE CRIMES 27 (1997) [hereinafter POLICYMAKER'S GUIDE] (same).

4. *See* JENNESS & BROAD, *supra* note 3, at 40 (noting that some of these laws date back to the latter part of the nineteenth century); *see also* DONALD ALTSCHILLER, HATE CRIMES: A REFERENCE HANDBOOK 22 (1999) (noting the connection between these laws and Klan violence); WANG, *supra* note 2, § 11.01, at 11-2 (same).

5. *See, e.g.*, GA. CODE ANN. § 16-11-37(b) (1999) (criminalizing burnings intended to intimidate others); N.Y. PENAL LAW § 240.35(4) (McKinney 2000) (prohibiting certain masked gatherings in public places). *See generally* WANG, *supra* note 2, at §§ 11.01–13.03 (describing these and similar laws in more detail). North Carolina's "Klan laws," enacted in 1953, are described *infra* notes 26–29 and accompanying text.

6. *See* JENNESS & BROAD, *supra* note 3, at 39–40 (explaining that these laws originated in "a previous generation," "were not introduced under the rubric of hate crimes legislation," and are only "in retrospect" considered bias crime laws).

7. As Professor Frederick Lawrence explains, "During the 1980s, public concern over the level of racially-motivated violence in the United States rose dramatically. This decade saw the most significant legislative response to the problem of bias crimes since Reconstruction." Frederick M. Lawrence, *The Case for a Federal Bias Crime Law*, 16 NAT'L BLACK L.J. 144, 145 (1999); *see also* Terry A. Maroney, Note, *The Struggle Against Hate Crime: Movement at a Crossroads*, 73 N.Y.U. L. REV. 564, 564–92 (1998) (analyzing the "unprecedented public attention focused on hate crime" in the 1980s and 1990s and the consequent legislative response).

8. *See* JENNESS & BROAD, *supra* note 3, at 40. These types of bias crime laws were challenged repeatedly in the 1980s and early 1990s on grounds that they unconstitutionally burdened the perpetrators' First Amendment right to free speech. *See, e.g.*, People v. Grupe, 532 N.Y.S.2d 815, 818 (1988) (holding that a law prohibiting bias-motivated violence did not prohibit free speech). Two United States Supreme Court cases, however, have largely dispelled any uncertainty surrounding the issue. In 1992, the Court, in *R.A.V.*

law—the sentence-enhancement statute—permits a judge, during the sentencing phase of a criminal prosecution, to impose a higher sentence for *any* crime motivated by the race, religion, or other protected status of the victim.[9] The second type, which commonly includes "ethnic intimidation" or "malicious harassment" statutes, generally targets physical injury, property damage, and threats proven to be motivated by bias.[10] Such statutes create new substantive crimes by taking the elements of an existing crime, adding the requirement

---

v. City of St. Paul, 505 U.S. 377 (1992), struck down a statute criminalizing "fighting words" based on race, color, creed, religion, or gender. *See id.* at 394–96. The Court held that because the statute did not criminalize *all* "fighting words," it isolated for special punishment only a certain type of speech and therefore violated the First Amendment. *See id.* The next year, however, in *Wisconsin v. Mitchell*, 508 U.S. 476 (1993), the Court unanimously upheld a Wisconsin statute penalizing perpetrators who selected their victims on the basis of race, religion, disability, or other protected characteristic. *See id.* at 488–90. The Court reasoned that because the statute punished action based on ideas rather than punishing the ideas themselves, it did not violate the First Amendment. *See id.* at 487; *see also* Hans F. Bader, Recent Development, *Penalty Enhancement for Bias-Based Crimes:* Wisconsin v. Mitchell, *113 S. Ct. 2194 (1993)*, 17 HARV. J.L. & PUB. POL'Y 253, 254–60 (1994) (summarizing the *Mitchell* opinion). *Mitchell* has not entirely prevented further academic debate on whether bias crime statutes violate the First Amendment. *See, e.g.*, Steven G. Gey, *What if* Wisconsin v. Mitchell *Had Involved Martin Luther King, Jr.? The Constitutional Flaws of Hate Crime Enhancement Statutes*, 65 GEO. WASH. L. REV. 1014, 1014 (1997) (calling the *Mitchell* rationale "deeply and irrevocably flawed"); Scott T. Noth, Comment, *A Penny for Your Thoughts: Post-*Mitchell *Hate Crime Laws Confirm a Mutating Effect Upon Our First Amendment and the Government's Role in Our Lives*, 10 REGENT U. L. REV. 167, 191 (1998) (stating that "[w]hen . . . government [regulates] not only actions and intentions, but motivational notions, it has trespassed into a new jurisdiction, grasping at reins not meant for human hands"). The decision has, however, established that almost all current statutory criminal penalties based on bias are no longer vulnerable to First Amendment litigation. *See* Anti-Defamation League, *Hate Crimes Laws: Constitutionality: Constitutional Challenges to Hate Crimes Statutes* (visited Sept. 1, 2000) <http://www.adl.org/frames/front_99hatecrime.html>.

9. *See, e.g.*, ALA. CODE § 13A-5-13(c) (1999) (mandating higher minimum sentences for crimes shown to have been motivated by bias); N.J. STAT. ANN. § 2C: 44-3 (West 1995 & Supp. 1999) (requiring an "an extended term" for a crime motivated by bias); *see also* Jennifer Jolly-Ryan, *Strengthening Hate Crime Laws in Kentucky*, 88 KY. L.J. 63, 75–76 (2000) (describing Kentucky's sentence-enhancement provision).

10. *See* WANG, *supra* note 2, § 10.03, at 10-7. The following actual event, which took place in North Carolina, illustrates the type of conduct ethnic intimidation statutes are designed to punish:

> In March 1988, an African-American woman was injured as she and her two children fled the path of a pickup truck in Taylorsville, North Carolina. Three white males in the truck yelled racial slurs and swerved the truck toward the family. On the third pass, the truck cut off the woman's path . . . then left the scene when another vehicle approached. The woman fell twice, sustaining injuries . . . that required surgery.

LEVIN & MCDEVITT, *supra* note 1, at 188 (citing an account from CENTER FOR DEMOCRATIC RENEWAL, THEY DON'T ALL WEAR SHEETS: A CHRONOLOGY OF RACIST AND FAR RIGHT VIOLENCE—1980–1986 (1987)).

of bias, and making the penalty more severe than it would be for the same crime without bias.[11] The third type of modern law criminalizing bias-motivated conduct is the penalty-enhancement statute, which provides an *automatic* increase in the offender's penalty if the prosecution proves the crime was motivated by bias toward the victim's protected status.[12] As with ethnic intimidation and malicious harassment statutes, offenders must be *charged* under penalty-enhancement statutes in order for the increased punishment to apply; unlike sentence-enhancement statutes, penalty-enhancement statutes require police and prosecutors, rather than judges, to determine initially whether the offender should be punished for bias.[13]

Most states use similar causation language in each of the newer types of bias crime statutes—they require that the offense was perpetrated "because of," "on account of," or "by reason of" the victim's protected characteristic.[14] Despite the prevalence of this language, confusion has arisen concerning the required connection between the offender's bias and the crime committed.[15] This Note examines ways to improve the causation language of North Carolina's ethnic intimidation statute and penalty-enhancement statute in light of the North Carolina General Assembly's recent, unsuccessful attempt to amend them.[16] Presently, both statutes require proof that

11. *See, e.g.*, MD. ANN. CODE art. 27, § 470A(b)(3)–(4) (1999) (penalizing bias-motivated property damage); *see also* James B. Jacobs, *The Emergence and Implications of American Hate Crime Jurisprudence*, *in* HATE CRIME: THE GLOBAL POLITICS OF POLARIZATION 150, 159–62 (Robert J. Kelly & Jess Maghan eds., 1998) (noting that these statutes are substantively independent of other crimes); Kenneth A. Wittenberg, *Taking A Bite Out of Hate Crimes*, 57 OR. ST. B. BULL. 9, 9–10 (1996) (describing Oregon's ethnic intimidation law). North Carolina's ethnic intimidation statute is described *infra* notes 34–37 and accompanying text.

12. *See, e.g.*, DEL. CODE ANN. tit. 11, § 1304(a)(2) (1998) (reclassifying high misdemeanors as felonies); MINN. STAT. ANN. § 609.749 (West 2000) (same). North Carolina's penalty-enhancement statute is described *infra* notes 38–42 and accompanying text. According to the Anti-Defamation League, only ten states, as of 1999, had not enacted penalty-enhancement hate crime laws. These states are Arkansas, Georgia, Hawaii, Indiana, Kansas, Kentucky, New Mexico, New York, South Carolina, and Wyoming. *See ADL State Provisions*, *supra* note 2, at <http://www.adl.org/frames/front_99hatecrime.html>.

13. *See infra* note 42 and accompanying text (describing the charging procedure for North Carolina's penalty-enhancement statute).

14. *See* FREDERICK M. LAWRENCE, PUNISHING HATE: BIAS CRIMES UNDER AMERICAN LAW 35–36 (1999); Jacobs, *supra* note 11, at 162; Lu-in Wang, *The Transforming Power of "Hate": Social Cognition Theory and the Harms of Bias-Related Crime*, 71 S. CAL. L. REV. 47, 67 (1997).

15. *See* discussion *infra* notes 61–87 and accompanying text.

16. *See* An Act to Honor the Memory of Matthew Shepard by Expanding the Scope

the specified offenses were committed "*because of* the victim's race, color, religion, nationality, or country of origin."[17] This Note suggests that clarifying the "because of" language to convey more clearly the required level of causation and the type of bias that must be proven will improve the two statutes' enforceability and effectiveness.

This Note first discusses North Carolina's bias crime laws, focusing on the ethnic intimidation statute and penalty-enhancement statute.[18] Next, the Note discusses the General Assembly's recent proposed changes to these two laws,[19] and explains an alternative that could both reflect the spirit of the amendments and better communicate the statutes' causation and motivation requirements.[20] The Note then suggests that revised causation language will encourage investigation of bias-motivation,[21] help improve the collection of data on bias crimes in North Carolina,[22] and facilitate further amendments to North Carolina's bias crime laws.[23]

The North Carolina General Statutes codify a family of laws that impose criminal penalties on certain acts motivated by bias.[24] The General Assembly has enacted each major type of hate crime law discussed above.[25] North Carolina was among the several states in the 1950s to enact laws criminalizing activities traditionally associated with the Ku Klux Klan,[26] such as destruction of religious structures,[27]

---

of the Hate Crime Laws and Increasing the Criminal Penalty for Committing a Hate Crime, H.R. 884, 1999 Leg., Reg. Sess. (N.C. 1999).

17. N.C. GEN. STAT. § 14-3(c) (1999) (emphasis added); *id.* § 14-401.14.

18. *See infra* notes 24–42 and accompanying text.

19. *See infra* notes 43–60 and accompanying text.

20. *See infra* notes 61–87 and accompanying text.

21. *See infra* notes 88–97 and accompanying text.

22. *See infra* notes 98–112 and accompanying text.

23. *See infra* notes 113–24 and accompanying text.

24. *See* CITIZENS' RIGHTS SECTION, NORTH CAROLINA ATTORNEY GENERAL'S OFFICE, HATE CRIME STATUTES IN NORTH CAROLINA 1–9 (2000) [hereinafter STATUTES IN NORTH CAROLINA].

25. *See id.* Many of these crimes are punished as misdemeanors and several others as felonies. *See, e.g.*, N.C. GEN. STAT. § 14-12.3 (1999) (punishing certain secret meetings as misdemeanors); *id.* § 14-62.2 (1999) (punishing setting fire to religious structures as a felony). In North Carolina, if the maximum punishment for a crime is more than six months imprisonment, it is a Class 1 misdemeanor. If the maximum punishment is between 30 days and 6 months imprisonment, the crime is a Class 2 misdemeanor. If the punishment is 30 or fewer days imprisonment or a monetary fine, the crime is a Class 3 misdemeanor. *See id.* § 14-3(a)(1)–(3) (1999). The presumptive ranges of sentences permitted for felonies are set out in section 15A-1340.17(c)(2) of the North Carolina General Statutes. *See id.* § 15A-1340.17(c)(2) (1999).

26. *See A Survey of Statutory Changes in North Carolina in 1953: Criminal Law: Secret Societies*, 31 N.C. L. REV. 375, 401–03 (1953) (noting the connection between the 1953 legislation and Ku Klux Klan activities). Each of these statutes is separately enumerated within Article 4A of Chapter 14 of the General Statutes of North Carolina.

placement of exhibits to intimidate others,[28] and participation in certain subversive activities.[29]

The General Assembly also adopted, during the early 1990s, each of the modern types of criminal statutes targeting bias-related acts. First, the General Statutes provide a sentence-enhancement

---

See N.C. GEN. STAT. § 14-12.2 to 14-12.15 (1999). Exemptions from Article 4A are listed in section 14-12.11. While these statutes aim to deter bias-related activities, not all of them require the State to prove bias. *See, e.g.*, N.C. GEN. STAT. § 14-62.2 (1999) (punishing church burning as a felony regardless of the perpetrator's motive). Where bias is not an element of the crime, but is nevertheless proven and the activity is punishable as a felony, the sentence can be increased under the sentence-enhancement statute described *infra* notes 30–33 and accompanying text. *See id.* § 15A-1340.16(d)(17) (1999).

27. Most prominent among the statutes aiming to prevent damage to religious structures are the prohibitions on cross-burning and church burning. *See* N.C. GEN. STAT. §§ 14-12.12, 14-49(b)(1), 14-62.2 (1999). Placing a burning or flaming cross on another person's property without that person's permission is prohibited, *see id.* § 14-12.12(a), as is placing a burning cross on a public street or highway if intended to intimidate or influence another person or group, *see id.* § 14-12.12(b). Willfully setting or helping set fire to a church, chapel, or meetinghouse is punishable as a felony, even when the State fails to prove the offender's racial or ethnic bias. *See id.* § 14-62.2. Finally, it is a felony to damage maliciously a place of worship with an explosive or incendiary device. *See id.* § 14-49(b)(1).

28. North Carolina has two laws that punish individuals who construct exhibits with the intent to intimidate or provoke other persons. *See* N.C. GEN. STAT. §§ 14-12.13, 14-12.14. While the use of intimidating exhibits is traditionally associated with acts of racial or religious intolerance, actual bias is not an element of either of these statutes. *See* STATUTES IN NORTH CAROLINA, *supra* note 24, at 6. The first statute makes it a Class I felony to set up any exhibit with the intention of intimidating another person, causing that person to do something unlawful, or preventing that person from doing something lawful. *See* N.C. GEN. STAT. § 14-12.13. The second statute prohibits displaying such exhibits while wearing a mask or other obscuring device. *See id.* § 14-12.14. The North Carolina Attorney General's Office claims that the first of these two statutes "applies to many more situations, and may be the most constitutionally defensible." STATUTES IN NORTH CAROLINA, *supra* note 24, at 6.

29. There are numerous prohibitions on secret meetings and other covert activities. *See* N.C. GEN. STAT. §§ 14-12.3 to 14-12.5, 14-12.7 to 14-12.9. Each is punishable as a Class 1 misdemeanor. *See id.* § 14-12.15. For example, it is unlawful to join, aid, or in any way organize a secret political or military society or a society that meets to violate or circumvent North Carolina's laws. *See id.* § 14-12.3. In general, to be prohibited, a society must promote or conduct illegal or dangerously subversive activities. *See id.* § 14-12.2 (1)–(3) (defining "secret society," "secret political society," and "secret military society"). Societies not violating the law may meet, but must identify with signs the locations of their meetings and maintain lists of members and organizers. *See id.* § 14-12.6. Also, individuals may not permit unlawful secret societies to organize or meet on their property. *See id.* § 14-12.5. North Carolina also prohibits taking oaths or pledges, or using signs, grips, passwords, or disguises to advance a secret military, political, or unlawful purpose. *See id.* § 14-12.4. In addition, no one may wear a mask, hood, or other face- or voice-disguising device on a street or other public way, on any public property in the state, or on private property without the owner's consent. *See id.* §§ 14-12.7–14-12.9; *see also id.* § 14-12.11 (exempting certain types of disguises, such as holiday and theater costumes and trade safety gear).

provision for felonies.[30] In determining a convicted felon's punishment, courts may impose a greater sentence after considering any of several enumerated aggravating factors.[31] One aggravating factor the court may consider is whether the "offense for which the defendant stands convicted was committed against a victim *because of* the victim's race, color, religion, nationality, or country of origin."[32] If the state proves such causation by a preponderance of the evidence and the sentencing judge chooses to take the aggravating factor into account, the judge may increase the defendant's punishment.[33]

The second type of modern bias crime law, the ethnic intimidation statute, creates a new crime that requires the prosecution to prove that specified acts were committed "because of" a protected characteristic.[34] Any adult who assaults another person, damages or defaces the property of another person, or threatens to do either of these acts, "*because of* race, color, religion, nationality, or country of origin" is guilty of a Class 1 misdemeanor.[35] Therefore, if a police investigation of an assault or property damage reveals evidence of racial, religious, or ethnic bias, the state may charge the perpetrator under the ethnic intimidation statute rather than the statute penalizing the same assault or vandalism committed without bias.[36] The statute also punishes anyone who teaches the techniques used to perpetrate such bias-motivated assault or property damage.[37]

---

30. *See id.* § 15A-1340.16(d)(17).

31. *See id.* § 15A-1340.16(b).

32. *Id.* § 15A-1340.16(d)(17) (emphasis added). In a recent case, the North Carolina Court of Appeals noted that the United States Supreme Court has held that using bias as an aggravating factor when determining the sentence to be imposed for a crime does not violate the First Amendment. *See In re* McDonald, 133 N.C. App. 433, 435, 515 S.E.2d 719, 721 (1999) (citing Wisconsin v. Mitchell, 508 U.S. 476, 485 (1993)).

33. *See* N.C. GEN. STAT. § 15A-1340.16(a)–(b). The sentencing judge may increase the sentence only within the range permitted by Section 15A-1340.17(c)(4). *See id.* § 15A-1340.16(b). The State bears the burden of proving by a preponderance of the evidence that such bias existed at the time of the crime before it may be considered an aggravating factor. *See id.* § 15A-1340.16(a). The bias factor cannot be used when the sentence is death and it cannot be the basis for increasing a sentence from incarceration to death. *See* STATUTES IN NORTH CAROLINA, *supra* note 24, at 4. According to the North Carolina Attorney General's office, some of the felonies most commonly involving bias, and therefore most vulnerable to sentence-enhancement, are homicide, malicious maiming, malicious castration, assault, arson, church burning, and stalking. *See id.*

34. *See* N.C. GEN. STAT. § 14-401.14 (1999).

35. *Id.* § 14-401.14(a) (emphasis added). The crime does not necessarily have to be based on the *victim*'s own race; it may also be based on the victim's association with other people of a particular race, religion, or other protected class. *See* STATUTES IN NORTH CAROLINA, *supra* note 24, at 1.

36. *See* N.C. GEN. STAT. § 14-401.14(a).

37. *See id.* § 14-401.14(b).

Third, the North Carolina General Statutes include a penalty-enhancement for misdemeanors, which allows offenders who perpetrate misdemeanors "because of" a protected characteristic to be charged under the statute prohibiting the misdemeanor itself, as well as under section 14-3(c), which increases the penalty because of the bias.[38] This penalty-enhancement statute provides that any crime that is ordinarily punished as a Class 2 or Class 3 misdemeanor "*shall be*" punished as a Class 1 misdemeanor if it is committed "*because of* the victim's race, color, religion, nationality, or country of origin."[39] Likewise, if a crime is ordinarily punished as a Class A1 or Class 1 misdemeanor, it "*shall be*" punished as a Class I felony if it is committed "*because of* the victim's race, color, religion, nationality, or country of origin."[40] The penalty-enhancement provision applies to all misdemeanors defined by North Carolina law except for ethnic intimidation, of which bias is already an element.[41] In writing the charge for a misdemeanor believed to be committed "because of" the victim's protected status, a magistrate must specify that the crime was both in violation of the statute prohibiting the crime itself and in violation of the penalty-enhancement statute.[42]

In April 1999, members of the North Carolina General Assembly introduced House Bill 884,[43] which proposed several amendments to North Carolina's sentence-enhancement, ethnic intimidation, and

38. *See id.* § 14-3(c) (1999).

39. *Id.* (emphasis added); *see also supra* note 25 (describing North Carolina's classification system for misdemeanors).

40. N.C. GEN. STAT. § 14-3(c) (emphasis added); *see also supra* note 25 (describing North Carolina's classification system for misdemeanors). The Attorney General's office notes that some of the most common Class 2 and 3 misdemeanors for which penalties are enhanced under this statute are first degree trespass, stalking (when no restraining order is in effect), and second degree trespass. *See* STATUTES IN NORTH CAROLINA, *supra* note 24, at 3. Some of the most common Class 1 misdemeanors are cross-burning, assault and battery, willful injury to real property, desecration of gravesites, communicating threats, and stalking (when a restraining order is in effect). *See id.*

41. *See* STATUTES IN NORTH CAROLINA, *supra* note 24, at 2; *see also* N.C. GEN. STAT. § 14-3(c).

42. *See* STATUTES IN NORTH CAROLINA, *supra* note 24, at 2. The Attorney General's Office further explains that a charge for a Class 2 or 3 misdemeanor "should 1) refer to the [prohibited motive], 2) refer to the crime as a Class 1 misdemeanor, and 3) state that the crime was in violation of the underlying crime *and* N.C.G.S. 14-3(c)." *Id.* A charge for a Class 1 misdemeanor "should 1) state that the crime was committed 'feloniously,' 2) refer to the [prohibited motive] of the crime, and 3) state that the crime was in violation of the underlying statute and N.C.G.S. 14-3(c)." *Id.*

43. An Act to Honor the Memory of Matthew Shepard by Expanding the Scope of the Hate Crime Laws and Increasing the Criminal Penalty for Committing a Hate Crime, H.R. 884, 1999 Leg., Reg. Sess. (N.C. 1999). A companion bill was introduced the same day in the North Carolina Senate. *See* S.R. 814, 1999 Leg., Reg. Sess. (N.C. 1999).

penalty-enhancement statutes.[44] The Bill, which failed on its second reading,[45] would have amended the causation requirement in the ethnic intimidation and penalty-enhancement statutes to include proof of hatred by requiring that the relevant offense not only be committed "because of" a protected characteristic, but also that it "arise[ ] out of the offender's generalized hatred of that category of persons."[46] If this change were the only proposed amendment in the Bill, the Bill could be seen as an attempt to weaken these two statutes by limiting them only to cases where the state can prove the perpetrator's actual hatred.[47] The Bill as a whole, however, is a plain attempt to broaden the two statutes in several ways.

First, the Bill's introductory remarks evince the General Assembly's attempt to address recent incidents of bias-related violence. The Bill stated that it was prompted in part by the murder of Matthew Shepard, a young Wyoming man and former North Carolina resident who "was seemingly a victim of a hate crime, his sexual orientation being the apparent reason for his murder."[48] The Bill also stated that "violent crime is abhorrent, and violent criminal acts based on a person's group membership are particularly unacceptable in a civil society."[49] Most importantly, as stated in its title, the Bill's goals were to "expand[] the scope of the hate crime laws and increas[e] the criminal penalty for committing a hate crime."[50] Second, every proposed amendment in the original version of the Bill reflected these goals. The original version, which was paralleled by Senate Bill 814,[51] proposed adding gender, sexual orientation, and disability to the protected characteristics in the sentence-enhancement, ethnic intimidation, and penalty-enhancement statutes.[52] It also proposed reclassifying a violation of

44. *See* H.R. 884. House Bill 884 was introduced by Representatives Alexander, Easterling, Hackney, Hensley, Insko, Luebke, G. Miller, Nesbit, Womble, and Wright. *See id.*

45. *See* North Carolina General Assembly, *Bill Inquiry* (visited Sept. 1, 2000) <http://www.ncga.state.nc.us>.

46. H.R. 884.

47. *See id.*

48. *Id.* Matthew Shepard, a 21-year-old gay University of Wyoming student, was severely beaten by two men, tethered to a fence and left to die in near-freezing temperatures outside of Laramie, Wyoming, in October 1998. *See* Howard Chua-Eoan, *That's Not a Scarecrow*, TIME, Oct. 19, 1998, at 72.

49. H.R. 884.

50. *Id.*

51. Senate Bill 814 was sponsored by Senators Gulley, Ballance, Dannelly, Kinnaird, Lucas, W. Martin, B. Miller, Reeves, and L. Shaw. *See Bill Inquiry*, *supra* note 45, at <http://www.ncga.state.nc.us>.

52. *See* H.R. 884, 1999 Leg., Reg. Sess. (N.C. 1999) (original version).

the ethnic intimidation statute from a Class 1 misdemeanor to a Class I felony, and expanding the penalty-enhancement statute to include felonies, not just misdemeanors.[53]

Finally, the proposed amendment to the causation element in the ethnic intimidation and penalty-enhancement statutes, which would have required proof of the "offender's generalized hatred," was added in committee to the original version of the Bill.[54] While this change might have narrowed the statutes' applicability, it does not appear to be an attempt to undermine the goal of "expanding the scope of the hate crime laws."[55] The committee members approved each of the broad expansions in the original Bill and further proposed that "age" also be made a protected characteristic.[56] This Note views the proposed "hatred" amendment as an attempt to emphasize and clarify the targeted motivation, but asserts that it is too specific to fulfill the Bill's goal of "expanding the scope of the hate crime laws."[57]

---

53. *See id.*

54. *See* H.R. 884 (after committee substitute).

55. *See* H.R. 884 (original version).

56. *See id.*

57. H.R. 884; *see infra* discussion accompanying notes 58–87. This analysis obviously starts with the proposition that "bias crimes" laws are an appropriate means of preventing hate-motivated harms. It is important to note, however, that there has been a great deal of academic controversy over whether it is a good idea to punish bias more than other criminal motivations, such as greed or lust. *See, e.g.*, Craig L. Uhrich, Comment, *Hate Crime Legislation: A Policy Analysis*, 36 HOUS. L. REV. 1467, 1528 (1999) (asserting that "the issue of punishing motive as an element of the crime is one with which the criminal law is not adequately equipped to deal"). Generally, commentators argue that bias-motivated offenders are not necessarily more culpable than other offenders, and bias-motivated crime is not necessarily more wrongful than other crime; therefore, offenders should not be punished more severely. *See* Anthony M. Dillof, *Punishing Bias: An Examination of the Theoretical Foundations of Bias Crime Statutes*, 91 NW. U. L. REV. 1015, 1081 (1997) (hesitating to concede that bias crimes laws are theoretically sound). *See generally* JAMES B. JACOBS & KIMBERLY POTTER, HATE CRIMES: CRIMINAL LAW & IDENTITY POLITICS (1998) (arguing against hate crimes laws on numerous legal and policy-related fronts); Carol S. Steiker, *Punishing Hateful Motives: Old Wine in a New Bottle Revives Calls for Prohibition*, 97 MICH. L. REV. 1857, 1859 (1999) (book review) (noting that Jacobs and Potter examine all aspects of hate crimes laws and "find nothing, except perhaps good intentions, to recommend them").

This Note, however, in addressing one way North Carolina's laws can be improved, accepts the arguments of many scholars, and almost every advocacy group, that bias crimes laws are philosophically and practically sound, particularly because of the heightened impact bias crimes have on victims and the community in comparison to other crimes. *See, e.g*, LAWRENCE, *supra* note 14, at 58–63 (arguing that the greater harm justifies a greater penalty); SOUTHERN POVERTY LAW CENTER, TEN WAYS TO FIGHT HATE 23 (2000) [hereinafter TEN WAYS] ("Because of the great danger they pose, hate crimes warrant aggravated penalties."); Alon Harel & Gideon Parchomovsky, *On Hate and Equality*, 109 YALE L.J. 507, 523–38 (1999) (formulating a justification for bias crimes based on distributive justice principles); Andrew E. Taslitz, *Condemning the Racist Personality: Why the Critics of Hate Crimes Legislation Are Wrong*, 40 B.C. L. REV. 739,

Because of the ambiguity inherent in the causation language of both the ethnic intimidation and the penalty-enhancement statutes, the committee properly sought to make the bias element more specific.[58] A more effective approach, however, would have been to replace or otherwise clarify the ambiguous "because of" language instead of merely supplementing that language by imposing the "hatred" requirement of House Bill 884.[59] After discussing the two major ambiguities of the "because of" language, this Note proposes an alternative way to amend North Carolina's ethnic intimidation and penalty-enhancement statutes to clarify further and reflect better the goal of House Bill 884.[60] By specifying exactly the type of causation they intend to penalize, these two statutes can ultimately become stronger and more comprehensive parts of North Carolina's scheme of bias crime laws.

The first type of ambiguity in the "because of" language involves the degree to which the characteristics of the victim motivated the crime. "Because of" requires causation between the victim's characteristic and the crime,[61] but does not indicate the required level of causation.[62] One reasonably may assume that the legislature intended for the race, religion, or other protected attributes of the victim to be more than just a passing thought,[63] but whether the protected attribute must be the sole cause of the crime, a substantial cause, or simply one of several causes is unclear. The words "because of," "by reason of," or "on account of" may be interpreted plausibly to require any one of the three.[64] Consider the following scenario: A

746–85 (1999) (refuting, on several bases, the argument that hate crimes laws are theoretically unjustifiable); *see also* Lawrence, *supra* note 7, at 145 (1999) ("A federal bias crime statute is warranted as a matter of . . . public policy.").

58. *See infra* discussion accompanying notes 61–87 (discussing the ambiguity an proposing an alternative approach to resolve the ambiguity).

59. *See infra* discussion accompanying notes 61–87.

60. *See infra* discussion accompanying notes 85–87.

61. *See* WANG, supra note 2, § 10.04[1], at 10-19 (noting that most state courts have interpreted "because of" to "require a causal connection between the protected characteristics enumerated in the statute and the criminal conduct"); *see also* Martinez v. State, 980 S.W.2d 662, 667 (Tex. App. 1998) (noting same).

62. *See* Jacobs, *supra* note 11, at 161 (noting the "ambiguity and imprecision" inherent in this and similar language); Robert J. Kelly, *Introduction*, *in* BIAS CRIME: AMERICAN LAW ENFORCEMENT AND LEGAL RESPONSES, *supra* note 1, at 3, 11 ("[T]here is some ambiguity in how strong hate feelings must be in the crime causation sequel."); *see also* LAWRENCE, *supra* note 14, at 36 (observing that "*[b]ecause of* bias crimes statutes . . . evade easy classification as either racial animus or discriminatory selection laws").

63. *See* JACOBS & POTTER, *supra* note 57, at 21 (discussing the requisite causal link to constitute a hate crime).

64. *See id.* (stating that such language begs the question, "[m]ust the criminal conduct have been totally, primarily, substantially, or just slightly caused by prejudiced

young man who was raised to hate Jewish people takes a stroll down a city sidewalk one afternoon. In the past, he has occasionally taken advantage of opportunities to vent his Anti-Semitism, but he has yet to commit any physically violent acts. This afternoon he is only thinking about how much he could use some extra money. With nothing in particular to do, he boards a subway car, but hesitates when he realizes the only other passenger is a woman he knows is Jewish. He begins to disembark in disgust, but then stops, thinks again, and sits only two seats away from her just as the subway car begins to leave the station. After he reassures himself that they are alone, he hits her over the head until she is unconscious, steals her purse, and removes her jewelry. He quickly gets off the train at the next stop and congratulates himself for picking up extra cash and "giving the Jews what they deserve" at the same time.

If "because of" is interpreted to require that the woman's religion—the protected characteristic—be the *sole* motivation for the crime, the State will not pursue an ethnic intimidation charge or a penalty-enhancement.[65] On the other hand, if "because of" is interpreted to require that the protected characteristic be a *substantial* motivation for the crime, the young man is more likely to be charged under either statute. Finally, if the statute allows religion to be just one of several reasons for the attack, the state is all the more likely to pursue penalty-enhancement.

Some courts have interpreted "because of" to require only that the protected characteristic be a substantial cause of the crime.[66] For example, in a leading case, the California Supreme Court examined the phrase "because of" in a penalty-enhancement statute and concluded that it did not require that the victim's protected

---

motivation?"); Jacobs, *supra* note 11, at 161 ("[S]hould a prosecutor interpret the hate crime laws to cover situations in which prejudiced motivation played any role in the defendant's choice of victim?").

65. *See* WANG, *supra* note 2, § 10.04[1], at 10-19 to 10-20 (noting the possibility of interpreting "because of" to require that the protected characteristic be the only motivation). The following excerpt illustrates a case in which the defendant more or less admits that ethnicity was his sole motivation:

> [A] white man . . . attacked . . . an Asian man, stabbing him twice in the back, puncturing a lung, in [a] parking lot. In a statement to police, [the white man] said, "It all started this morning. I didn't have anything to do when I woke up . . . . So, I figured, what the fuck, I'm gonna go kill me a Chinaman."

JACOBS & POTTER, *supra* note 57, at 24.

66. *See, e.g.*, People v. Superior Court (Aishman), 896 P.2d 1387, 1390 (Cal. 1995) (adhering to the "substantial factor" holding of *In re* M.S., 896 P.2d 1365 (Cal. 1995)); *see also* Matter of Welfare of S.M.J., 556 N.W.2d 4, 7 (Minn. Ct. App. 1996) (stating that, because they require causation, these statutes "exclude offenses committed by a person . . . whose bias is not in substantial part what motivated the offense").

characteristic be the *sole* cause of the crime.[67] The court explained that, while the legislature did not intend to punish offenders who entertained bias but acted on other motivations, it also did not intend to limit the statute to "offenses committed exclusively or even mainly because of the prohibited bias."[68] The court concluded instead that "by employing the phrase 'because of,' " the statute dictates that the prohibited bias must be a "*substantial factor* in bringing about the crime."[69] At least one other court has suggested that the bias need not even be a *substantial* factor. In *State v. Pollard*,[70] the Washington Court of Appeals concluded that it was unnecessary to read a "substantial factor" requirement into a statute that punished certain conduct committed "because of" the victim's protected characteristic.[71] Under the facts of the case, the court concluded that the protected characteristic was a substantial motivating factor, but the court presumably would have upheld a conviction if the characteristic had been just one of several causes of the crime.[72]

Without consensus among other states about the scope of the "because of" language, it is difficult to predict whether North Carolina's courts would interpret the ethnic intimidation and penalty-enhancement statutes to require sole, substantial, or just partial causation. Requiring the protected characteristic to be the sole cause of the crime, however, is inconsistent with House Bill 884's goal of "expanding the scope of the hate crime laws."[73] If the General Assembly attempts again to amend these statutes with the Bill in mind, it should specify that the relevant crime be either *substantially* or *partially* motivated by the protected characteristic.

The second ambiguity inherent in the language of the penalty-enhancement and ethnic intimidation statutes concerns the perpetrator's mind-set when committing the crime.[74] Controversy

67. *See In Re* M.S., 896 P.2d 1365, 1377 (Cal. 1995).

68. *Id.*

69. *Id.* (emphasis added).

70. 906 P.2d 976, 981 (Wash. Ct. App. 1995).

71. *See id.* at 978.

72. *See id.* at 981–82; *see also* People v. Nitz, 674 N.E.2d 802, 806 (Ill. App. Ct. 1996) (" 'We find nothing in the language of the statute that would prohibit a person with 'mixed motives' from being prosecuted under the statute.' ") (quoting *In re* Vladimir P., 670 N.E.2d 839, 844 (Ill. App. Ct. 1996)).

73. H.R. 884, 1999 Leg., Reg. Sess. (N.C. 1999); *see also supra* notes 48–53 and accompanying text (discussing the Bill's intended effect of expanding the scope of hate crime laws).

74. *See* Dillof, *supra* note 57, at 1074–75 (explaining that hate crimes can be interpreted to require different kinds of "intrinsic desire").

over the precise state of mind required by "because of"[75] has led to the development of two models of interpretation.[76] The first, usually called the "discriminatory victim selection" model, interprets "because of" to mean that the offender chose the victim because the victim possessed one or more of the protected characteristics,[77] regardless of whether the offender has any particular animus toward people with that characteristic.[78] Imagine, for instance, a man who intends to commit rape on a given night. He targets one woman in particular because she is Asian. He does not, however, wish her any more harm than if she were any other woman of any other ethnic group. He only targets her ethnicity because he believes Asian women to be weak, vulnerable, and unlikely to struggle. Under the "discriminatory victim selection" model, this man would have committed the crime "because of" the ethnicity of the victim, and should therefore be subject to penalty-enhancement.[79]

The North Carolina legislature could conclude that the ethnic intimidation statute and penalty-enhancement statute should not require proof of actual animus. If so, the penalty-enhancement statute could be drafted as follows: "If the offender intentionally selected the victim of the [crime] entirely or substantially because the victim possessed a particular [protected characteristic], the offender shall be guilty of [a class of crime one level higher than if he or she had not selected the victim on this basis]." This language would replace the current language that ambiguously requires the crime to

75. *See* Lu-in Wang, *The Complexities of "Hate,"* 60 OHIO ST. L.J. 799, 809 (1999).

76. *See* LAWRENCE, *supra* note 14, at 9 (describing the two models); Frederick M. Lawrence, *The Punishment of Hate: Toward a Normative Theory of Bias-Motivated Crimes*, 93 MICH. L. REV. 320, 376 (1994) (same); Taslitz, *supra* note 57, at 739 n.1 (noting the "two broad categories" and their differences).

77. *See* Lawrence Crocker, *Hate Crimes Statutes: Just? Constitutional? Wise?* 1992/1993 ANN. SURV. AM. L. 485, 487–89 (1993) (describing the "discriminatory victim selection" model). Previously, scholars also entertained the idea of a "manifests racial animus" model, but the Supreme Court's decision in *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), invalidated this model on the grounds that it unconstitutionally interferes with First Amendment speech. *See supra* note 8.

78. *See* Dillof, *supra* note 57, at 1076 ("[A]nimus is not required. All that is required is that the victim's [protected characteristic] play some role in the decision to commit the crime against the victim."); Harel & Parchomovsky, *supra* note 57, at 533 ("All that is required under the discriminatory model is that the [protected characteristic] of the victim . . . somehow figure into the offender's decision to act against her.").

79. Professor Lu-in Wang offers another example from an interview with a man convicted of robbing and murdering a gay Vietnamese man. In the interview, the perpetrator explained his and his companions' states of mind in choosing their victim: " 'More or less we had it embedded in our head that, you know, they're weak. You know what I'm saying, we could take theirs . . . and get away with it. They wouldn't put up a fight.' " Wang, *supra* note 75, at 892.

be committed "*because of*" a protected characteristic, and would focus on simple proof of discriminatory victim selection. Under such a statute, a person who, for example, vandalizes the property of a non-English-speaking Latino family would be subject to penalty-enhancement whether that person actually did so to harm Latinos, or whether he or she simply thought that a language barrier would prevent the family from reporting the crime.[80] This revision would allow enhanced penalties for a broader range of crimes committed against members of the protected categories and would, therefore, reflect House Bill 884's goal of "expanding the scope of the hate crime laws."[81] It would also, however, directly contradict the committee's proposed amendment specifically requiring the "offender's generalized hatred of that category of persons."[82]

The second model of interpretation—the "motivated by animus" model—requires that the offender not only chose the victim because of a protected characteristic, but also that the offender "purposely acted in furtherance of [his or her] hostility toward the target group."[83] The rapist described above would not be subject to a statute drafted to reflect this model because he was not motivated by any particularized hatred of Asian people. Adopting the "motivated by animus" interpretation, North Carolina's penalty-enhancement statute could be amended as follows: "If the commission of the [crime] was motivated [entirely, substantially, or partially] by the offender's *hatred or animus* toward the victim's [protected characteristic], the offender shall be guilty of [a class of crime one level higher than if the offense had been committed without this motivation]." This change closely reflects the committee's emphasis on hatred.[84] As suggested below, however, there is yet another way to

80. If section 14-3(c) applied to felonies as well as misdemeanors, this suggested redrafting could be read to require that rapists and other sexual assailants be subject to penalty-enhancement because they select their victims on the basis of gender. Some scholars argue that this is an acceptable outcome both legally and in terms of policy. *See infra* notes 117–24 and accompanying text. As noted before, House Bill 884 proposed amending North Carolina's penalty-enhancement to include felonies. If the legislature were to propose such a change in the future, it should take into account the policy implications of victim-selection language on crimes of rape and sexual assault.

81. H.R. 884, 1999 Leg., Reg. Sess. (N.C. 1999).

82. *Id.*

83. Lawrence, *supra* note 76, at 364 (describing the "motivated by animus" model); *see also* Dillof, *supra* note 57, at 1075–76 (same); Wang, *supra* note 14, at 75 (same). This model is often termed the "motivated by *racial* animus" model, but this Note deals with bias against more than just race and thus modifies the label to indicate its general applicability.

84. *See* H.R. 884 (version after committee substitute).

draft the statutes that would permit them to focus on crimes motivated by animus *and* to further House Bill 884's goal of "expanding the scope of the hate crime laws."

A revision of the two statutes could require proof that a particular type of odium against the protected characteristic motivated the crime, thus narrowing the mental state to hatred. It could require "hatred," but could also list animus, disgust, intent to harm, and other similar states of mind.[85] Moreover, the revision could be drafted to encompass situations where the offense was motivated by *someone else's* hatred, animus, or intent to harm the protected characteristics, so long as the perpetrator knew of that person's mental state.[86]

A broader revision of the penalty-enhancement statute reflecting these suggestions could read as follows: "If commission of [the crime] was motivated substantially or partially by (a) the offender's or another person's hatred of or animus toward the victim's [protected characteristic], (b) the offender's intent to harm or intimidate a person (including the victim) or group because that person or group possessed the victim's [protected characteristic], or (c) the offender's intent to exhibit his or her own or another person's hatred of, animus toward, or intent to harm, a member of the victim's [protected characteristic] (including the victim), the offender shall be guilty of [a class of crime one level higher than if the offense had been committed absent (a), (b), or (c)]." Under either (a), (b), or (c), the offender would have to be at least partially motivated by hatred, animus, desire to harm, or a similar mental state. The hatred, animus, or desire to harm, however, would not have to be the perpetrator's own. The vandal discussed above would not be charged under this statute

85. As Professor Dillof explains, the "motivated by animus" model, true to its name, seeks to punish animus, which "comes in many shades." Dillof, *supra* note 57, at 1075. He states that the targeted mental state is "roughly the desire that ill befall those of the target [group] or that those of the target [group] be absent from the [perpetrator's] sphere of interest." *Id.*

86. Professor Wang argues for an even broader interpretation of the targeted motivation in bias crime statutes, but many of her points support the idea that the requisite "animus" should not have to originate from the offender himself. *See* Wang, *supra* note 75, at 897–900. She points out, for instance, that opportunism—such as financial gain or impressing friends—motivates many offenders to choose historically-vulnerable groups, and yet punishing them under bias crimes is justifiable because the harm to the victims is just as severe. *See id.* This argument supports the idea that bias crimes should punish a perpetrator who assaults a black man, not because he hates blacks, but because *his friends do*, and he wants to please them. *Cf.* Harel & Parchomovsky, *supra* note 57, at 520–38 (arguing that, to protect the historic vulnerability of certain groups, society should be allowed a broader range of justifications for bias crimes laws generally).

because she chose to increase her chances of getting away with the vandalism, not because of a particular distaste for Latinos.[87] If, however, she chose the family because she wanted to impress her racist friends, she could be charged under the statute because her act was motivated at least in part by "another person's ... animus" toward the victim's ethnicity.

Clarifying the causation and motivation language may aid the investigation and prosecution of bias crimes,[88] which may in turn increase bias crime data collection.[89] The effectiveness of bias crime statutes depends on police discretion in investigating bias, and on prosecutorial discretion in charging offenders under the applicable laws.[90] Statutory ambiguity broadens police discretion in enforcing criminal laws generally.[91] In bias crime laws, however, the ambiguous element—the requirement of bias motivation—is the very element that sets these laws apart from others,[92] so the connection between discretionary under-enforcement and the ambiguity of bias crime laws is particularly acute.[93] Because bias motivation is especially difficult

87. *See supra* text accompanying note 80.

88. *See infra* notes 90–97 and accompanying text (discussing investigation and prosecution of bias crimes).

89. *See infra* notes 98–112 and accompanying text (discussing bias crime data collection).

90. *See* JACOBS & POTTER, *supra* note 57, at 92 ("[O]nce these laws are on the books, police and prosecutors must decide how to enforce them."); LEVIN & MCDEVITT, *supra* note 1, at 179 (explaining that prosecutors must decide how offenders will be charged when bias is the suspected motivation); *id.* at 194 ("For such laws to be constructive ... prosecutors must effectively charge defendants ...."); Ferry, *supra* note 1, at 135 (noting that bias crime statutes are one of the main sources from which police derive their working definition of "hate crime"); Jeannine Bell, Note, *Policing Hatred: Police Bias Units and the Construction of Hate Crime*, 2 MICH. J. RACE & L. 421, 423 (1997) ("As is the case in most other crimes ... it is the police who are responsible for investigating and later identifying and classifying bias crimes.").

Because they constitute the primary level of contact between the public and justice system, police have tremendous discretion over how to maintain order under existing laws. *See* Robert E. Worden, *Situational and Attitudinal Explanations of Police Behavior*, 23 L. & SOC'Y REV. 667, 672–75 (1989). As one commentator has noted, "[b]ecause their day-to-day jobs are characterized by a high degree of discretion and autonomy in organizational activities, [police officers] can determine the amount and quality of benefits and sanctions to be dispensed to the public." Bell, *supra*, at 449 (citing MICHAEL LIPSKY, STREET-LEVEL BUREAUCRACY 13 (1980)). If they so choose, police often have the power to reduce bias crimes laws to virtual political gestures by choosing not to enforce them. *See* Samuel Walker & Charles M. Katz, *Less than Meets the Eyes: Police Department Bias-Crime Units*, 14 AM. J. POLICE 29, 32 (1995).

91. *See* Bell, *supra* note 90, at 451 ("Legislatures delegate discretion to the police through ambiguity in the law.").

92. *See supra* text accompanying notes 8–13.

93. *See* JAMES GAROFALO & SUSAN E. MARTIN, NAT'L INSTITUTE OF JUSTICE, U.S. DEPT. OF JUSTICE, BIAS-MOTIVATED CRIMES: THEIR CHARACTERISTICS AND THE

to identify and prove,[94] police working with limited resources may be reluctant to focus investigations on the bias-related aspects of a crime to the detriment of a crime's other aspects.[95] This is not to suggest that North Carolina's law enforcement has shown conscious unwillingness to enforce the ethnic intimidation and penalty-enhancement statutes. To the contrary, in a commentary to police officers on the penalty-enhancement provision for bias crimes, Ralph B. Strickland of the North Carolina Justice Academy stated, "[b]elieve me, the satisfaction of raising a misdemeanor to a felony in this particular type of case is well worth the effort on your part."[96] At the same time, however, he emphasized that enforcement of this law is not an easy task. He advised that officers discuss with prosecutors the difficulties of proving motive and warned that these difficulties require more detailed prosecution.[97] With a clarified bias-motivation element in both the penalty-enhancement and ethnic intimidation statutes, officers seeking to enforce either provision would at least have a better understanding of which motive to investigate and the relationship of that motive to the crime's causation. The redrafting should therefore eliminate at least some of the police discretion that stems from statutory ambiguity.

In addition, more frequent investigation may lead to increased documentation and reporting of these incidents for statistical purposes.[98] In 1990, Congress passed the Federal Hate Crimes

---

LAW ENFORCEMENT RESPONSE 49 (1993) (describing the problem of statutory ambiguity in police enforcement of bias crimes laws); Bell, *supra* note 90, at 453 (noting that police discretion creates "legitimate cause for concern about the effective enforcement of bias crime laws").

94. *See* James Garofalo & Susan E. Martin, *The Law Enforcement Response to Bias-Motivated Crimes*, *in* BIAS CRIME: AMERICAN LAW ENFORCEMENT AND LEGAL RESPONSES, *supra* note 1, at 64, 70 (noting that there are many difficult factors involved in a decision to classify a crime as a bias crime); Staff Project, *supra* note 2, at 59 (citing arguments that, in the hate crimes context, an offender's subjective mental state is inherently difficult to prove); Bell, *supra* note 90, at 423 ("Enforcing bias crime legislation would be much easier if identifying bias crime were like identifying homicide.").

95. *See* Bell, *supra* note 90, at 452 (noting that "the logic of efficiency supports non-enforcement when limited resources are allocated to conduct considered more deserving of official action").

96. Ralph B. Strickland, Jr., *Just Another Statute at Law: Commentary on North Carolina General Statutes of Interest to the Law Enforcement Community*, Mar. 1996, (visited May 1, 2000) <http://www.jus.state.nc.us./NCJA/stmart95.htm.>

97. *See id.*

98. *See* Marc Lieberman et al., *The Case for Hate Crime Legislation*, ARIZ. ATT'Y, Mar. 1996, at 14, 16 (noting that "many police agencies never investigate whether crimes are perpetrated for discriminatory reasons"); *see also* Mark Hansen, *Curbing Hate Crimes*, A.B.A. J., Apr. 1996, at 104, 104 (citing a study showing that centralized data-collection is hindered because police misclassify a large percentage of crimes that should be considered

Statistics Act (the "Act"),[99] which required the United States Attorney General to collect and report information from state and local agencies on crimes motivated by race, religion, sexual orientation, or ethnicity.[100] In general, its purpose was to create a better basis for understanding the scope of bias crimes occurring throughout the United States and to provide local agencies with information useful in reducing these crimes.[101] State and local compliance with such data collection is encouraged but not mandatory under the Act.[102] Many states, however, have enacted statutes requiring agencies to report bias-related criminal activities to a central repository for the purpose of cooperating with the Act.[103] North Carolina has no such statutory reporting requirement, but since 1992, the North Carolina Department of Justice Division of Criminal Information (DCI) has encouraged state and local agencies to report incidents identified as potential hate crimes and has provided these agencies with forms, statistical analysis, and other reporting assistance.[104]

Widespread compilation of data on hate crimes can greatly strengthen a state's efforts to reduce their incidence.[105] The U.S.

---

bias crimes); Kristine Olson et al., *The Government and the Community: A Coordinated Response to Hate Crime in America*, 45 FED. LAW. 47, 47 (Oct. 1998) ("The collection of . . . data is only as good as the ability of a given jurisdiction to identify . . . bias motivated crime . . . .").

99. Pub. L. No. 101-275, 104 Stat. 140 (codified in part at 28 U.S.C.A. § 534 (1993 & Supp. 2000)).

100. *See id.*; *see also* Andrew M. Gilbert & Eric D. Marchand, Note, *Splitting the Atom or Splitting Hairs—The Hate Crimes Prevention Act of 1999*, 30 ST. MARY'S L.J. 931, 953 (1999) (describing the Act).

101. *See* WANG, *supra* note 2, § 2.05, at 2-34.

102. *See* POLICYMAKER'S GUIDE, *supra* note 3, at 5; Gilbert & Marchand, *supra* note 100, at 956; Maroney, *supra* note 7, at 594.

103. *See, e.g.*, FLA. STAT. ANN. § 877.19 (West 1994 & Supp. 2000) (requiring police departments to report monthly); OR. REV. STAT. § 181.550 (1997) (mandating annual reports); *see also* POLICYMAKER'S GUIDE, *supra* note 3, at 6 (noting that by 1997, "19 states had enacted statutes that mandated hate crime data collection").

104. *See* NORTH CAROLINA STATE BUREAU OF INVESTIGATION, HATE CRIME REPORTING 1998, 1 (1999) [hereinafter HATE CRIME REPORTING].

105. *See* Coldren, *supra* note 2, at 167, 169–70 (arguing that "collection, analysis, and dissemination of data on bias crime[s]" is one of the "five major areas in which the state government can provide needed leadership in the response to bias crime"); John P. Cook, *Collection and Analysis of Hate Crime Activities*, *in* BIAS CRIME: AMERICAN LAW ENFORCEMENT AND LEGAL RESPONSES, *supra* note 1, at 143, 144 (noting the value to the community in collecting bias crime data); William A. Marovitz, *Hate or Bias Crime Legislation*, *in* BIAS CRIME: AMERICAN LAW ENFORCEMENT AND LEGAL RESPONSES, *supra* note 1, at 48, 52 (stating that reporting is vital because "[t]he first step in addressing hate crimes is to know the magnitude of the problem"); Gilbert & Marchand, *supra* note 100, at 986 ("[B]etter reporting of hate crimes will increase the ability to enforce hate

Department of Justice has stated that standardized reporting enables law enforcement to "analyze patterns and trends of bias crime," encourages otherwise reluctant victims to report the crimes, shows communities that law enforcement is "committed to vigorously pursuing the offenders," and "sharpens community awareness of bias crime."[106] Throughout the states, however, only a small percentage of bias crimes are believed to be reported to central repositories.[107] North Carolina's DCI notes that a limited number of North Carolina agencies have chosen to participate in centralized reporting, and, among those, only a few have reported more than one hate crime.[108] While the low level of reporting may indicate to some that few bias crimes are actually occurring, DCI suggests that North Carolina is no exception to the general under-reporting problem. DCI states that "this limited participation is not sufficient to allow valid statewide measures of the volume and types of crimes motivated by hate ...."[109] Although increased investigation cannot cause victims to report bias crimes in the first place,[110] the police may be more willing to investigate for evidence of bias if they have a better sense of the types of bias-motivation that are punishable by law.[111] The investigation, in turn, may generate more bias crime data that can be reported for statistical purposes.[112]

---

crime laws ...."); *see also* ALTSCHILLER, *supra* note 4, at 16 (observing that systematic reporting gives law enforcement officials "the ability to ... discern patterns and forecast possible racial and ethnic tensions in different localities").

106. OFFICE OF JUSTICE PROGRAMS, U.S. DEP'T OF JUSTICE, NATIONAL BIAS CRIMES TRAINING FOR LAW ENFORCEMENT AND VICTIM ASSISTANCE PROFESSIONALS: A GUIDE FOR TRAINING INSTRUCTORS 213 (1995).

107. *See* POLICYMAKER'S GUIDE, *supra* note 3, at xii ("[B]ias-motivated crimes typically are underreported by both law enforcement agencies *and* victims."); Hansen, *supra* note 98, at 104 (noting a study showing that 75% of hate crimes go unreported); Edward M. Kennedy, *Hate Crimes: The Unfinished Business of America*, BOSTON B.J., Jan./Feb. 2000, at 6 ("[U]nder-reporting is a serious impediment to learning the true dimensions of the problem."); Lieberman, *supra* note 98, at 16 ("Authorities believe only five percent of hate crimes committed are actually reported."); *see also* TEN WAYS, supra note 57, at 23 (explaining that hate crimes laws are "flawed by reporting inaccuracies").

108. *See* HATE CRIME REPORTING, *supra* note 104, at 1. Between 1992 and 1994, only a negligible number of agencies reported any bias crimes. Between 1995 and 1998, between 17 and 83 agencies reported bias crimes. *See id.*

109. *Id.*

110. *See* POLICYMAKER'S GUIDE, *supra* note 3, at xii (listing many reasons victims fail to inform the authorities about bias crimes); Lawrence, *supra* note 7, at 148 (stating that many organizations have found that most hate crime victims "do not report incidents at all"); Olson, *supra* note 98, at 47 (observing that uncertainty about the law enforcement response prevents many bias crime victims from contacting the police).

111. *See* POLICYMAKER'S GUIDE, *supra* note 3, at 6 ("[H]ate crime reporting is complicated by the need to determine offender motivation.").

112. *See* Hansen, *supra* note 98, at 104; Lieberman et al., *supra* note 98, at 16; Olson et

Finally, redrafting the causation and bias-motivation language in the ethnic intimidation and penalty-enhancement statutes could also pave the way for other amendments to North Carolina's bias crimes laws. As discussed above, members of the North Carolina General Assembly proposed numerous amendments to the penalty-enhancement statute and related statutes in the original House Bill 884 and its companion Senate Bill 814.[113] The potential they created for dramatically expanding the applicability of the ethnic intimidation and penalty-enhancement statutes may well have been the committee's impetus for adding the requirement of "the offender's generalized hatred."[114] If, in a future attempt to expand these laws, the legislators redraft the "because of" language as suggested above, they will have a framework within which to address other needed statutory changes.[115]

For example, House Bill 884 included an amendment that would have placed gender among the protected categories.[116] Scholars, policy organizations, and other groups have advocated for this change throughout the states generally,[117] and many states have already added gender as a protected category.[118] Reluctance in other states to add gender has frequently been caused by disputes over what it means to commit a crime "because of . . . gender."[119] Some hesitate, on the one hand, to classify crimes such as domestic violence, rape, and sexual assault as "bias-motivated," even though the victim most often would not be chosen but for her gender.[120] Contrary to the evidence, many argue that including gender would convert bias

---

al., *supra* note 98, at 47.

113. *See supra* note 48–53 and accompanying text (discussing the original Bill).

114. *See supra* notes 54–57 and accompanying text (discussing the generalized hatred addition to the original Bill).

115. *See supra* pp. 2018–19.

116. *See* H.R. 884, 1999 Leg., Reg. Sess. (N.C. 1999).

117. *See, e.g.*, Lawrence, *supra* note 7, at 145 ("Gender-motivated violence . . . [is] as much [a] bias crime[ ] as racially- and ethnically-motivated crimes."); Anti-Defamation League, *Hate Crimes: Laws: ADL Approach to Hate Crime Legislation: Penalty Enhancement and the Inclusion of Gender* (visited Sept. 1, 2000) <http://www.adl.org/frames/front_99hatecrime.html> [hereinafter *Gender Inclusion*] (strongly advocating the inclusion of gender among the protected groups and acknowledging its inclusion the model ADL legislation).

118. *See ADL State Provisions*, *supra* note 2, at <http://www.adl.org/frames/front_99hatecrime.html>; *Gender Inclusion*, *supra* note 117, at <http://www.adl.org/frames/front_99hatecrime.html>.

119. Kristin L. Taylor, Note, *Treating Male Violence Against Women as a Bias Crime*, 76 B. U. L. REV. 575, 598–99 (1996).

120. *See* Katherine Chen, Note, *Including Gender in Bias Crime Statutes: Feminist and Evolutionary Perspectives*, 3 WM. & MARY J. WOMEN & L. 277, 316–30 (1997).

crimes statutes into little more than penalty-enhancement for sexual offenses against women.[121] Others argue that violent acts targeting persons of a certain gender (women in particular) are just as bias-motivated as other bias crimes, and that legislatures should be undeterred by arguments that bias is more difficult to prove due to the complexity of crimes against women.[122]

If, however, a bias crime statute is re-drafted to approximate the revisions suggested above, crime will have to be committed out of hatred, animus, or intent to harm not necessarily the victim herself, but the victim's gender generally.[123] This added clarity may allay fear that, if gender is included, every sex-related crime would fall under the statute.[124] Those who hesitate to include gender because the purpose of the statute is ambiguous may be more willing to do so if the scope is narrowed to "animus."

The original 1999 House Bill 884 ambitiously sought to expand North Carolina's ethnic intimidation and sentence-enhancement statutes to protect more groups, cover more crimes, and penalize offenders more severely.[125] When it added the "hatred" requirement to the causation language of these two statutes, the House committee may have been attempting to both reign in the potential impact of these changes while at the same time supporting the Bill's goals. This Note has argued that the "hatred" language was too narrow to do both, has proposed an alternative approach, and has suggested that

---

121. *See* Julie Goldscheid, *Gender-Motivated Violence: Developing a Meaningful Paradigm for Civil Rights Enforcement*, 22 HARV. WOMEN'S L.J. 123, 158 (1999) ("The prevalence and pervasiveness of crimes such as domestic violence and sexual assault, as well as biased attitudes surrounding those crimes, produce questions about which of those crimes should be treated as acts of discrimination."). It should be noted that in states that have included gender as a protected characteristic, "there has not been an overwhelming number of gender-based crimes reported as an extension of domestic violence and rape cases." *Gender Inclusion*, *supra* note 117, at <http://www.adl.org/frames/front_99hatecrime.html>.

122. *See, e.g.*, Goldscheid, *supra* note 121, at 140 (noting that in cases of bias crimes based on gender, state courts have managed to find ample evidence of animus toward gender); Chen, *supra* note 120, at 318–24 (arguing that difficulty in proving gender bias "should not be a sufficient reason to exclude gender"); *Gender Inclusion*, *supra* note 117, at <http://www.adl.org/frames/front_99hatecrime.html> (stating that the Anti-Defamation League added gender to its model legislation after concluding that "gender-based hate crimes could not be easily distinguished from other forms of hate motivated violence").

123. *See supra* pp. 2018–19.

124. *See supra* notes 121 and accompanying text.

125. *See supra* text accompanying notes 48–53 (discussing the intended effect of expanding the scope of bias crime legislation).

this approach may help improve the enforceability and effectiveness of these two laws, thereby facilitating further improvements to these and other North Carolina bias crime provisions.

ANN M. ANDERSON

Answering the Call: Wake County's Commitment to Diversity in Education

When students in North Carolina's elementary and secondary public schools returned to school this fall, they had more to catch up on than their summer vacations; they had to get to know their new classmates. In successive decisions handed down by the District Court for the Western District of North Carolina and the United States Court of Appeals for the Fourth Circuit, public school boards were instructed that they may no longer consider race when formulating their student assignment plans.[1] After decades of court-ordered racial desegregation, school administrators—recently released from desegregation decrees—must implement student assignment plans without considering race. For those schools that elected to maintain racially diverse student bodies, these decisions undermine their discretionary powers over the operation of their schools. The decisions challenge school boards to prove their commitment to diversity in education. Wake County answered this challenge by developing a student assignment plan designed to ensure a diverse education without resorting to racial classifications. Wake County's two-tiered assignment plan incorporates family income and academic performance as a means to maintain a diverse student body.[2]

This Note first explains the legal impetus for Wake County's diversity-focused student assignment plan, including the removal of race as a proper consideration in the educational context.[3] The Note then describes Wake County's new diversity-focused student

---

1. *See* Eisenberg v. Montgomery County Pub. Sch., 197 F.3d 123, 133 (4th Cir. 1999), *cert. denied*, 120 S. Ct. 1420 (2000); Tuttle v. Arlington County Sch. Bd., 195 F.3d 698, 705–07 (4th Cir. 1999), *cert. dismissed*, 120 S. Ct. 1552 (2000); Capacchione v. Charlotte-Mecklenburg Sch., 57 F. Supp. 2d 228, 293 (W.D.N.C. 1999), *stay granted sub nom.* Belk v. Charlotte-Mecklenburg Bd. of Educ., No. 99-2389(L), 1999 U.S. App. LEXIS 34574, at *2–3 (4th Cir. Dec. 30, 1999). For an in-depth critique of these cases, see John Charles Boger, *Willful Colorblindness: The New Racial Piety and the Resegregation of Public Schools*, 78 N.C. L. REV. 1719, 1744–1781 (2000).

2. *See* Todd Silberman, *School Plan Adopted*, NEWS & OBSERVER (Raleigh, N.C.), Jan. 11, 2000, at 1A; Tim Simmons, *School Plan Signals New Chapter in Integration*, NEWS & OBSERVER (Raleigh, N.C.), Jan. 16, 2000, at 1A [hereinafter Simmons, *School Plan Signals*]; *see also infra* notes 53–61 and accompanying text (discussing Wake County's new plan).

3. *See infra* notes 9–47 and accompanying text.

assignment plan, which is designed to overcome these barriers.[4] Next, the Note discusses the standards a reviewing court could apply to Wake County's new plan if its constitutionality was contested and analyzes the plan in light of each possible standard.[5] Finally, this Note argues that a reviewing court should limit its judicial inquiry in this area to rational basis review.[6]

---

4. *See infra* notes 48–61 and accompanying text.

5. *See infra* notes 62–108 and accompanying text.

6. *See infra* notes 109–58 and accompanying text. In order to understand why courts engage in judicial scrutiny of student assignment plans, an overview of the history of desegregation in American schools is appropriate. A thorough discussion of the topic, however, is beyond the scope of this Note, which focuses on the aftermath and implications of forced integration facing current school systems. For a review of the desegregation dilemma's evolution, see 15 AM. JUR. 2D *Civil Rights* §§ 61–83 (1976 & Supp. 1999); DAVID J. ARMOR, FORCED JUSTICE: SCHOOL DESEGREGATION AND THE LAW 17–58 (1995); see also GARY ORFIELD & SUSAN E. EATON, DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF *BROWN V. BOARD OF EDUCATION* xxi–xxiii (1996) (providing a caption of the leading decisions on desegregation).

In 1896, *Plessy v. Ferguson*'s "separate but equal" rationale provided American society with a judicial grant to exploit and discriminate against African-Americans that lasted for six decades. 163 U.S. 537, 550–51 (1896), *overruled by* Brown v. Board of Educ. ("Brown I"), 347 U.S. 483, 494–95 (1954). Finally recognizing that separate is "inherently unequal," the Supreme Court, in 1954, decided the landmark case, *Brown v. Board of Education*, which held that, "in the field of public education . . . 'separate but equal' has no place." *Brown I*, 347 U.S. at 495. Although *Brown I* articulated that segregation in public schools violates the Equal Protection Clause of the Constitution, it did not provide a remedy. The Court attempted to fill the void left by *Brown I* the following term when it decided *Brown v. Board of Education ("Brown II")*, 349 U.S. 294 (1955). *Brown II*'s holding that school boards had to desegregate "with all deliberate speed," *id.* at 301, caused more confusion than clarity. *See, e.g.*, Briggs v. Elliott, 132 F. Supp. 776, 777 (E.D.S.C. 1955) (finding that *Brown I* did not require integration, but rather prohibited state-imposed segregation).

By the time the Court decided *Green v. County School Board*, 391 U.S. 430 (1968), little progress had been made in dismantling dual school systems. *See* 15 AM. JUR. 2D *Civil Rights* § 64 (1976 & Supp. 1999); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 13–14 (1971) (noting the difficulties faced by courts and society in light of *Brown I*). In *Green*, the Supreme Court announced for the first time that school districts had an affirmative duty to end dual school systems. *See* ARMOR, *supra*, at 28 ("[*Green*] was the first decision of the Supreme Court that declared an affirmative duty to desegregate and, more importantly, that defined desegregation not as ending compulsory separation but rather as the abolition of white and black schools."). In *Green*, the Court struck down a school board's " 'freedom-of-choice' plan" because it did not go far enough to dismantle the "well-entrenched dual system[]." 391 U.S. at 437. The Court reasoned that the " 'freedom-of-choice' plan" was just one step toward dismantling segregation within student assignments and that the mandates of *Brown I* extend to the maintenance of a " 'racially nondiscriminatory school system.' " *Id.* at 435 (quoting *Brown II*, 349 U.S. at 301). Because racial identification in this case extended to "every facet of school operations—faculty, staff, transportation, extracurricular activities and facilities," *Green*, 391 U.S. at 435, the Court ordered the school board to develop a plan "that promises realistically to work, and promises realistically to work *now*." *Id.* at 439. Thus, *Green* rejected *Brown II*'s cautious standard and imposed an affirmative duty on school boards

to integrate immediately. Courts now look to these "*Green* factors"—faculty, staff, transportation, extracurricular activities, and facilities—to determine whether a school system has attained unitary status. *See* Missouri v. Jenkins, 515 U.S. 70, 88 (1995); Freeman v. Pitts, 503 U.S. 467, 492–93 (1992); Milliken v. Bradley, 433 U.S. 267, 283 (1977); United States v. City of Yonkers, 197 F.3d 41, 50 (2d Cir. 1999); United States v. Georgia, 171 F.3d 1333, 1338 (11th Cir. 1999); Wessmann v. Gittens, 160 F.3d 790, 801 (1st Cir. 1998); Coalition to Save Our Children v. State Bd. of Educ., 90 F.3d 752, 760 (3d Cir. 1996); Dowell v. Board of Educ., 8 F.3d 1501, 1514 (10th Cir. 1993); *Capacchione*, 57 F. Supp. 2d at 233.

Notwithstanding the plain language of *Green*, school authorities and courts continued to struggle with *Brown I*'s mandate. *See Swann*, 402 U.S. at 14. In *Swann*, the Supreme Court redefined the requirements of *Brown I* and established guidelines for courts and school authorities to follow when implementing those requirements. *See id.* at 6, 14. The unanimous Court's analysis began with a reminder that the purpose of *Brown I* was to eliminate the constitutional violations caused by state-imposed segregation. *See id.* at 6. The main issue confronting the Court, therefore, was how *Brown I* should apply to a previously segregated school system.

According to the *Swann* Court, the goal of *Brown I* was to create a "unitary" school system, not simply an integrated student body. *See id.* at 15 (stating that the *Brown* decisions were the basis of the Court's holding in *Green*, which charged school authorities with the affirmative duty to create a unitary school system). The Court noted that the schools are responsible for integrating the entire system. *See id.* at 18–21. Thus, in addition to student assignment, school authorities must work to eliminate racial distinctions with regard to the other five *Green* factors. *See id.* at 18; *see also Green*, 391 U.S. at 435 (listing what are now known as the *Green* factors). Although the Court provided guidelines with respect to all six of these factors, *see Swann*, 402 U.S. at 18, 20 (suggesting that with regard to transportation, staff, and extracurricular activities, eliminating invidious racial distinctions may be sufficient, but that racial differences in faculty assignment, school construction and abandonment, require specific commands), it focused on student assignment. *See id.* at 22 (noting that the central issue is student assignment). In analyzing the desegregation plan imposed on the school board by the district court, *see Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 311 F. Supp. 265, 267–70 (W.D.N.C. 1970) (enumerating the desegregation order adopted by the court after the school authorities failed, for nearly a year, to abide by a previous court order requiring the school board to adopt a plan), the Court determined that any remedial measure must be gauged by its reasonableness, effectiveness, and feasibility, but acknowledged that there are no precise guidelines. *See Swann*, 402 U.S. at 28, 31. The Court recognized that a desegregation plan "may be administratively awkward, inconvenient, and even bizarre in some situations," but stated that such awkwardness may be necessary to remedy the vestiges of past discrimination and eliminate the dual system. *Id.* at 28. With these principles in mind, the Court found the district court's order, which provided for the extensive use of busing, to be reasonable and effective as a more realistic assurance of desegregation than returning to a neighborhood school plan. *See id.* at 30; ARMOR, *supra*, at 12, 29–32 (discussing Charlotte's massive cross-county busing plan and the resulting widespread use of this remedy in other desegregation plans). The Court then ordered Charlotte-Mecklenburg to dismantle its dual system and remanded the case to the federal district court with express directions to retain jurisdiction over Charlotte-Mecklenburg Schools until the school system is deemed "unitary." *See Swann*, 402 U.S. at 32; *see also Capacchione*, 57 F. Supp. 2d at 232 (stating that although "[t]he usurpation of a local school system's student assignment policies by a federal court was an extraordinary event[,] . . . this Court's exercise of its equity power was deemed necessary to eliminate the conditions and redress the injuries caused by the 'dual school system' ").

Swann addressed not only the concerns of the Charlotte-Mecklenburg Schools,

Wake County's student assignment plan is unique because it does not rely on explicit racial classifications. Instead, it integrates family income and student achievement into the assignment process. The avoidance of racial classifications is necessary because racial classifications are generally subjected to strict judicial scrutiny;[7] several student assignment plans integrating racial classifications have been invalidated under that demanding test.[8] The court decisions that invalidated race-conscious student assignment plans mandate a colorblind approach to student assignments in sharp contrast with the long-standing deference granted to local authorities in the formulation of education policy. To understand the legal impetus for

---

but also answered most of the lingering questions from *Brown I*. *See* ARMOR, *supra*, at 29 ("If *Brown II* was notable for its ambiguity and lack of detail, *Swann* was exceptional for its clarity and specificity, which ended much of the legal confusion at that time."). *Swann* did not, however, end the resistance to desegregation. In *McDaniel v. Barresi*, 402 U.S. 39 (1971), decided the same day as *Swann*, the Court relied upon its decision in *Swann* to uphold a voluntary elementary school desegregation plan. *See id.* at 41. *McDaniel* involved an equal protection challenge to a student assignment plan designed "to achieve greater racial balance" by manipulating attendance zones. *Id.* at 40. Plaintiffs, parents of white children attending the elementary schools, argued that the plan was unconstitutional because it " 'treat[ed] students differently because of their race.' " *Id.* at 41 (quoting Baressi v. Brown, 175 S.E.2d 649, 652 (Ga. 1970)). The Supreme Court of Georgia agreed. *See Baressi*, 175 S.E.2d at 652. On appeal, however, the United States Supreme Court held that local school boards may, and are "almost invariably," required to take race into consideration in conformity with their affirmative duty to dismantle dual school systems. *McDaniel*, 402 U.S. at 41.

In direct opposition to forced integration, the North Carolina General Assembly passed, during the early stages of the *Swann* litigation, a statute explicitly prohibiting the use of race-based classifications in busing and student assignment for the purpose of achieving racial balance. *See* Anti-Busing Law, N.C. GEN. STAT. § 115-176.1 (Supp. 1969) (repealed 1981); *see also* North Carolina State Bd. of Educ. v. Swann, 402 U.S. 43, 44 (1971) (noting that the General Assembly enacted the bill after the district court directed the Charlotte-Mecklenburg Schools to consider various means to effect desegregation). The Anti-Busing Law provided: "No student shall be assigned or compelled to attend any school on account of race . . . or for the purpose of creating a balance or ratio of race . . . . Involuntary bussing [sic] of students in contravention of this article is prohibited, and public funds shall not be used for any such bussing [sic]." § 115-176.1. In a unanimous decision, the Supreme Court struck down the statute as directly conflicting with the duty imposed by the district court in *Swann* to dismantle the dual system. *See North Carolina State Bd. of Educ.*, 402 U.S. at 45–46. Speaking for the Court, Justice Burger stated, "the statute exploits an apparently neutral form to control school assignment plans by directing that they be 'color blind'; that requirement . . . would render illusory the promise of *Brown* . . . . [R]ace [must] be considered in formulating a remedy." *Id.* at 45–46.

7. *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989).

8. *See, e.g.*, Eisenberg v. Montgomery County Pub. Sch., 197 F.3d 123, 133 (4th Cir. 1999), *cert. denied*, 197 F.3d 123 (2000); Tuttle v. Arlington County Sch. Bd., 195 F.3d 698, 707 (4th Cir. 1999), *cert. dismissed*, 120 S. Ct. 1552 (2000); *Wessmann*, 160 F.3d at 807–08; *Capacchione*, 57 F. Supp. 2d at 292. *But see* Hunter v. Regents of Univ. of Cal., 190 F.3d 1061, 1067 (9th Cir. 1999).

Wake County's plan, the movement toward applying strict scrutiny to all racial classifications and the more recent cases applying strict scrutiny to race-conscious student assignment plans must first be discussed.

The movement toward strict scrutiny analysis of all race-based classifications began with Justice Powell's opinion in *Regents of the University of California v. Bakke*.[9] In a split decision confronting the constitutionality of the University of California at Davis Medical School's minority set-aside admissions policy, Justice Powell stated that "[r]acial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination."[10] Justice Powell, however, failed to muster any support for the proposition that all race-based classifications must be subjected to strict scrutiny—four justices agreed that the appropriate constitutional standard was an intermediate level of scrutiny like that applied to gender-based distinctions,[11] while another group of four failed to reach the constitutional issue.[12]

Eleven years later, in *City of Richmond v. J.A. Croson Co.*,[13] the Court held that strict scrutiny is the appropriate standard of review for all race-based classifications.[14] In *Croson*, the Court struck down a government-imposed program requiring contractors on city projects to subcontract at least thirty percent of the contracts to minority business enterprises.[15] The Court reasoned that rather than attempting to remedy the effects of past discrimination specifically within the Richmond construction industry, the plan was based on "an amorphous claim" of past discrimination in the construction

9. 438 U.S. 265, 291 (1978) (analyzing the University of California at Davis Medical School's admissions policy, which set aside 16 out of 100 seats for consideration of minority applications only and left the remaining 84 seats open to members of any race).

10. *Id.* at 291.

11. *See id.* at 361–62 (Brennan, J., joined by White, Marshall, & Blackmun, JJ., concurring in the judgment in part and dissenting in part).

12. *See id.* at 421 (Stevens, J., joined by Burger, C.J., Stewart, & Rehnquist, JJ., concurring in the judgment in part and dissenting in part). This group refused to decide the issue on constitutional grounds because the plan could be invalidated on statutory grounds as violating Title VI. *See id.* at 412–21 (Stevens, J., joined by Burger, C.J., Stewart, & Rehnquist, JJ., concurring in the judgment in part and dissenting in part).

13. 488 U.S. 469 (1989).

14. *See id.* at 493 (plurality opinion of O'Connor, J., joined by Rehnquist, C.J., White, & Kennedy, JJ.); *id.* at 520 (Scalia, J., concurring in the judgment).

15. *See Croson*, 488 U.S. at 511. According to the plan, a minority-owned business enterprise is " '[a] business at least fifty-one (51) percent of which is owned and controlled . . . by minority group members.' " *Id.* at 478 (quoting RICHMOND, VA., CITY CODE § 12-23 (1985)). The plan defined "minority group members" as African-American, Spanish-speaking, Asian American, Indian, Eskimo, or Aleut U.S. citizens. *See id.*

industry generally.[16] Absent evidence of past discrimination, Richmond could not show a compelling need for even the benign race-conscious measures.[17] Further, Richmond was unable to show that its plan was narrowly tailored to its alleged remedial objective because the city failed to consider race-neutral means to increase minority participation in the industry and because the thirty percent quota amounted only to racial balancing rather than a remedy for past discrimination.[18] After *Croson*, only attempts to remedy specific instances of past discrimination, such as a city's own historic discriminatory practices, rather than general discrimination in an industry, constitute compelling governmental interests sufficient, which if narrowly tailored, will withstand strict scrutiny.

In 1995, the Supreme Court extended *Croson's* strict scrutiny analysis to acts of the federal government, including the limited category of compelling interests.[19] In *Adarand Constructors, Inc. v. Pena*,[20] the Court examined two provisions of the Small Business Act,[21] which provided financial incentives to prime government contractors to award subcontracts to minority business enterprises.[22] In light of *Croson*, the Court determined that all racial classifications imposed by a government actor, whether federal, state, or local, should be reviewed under a strict scrutiny standard.[23] Together *Adarand* and *Croson* demonstrate that any race-conscious governmental act, regardless of the actor or purpose, will be subject to strict scrutiny.[24]

---

16. *Id.* at 499 (plurality opinion of O'Connor, J., joined by Rehnquist, C.J., White, & Kennedy, JJ.).

17. *See id.* at 510–11 (plurality opinion of O'Connor, J., joined by Rehnquist, C.J., White, & Kennedy, JJ.).

18. *See id.* at 507–08 (plurality opinion of O'Connor, J., joined by Rehnquist, C.J., White, & Kennedy, JJ.) (noting that "it is almost impossible to assess whether the Richmond plan is narrowly tailored to remedy prior discrimination since it is not linked to identified discrimination in any way" as "there does not appear to have been any consideration of the use of race-neutral means to increase minority business participation in city contracting").

19. *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995). "[W]e hold today that all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests." *Id.*

20. 515 U.S. 200 (1995).

21. 15 U.S.C. §§ 631–56 (1994). The two provisions at issue in *Adarand* were 15 U.S.C. §§ 637(d)(2)–(3) (1994).

22. *See Adarand*, 515 U.S. at 205–10.

23. *See id.* at 227.

24. For an overview of these cases, see Michael A.B. Turner, Comment, *Should Race Be a Factor in Law School Admissions? A Study of* Hopwood v. Texas *and How the Equal*

This principle was evident in the three school desegregation cases decided last fall within the Fourth Circuit. The first of these cases was *Capacchione v. Charlotte-Mecklenburg Schools*,[25] in which a federal district court enjoined the Charlotte-Mecklenburg School District (CMS) from using any classifications "that deny students an equal footing based on race,"[26] including the use of mandatory busing and race-based admissions.[27] Specifically, the court held that the use of race in the school district's magnet school admissions policy failed a strict scrutiny analysis[28] and thus was unconstitutional. The court decided that the governmental interest at issue was compelling because CMS was acting under a court order when it implemented the plan.[29] Nevertheless, the court reasoned that the admissions policy's explicit use of race was not narrowly tailored to further the

---

Protection Clause Makes Race-Based Classifications Unconstitutional, 27 U. BALT. L. REV. 395, 414–21 (1998); Russell N. Watterson, Jr., Note, Adarand Constructors v. Pena: *Madisonian Theory as a Justification for Lesser Constitutional Scrutiny of Federal Race-Conscious Legislation*, 1996 BYU L. REV. 301, 306–11 (1996).

25. 57 F. Supp. 2d 228 (W.D.N.C. 1999), *stay granted sub nom.* Belk v. Charlotte-Mecklenburg Bd. of Educ., No. 99-2389(L), 1999 U.S. App. LEXIS 34574 (4th Cir. Dec. 30, 1999). *Capacchione* represents the fourth challenge to the duty imposed by *Swann* on the Charlotte-Mecklenburg Board of Education to create a unitary school district. *See* Moore v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 47, 48 (1971) (per curiam) (challenging *Swann* based on North Carolina's anti-busing statute, N.C. GEN. STAT. § 115-176.1 (Supp. 1969) (repealed 1981), which the Supreme Court deemed unconstitutional, *see* N.C. State Bd. of Educ. v. Swann, 402 U.S. 43, 46 (1971)); Cuthbertson v. Charlotte-Mecklenburg Bd. of Educ., 535 F.2d 1249 (4th Cir. 1976) (unpublished affirmance); Martin v. Charlotte-Mecklenburg Bd. of Educ., 475 F. Supp. 1318, 1347 (W.D.N.C. 1999) (refusing to grant plaintiffs injunctive relief enjoining the school board from using race as a factor in the desegregation plan). In *Cappachione*, the court held that CMS had outgrown its judicial babysitter by creating a unitary system with regard to all six of the *Green* factors—student assignment, faculty, staff, transportation, extracurricular activities, and facilities. *See Capacchione*, 57 F. Supp. 2d at 242–84. The court blended two distinct issues, simultaneously answering whether the school system had achieved unitary status and how the school system may assign students after this declaration. For a discussion of the unitary status issue in *Cappachione*, see Boger, *supra* note 1, at 1745–49.

26. *Cappachione*, 57 F. Supp. 2d at 294. Specifically, the court prohibited Charlotte-Mecklenburg from "assigning children to schools or allocating educational opportunities and benefits through race-based lotteries, preferences, set-asides, or other means that deny students an equal footing based on race." *Id.*

27. Ironically, the court had previously ordered the District to implement these measures in order to dismantle their dual system. *See id.*; *see also* David L. Marcus, *After the Buses Stop: Virtual Resegregation?*, U.S. NEWS & WORLD REPORT, Dec. 13, 1999, at 38 ("The [*Capacchione*] decision marked the end of busing in the first city to use it three decades ago to integrate schools, and it left Charlotte officials scrambling to find other ways to racially mix schools."); *supra* note 25 (discussing the *Capacchione* court's holding that the Charlotte-Mecklenburg district had achieved unitary status).

28. *See supra* notes 9–24 and accompanying text (discussing the evolution of strict scrutiny analysis in the context of race-based classifications).

29. *See Capacchione*, 57 F. Supp. 2d at 288–89.

relevant governmental interest.[30] The court found that the magnet

30. *See id.* at 287–90. Regardless of whether racial diversity is a compelling interest, the court found that CMS's magnet school admissions policy was not narrowly tailored. *See Capacchione*, 57 F. Supp. 2d at 290. First, the court found that the use of the 40:60 ratio was unnecessary in light of *Swann* because it established an unreasonably prohibitive ratio, the ratio was more race conscious than procedures suggested in *Swann*, and rather than focusing on less invidious means, such as attendance zones, the magnet program's primary focus was on the "individual students' racial identit[y]." *Id.* at 289. Second, the court noted the inflexibility and impracticability of the set-aside procedure. *See id.* at 289–90. Not only did the procedure fail to address the practicability of achieving a 40:60 ratio in all of the schools, but it adhered to a rigid construction of this ratio. *See id.* For instance, if seats set-aside for racial minority students failed to fill up with racial minorities, the seat remained vacant even though the school had full waiting lists of non-racial minorities waiting to be admitted to the school. *See id.* at 289. The court quoted an excerpt from a letter written to the school's superintendent by Dr. Michael Stolee, who was appointed by the court to assist the District with the development of its desegregation plan. The letter stated that the 40:60 black to white student ratio should be sought, but " '[i]f one race were to be under-enrolled, *the other race should not be permitted to fill the vacant slots.*' " *Id.* at 287 (quoting the June 11, 1992 memo from Dr. Stolee to Dr. Murphy) (emphasis in original). According to the court, such harsh inflexibility was not narrowly tailored. *See id.* at 289–90. Finally, the court established that preferences for remedial purposes may only remain in effect until the effects of prior discrimination are corrected. *See id.* at 290. Because the CMS plan was established to function in perpetuity, it not only failed strict scrutiny, but "there [was] no reasonable basis for the rigid set-asides." *Id.*

In discussing CMS's asserted interests, the court accepted as a valid objective the school system's goal of remedying past discrimination because the plan was implemented while the District was still under court order to desegregate. *See id.* at 288–89. The court, however, deemed the school system's second asserted interest—the pursuit of racial diversity in the classroom—irrelevant because it accepted the first interest. *See id.* at 289. The court suggested, however, that diversity would not be a compelling interest. *See id.* In so doing, the court relied upon recent federal court decisions interpreting *Croson* and *Adarand*, which suggested that racial diversity could not be a compelling governmental interest. *See id.* (citing Lutheran Church–Mo. Synod v. F.C.C., 141 F.3d 344, 354 (D.C. Cir. 1998)); Wessmann v. Gittens, 160 F.3d 790, 795–800 (11th Cir. 1998); Hopwood v. Texas, 78 F.3d 932, 948 (5th Cir. 1996); Hayes v. North State Law Enforcement Officers Ass'n, 10 F.3d 207, 213 (4th Cir. 1993).

An analysis of whether diversity in public elementary and secondary education constitutes a compelling interest is beyond the scope of this Note. For an excellent discussion of the issues and arguments in support of finding a compelling interest, see Note, *The Constitutionality of Race-Conscious Admissions-Programs in Public Elementary and Secondary Schools*, 112 HARV. L. REV. 940, 948–55 (1999) [hereinafter *Race-Conscious Admissions*]; Joanna R. Zahler, Note, *Lessons in Humanity: Diversity as a Compelling State Interest in Public Education*, 40 B.C. L. REV. 995, 1013–39 (1999). Importantly, the Supreme Court has been silent on whether providing a diverse primary public education can be a compelling interest. *See* Tuttle v. Arlington County Sch. Bd., 195 F.3d 698, 705 (1999), *cert. denied*, 120 S. Ct. 1552 (2000); Zahler, *supra*, at 1013. In fact, a body of Supreme Court authority arguably leaves open the possibility that diversity constitutes a compelling interest. *See, e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 237 (1995) ("[W]e wish to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.' " (quoting Fullilove v. Klutznick, 448 U.S. 448, 519 (1980) (Marshall, J., concurring in the judgment)); *id.* at 258 (Stevens, J., dissenting) ("The proposition that fostering diversity may provide a sufficient interest to justify such a program is *not*

school's admissions policy was "inconsistent with the movement towards race neutrality envisioned by *Brown I*."[31]

A few weeks after the Western District Court of North Carolina decided *Capacchione*, the Fourth Circuit decided *Tuttle v. Arlington County School Board*[32] and *Eisenberg v. Montgomery County Public Schools*.[33] In both cases, the Fourth Circuit confronted explicit uses of race in student assignment plans for purposes other than to remedy the effects of past discrimination.[34] Although the court "assumed" that the promotion of racial and ethnic diversity could be a compelling interest,[35] it found that neither policy was narrowly tailored, and consequently enjoined both school systems from using race in this fashion.[36] While somewhat similar, the factual distinctions in *Tuttle* and *Eisenberg* expose the Fourth Circuit's perception of proper student assignment plans.

Tuttle involved a lottery for positions in an oversubscribed alternative kindergarten that considered a potential student's racial or ethnic background.[37] The court applied strict scrutiny because the

---

inconsistent with the Court's holding today . . . ."); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 511 n.1 (1989) (Stevens, J., concurring in part and concurring in the judgment) (suggesting that some race-based measures may have legitimate and beneficial purposes that should not be dismissed); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 286 (1986) (O'Connor, J., concurring in part and concurring in the judgment) ("[C]ertainly nothing the Court has said today necessarily forecloses the possibility that the Court will find other government interests . . . sufficiently 'important' or 'compelling' to sustain the use of affirmative action policies."); Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 314 (1978) (opinion of Powell, J.) ("[T]he interest in diversity is compelling in the context of a university's admissions program . . . ."); *see also* Zahler, *supra*, at 1013 & n.143 (noting that although the Court has not "squarely addressed" the issue it has left room for holding diversity to be a compelling interest in public education and citing Justice O'Connor's concurring opinion in *Wygant*). *But see Hopwood*, 78 F.3d at 944 ("Any consideration of race or ethnicity . . . for the purpose of achieving a diverse student body is not a compelling interest under the Fourteenth Amendment.").

31. *Cappachione*, 57 F. Supp. 2d at 290; *see also supra* note 6 (discussing *Brown* and its progeny).

32. 195 F.3d 698 (4th Cir. 1999), *cert. dismissed*, 120 S. Ct. 1552 (2000).

33. 197 F.3d 123 (4th Cir. 1999), *cert. denied*, 120 S. Ct. 1420 (2000).

34. *See Eisenberg*, 197 F.3d at 125; *Tuttle*, 195 F.3d at 700. While the Montgomery County school system in *Eisenberg* had never been under court order to desegregate, the Arlington County school system in *Tuttle* had been under such an order previously. The Fourth Circuit, however, had declared Arlington County unitary in *Hart v. County School Board*, 459 F.2d 981, 982 (1972).

35. *See Eisenberg*, 197 F.3d at 130, 134 ("We will assume, without holding . . . that diversity may be a compelling governmental interest . . . . No inference may here be taken that we are of opinion that racial diversity is a compelling governmental interest." (citing *Tuttle*, 195 F.3d at 704–05)); *Tuttle*, 195 F.3d at 705, 707 ("[W]e will assume, without so holding, that diversity may be a compelling government interest . . . .").

36. *See Eisenberg*, 197 F.3d at 133–34; *Tuttle*, 195 F.3d at 707.

37. *See Tuttle*, 195 F.3d at 701–02. During the school term at issue, the school had

applicant's racial classification was one of the factors considered in the lottery.[38] Notwithstanding the assumption that the promotion of diversity is a compelling interest,[39] the court held that the plan was not narrowly tailored[40] because the school board failed to consider other race-neutral alternatives,[41] and the plan amounted to nothing more than racial balancing.[42]

Less than two weeks later, the Fourth Circuit, in *Eisenberg*, faced a district transfer policy for a magnet school that contained an explicit

---

received 185 applications for admission to fill 69 available seats. The weighted lottery was designed to further the school's goals of preparing children to live in a diverse society and to educate a diverse student body. *See id.*

38. *See id.* at 704. The admissions policy first considered whether the student had siblings at the school and then filled the remainder of available seats based on three diversity factors—socioeconomic status, first language, and racial or ethnic background. *See id.* at 701–02. The court divorced the first two factors, socioeconomic and first language status, from the racial component of the lottery and focused on the constitutionality of the racial classification. *See id.* at 705.

39. *See id.* at 704–05. After acknowledging that other courts have avoided deciding this question, the court passed the responsibility onto the Supreme Court by assuming that diversity may constitute a compelling governmental interest. *See id.* at 705.

40. In concluding that the lottery was not narrowly tailored because it relied upon racial balancing, the court examined the following five factors: "(1) the efficacy of alternative race-neutral policies, (2) the planned duration of the policy, (3) the relationship between the numerical goal and the percentage of minority group members in the relevant population or work force, (4) the flexibility of the policy, including the provision of waivers if the goal cannot be met, and (5) the burden of the policy on innocent third parties." *Id.* at 706 (quoting Hayes v. North State Law Enforcement Officers Ass'n, 10 F.3d 207, 216 (4th Cir. 1993) (citing United States v. Paradise, 480 U.S. 149, 171 (1987))).

First, the court found that other race-neutral diversity policies were available to the school because the Alternative Schools Admission Study Committee, the group that ultimately adopted the current policy, had proposed at least one other race-neutral alternative. *See Tuttle*, 195 F.3d at 706. Second, the lottery was designed to continue in perpetuity, rather than terminating at a certain point. *See id.* Third, the court found that the relationship between the numerical goal and percentage of minorities was based on racial balancing because the lottery "skew[ed] the odds of selection in favor of certain minorities." *Id.* at 707. According to the court, the asserted goals of diversity do not require racial balancing. *See id.* The court also found the policy inflexible. *See id.* Part of the flexibility determination is whether the policy treats applicants as individuals. *See id.* (citing Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 318 (1978)). The court found that the admissions policy "does not treat applicants as individuals," but rather "[t]he race/ethnicity factor grants preferential treatment to certain applicants solely because of their race." *Id.* Finally, in looking at the burden of the policy on innocent third parties, the court noted that the policy ironically purports to promote individuality while in fact it fosters conformity and has a pernicious effect on four-year-old children. *See id.* at 707 & n.12. Having essentially failed all five factors, the court concluded that the policy was not narrowly tailored to achieve diversity. *See id.* at 708.

41. *See id.* at 706.

42. *See id.* at 705 (stating that "[s]uch nonremedial racial balancing is unconstitutional").

racial classification.[43] While the Fourth Circuit again "assumed" that diversity is a compelling interest, it held that the classification was not narrowly tailored and was thus unconstitutional.[44] The transfer policy at issue prohibited transfers when the transfer would upset the present racial balance of either school involved in the transfer.[45] The court reasoned that the Montgomery County policy attempted to counter racial imbalances brought about by a student's private decision to attend a magnet school.[46] Taken together, *Tuttle* and *Eisenberg* suggest that student assignment policies cannot involve either non-remedial racial balancing or remedial racial balancing, if the school is trying to remedy imbalances caused by private choices, rather than state-sanctioned policies.[47]

Confronted with the "racial piety"[48] of *Capacchione*, *Tuttle*, and *Eisenberg*, school systems are now under pressure to adjust their student assignment policies if they want to maintain diversity.[49] Some districts are returning to a neighborhood school system, whereby students attend the school closest to their homes with total disregard to racial balance.[50] Those districts that wish to provide a diverse, integrated education, however, must develop a new formula that produces racial integration but does not employ express racial classifications.[51] Wake County is leading the state in this endeavor.[52]

---

43. *Eisenberg*, 197 F.3d 123, 128 (4th Cir. 1999), *cert. denied*, 120 S. Ct. 1420 (2000). Although other factors are taken into consideration with regard to transfer requests, the court noted that "absent a 'unique personal hardship,' [such as siblings attending or parents teaching at the requested school] if the assigned school and the requested school are both stable and their utilization/enrollment factors are acceptable for transfers," race will be the decisive factors. *Id.* at 129.

44. *See id.* The court again assumed that the district's purported interest in promoting diversity was compelling. *See id.* at 130–31, 134.

45. *See id.* at 125 n.1, 126–27. The County considered other factors that could outweigh the impact on diversity. These factors included the stability of the school, utilization/enrollment, and the reason for the request. *See id.* at 126.

46. *See id.* at 131. In holding that the plan was not narrowly tailored, the court stated that "any racial or ethnic imbalance is a product of 'private choices [and] it does not have constitutional implications.' " *Id.* at 132 (quoting Freeman v. Pitts, 503 U.S. 467, 495 (1992)).

47. In other words, schools within the Fourth Circuit may use race as a factor in student assignment plans, but only if they are attempting to remedy the existing effects of deliberate discrimination within their school systems.

48. Boger, *supra* note 1, at 1722.

49. *See id.* at *2, 76–92; T. Keung Hui & Todd Silberman, *Wake Needs New Ways to Diversify Schools, Leaders Say*, NEWS & OBSERVER (Raleigh, N.C.), Dec. 10, 1999, at 1B; Ben Wildavsky, *A Question of Black and White*, U.S. NEWS & WORLD REPORT, Apr. 10, 2000, at 26.

50. *See, e.g.*, United States v. Overton, 834 F.2d 1171, 1177–78 (1987); Riddick v. School Bd., 627 F. Supp. 814, 817 (E.D. Va. 1984); ARMOR, *supra* note 6, at 51.

51. *See supra* notes 25–47 and accompanying text (showing that in the Fourth Circuit

Traditionally, Wake County has relied primarily upon race-conscious assignment and transfer policies to ensure racial balance.[53] Wake County's previous use of magnet programs and racial quotas enabled its schools to achieve unparalleled success in desegregation.[54] While the nation educates seventy percent of its minority students in predominantly minority schools, only twenty-one percent of Wake County's black students are in schools with minority enrollment above fifty percent.[55]

To maintain this level of diversity, which Wake County believes is integral to student academic success,[56] the school system has shifted its focus from traditional approaches to other educationally driven factors, namely family income and academic skills.[57] In making this change, school authorities relied upon research indicating that the presence of relatively large numbers of students living in poverty or performing at or below grade-level on year-end exams negatively impacts the academic performance of the entire student body.[58] Therefore, beginning with the current 2000–2001 school term, Wake County student assignment and transfer decisions reflect a diverse student population in terms of socioeconomic status and student performance.[59] These factors are ideal because of their educational

---

express racial classifications in the school assignment context will be subject to strict scrutiny and deemed unconstitutional).

52. *See* Silberman, *supra* note 2, at 1A (quoting Wake County Superintendent Jim Surratt as stating, " 'This is a brave new world .... It's a momentous decision. We're going to try to make it work.' "); Wildavsky, *supra* note 49, at 26–27 (highlighting Wake County's plan as a solution to the race-blind mandate imposed by recent federal cases).

53. *See* Todd Silberman, *Schools Facing Diversity Dilemma*, NEWS & OBSERVER (Raleigh, N.C.), Dec. 26, 1999, at 1A [hereinafter *Schools Facing*] (discussing the use of magnet programs and racial quotas).

54. *See id.* (stating that "Wake County stands out among large school districts in North Carolina and across the country, both for its extent of its integration and for the harmony with which the integration has been achieved").

55. *See id.*

56. *See* Wake County Public School System, *Student Assignment 6200* (visited Sept. 1, 2000) <http://www.wcpss.net/policy_files/policy_pdfs/6000_series.pdf> [hereinafter *Student Assignment 6200*] ("The Wake County Public School System believes that maintaining diverse student populations in each school is critical to ensuring academic success for all students....").

57. *See id.* (noting that research supports the link between diverse student bodies and academic success).

58. *See id.*; *see also infra* notes 75–81 (discussing the disparate impact of poverty and poor performance on minority students).

59. *See Student Assignment 6200*, *supra* note 56; Wake County Public School Systems, *Transfer of School Assignment 6203* (visited Sept. 1, 2000) <http://www.wcpss.net/policy_files/policy_pdfs/6000_series.pdf> [hereinafter *Student Assignment 6203*]; *see also* Silberman, *Schools Facing*, *supra* note 53, at 1A (describing Wake County's new income and performance-based student assignment plan); Simmons, *School Plan Signals*, *supra*

value and race-neutrality. Specifically, the student assignment process will integrate considerations of school capacity, utilization, enrollment, and proximity to the student's home. Where racial considerations, however, once came into play, the school system will consider "[d]iversity in student achievement (percentage of students scoring below grade level should be no higher than [twenty-five percent], averaged across a two-year period) ... [and] [d]iversity in socioeconomic status (percentage of students eligible for free or reduced price lunch will be no higher than [forty percent])."[60] Based on these diversity factors, "[a]bout [thirty-eight] percent of Wake's minority students will no longer be automatically targeted for integration...."[61]

Wake County's decision to replace explicit consideration of race with race-neutral alternatives allows the plan to avoid the constitutional infirmity identified in *Capacchione*, *Tuttle*, and *Eisenberg*. The districting plans or policies in those cases were invalidated because they invoked the general rule that explicit racial classifications trigger strict judicial scrutiny.[62] Absent consideration of race, however, the constitutional inquiry into Wake County's new student assignment plan should be less rigorous because neither socioeconomic status nor academic skills is a suspect classification, causing the court to apply strict scrutiny.[63] Whether Wake County's plan should be examined under strict scrutiny is the determinative question—the degree of scrutiny likely will dictate whether the plan withstands a constitutional attack.[64]

---

note 2, at 1A (same); Tim Simmons & Todd Silberman, *Diversity in Schools*, NEWS & OBSERVER (Raleigh, N.C.), Jan. 23, 2000, at 15A (same).

60. *Student Assignment 6200*, *supra* note 56.

61. Simmons, *School Plan Signals*, *supra* note 2, at 1A.

62. *See supra* notes 25–47 and accompanying text (discussing *Capacchione*, *Eisenberg*, and *Tuttle*).

63. *See, e.g.*, San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 29 (1973) (holding that wealth discrimination in a school financing case does not invoke strict scrutiny); James v. Valtierra, 402 U.S. 137, 140–43 (1971) (holding that a state constitutional provision requiring popular referendums to approve low-rent housing projects does not violate the Equal Protection Clause); Dandridge v. Williams, 397 U.S. 471, 485 (1970) (holding that rational basis review applies to economic and social welfare classifications).

64. Student assignment plans are more likely to face political challenges than constitutional challenges. Unless school boards are truly committed to maintaining diversity in their classrooms, they will probably not adopt student assignment plans that require the continued use of busing or annual reassignment of students, especially if they sense a hostility from courts with regard to integration plans. If school boards choose to follow Wake County's lead, they will also face political challenges at the ballot box during the next school board election. *See* Wildavsky, *supra* note 49, at 27 (citing Gary Orfield as suggesting that a plan like Wake County's is educationally beneficial, but "unsustainable

Wake County's plan may be subject to strict judicial scrutiny under the federal constitution because a reviewing court may conclude that the plan has a potentially invidious discriminatory intent. In determining whether to apply strict judicial scrutiny, courts may look beyond a plan's facial neutrality to its actual purpose; if the differential treatment of a class is intentional, and not merely incidental, courts will apply strict scrutiny.[65] The North Carolina State Constitution may also prove to be a barrier to Wake County's plan. Specifically, the Wake County plan may be struck down because a recent North Carolina Supreme Court opinion recognized the right to a "sound basic education" as a fundamental right under the state constitution.[66]

Although facially neutral, the school board may be forced to defend its new policy against an almost certainly fatal legal challenge if a court concludes that its actual purpose is discriminatory in nature.[67] In *Washington v. Davis*,[68] the Court established that facially neutral policies that impose a disparate impact upon a racial minority require rational basis review.[69] The Court noted, however, that such

politically").

65. *See, e.g.*, Rogers v. Lodge, 458 U.S. 613, 622–23 (1982) (finding circumstantial evidence sufficient to support an inference of purposeful discrimination); Arlington Heights v. Metropolitan Hous. Corp., 429 U.S. 252, 264–65 (1977) (stating that intentional discrimination need not be the sole motive of the regulation; the presence of discrimination as a "motivating factor" is sufficient); Washington v. Davis, 426 U.S. 229, 242 (1976) (concluding that disparate impact on its own is insufficient to establish an intent to discriminate, but may be considered circumstantial evidence of such an intent).

66. Leandro v. State, 346 N.C. 336, 347, 357, 488 S.E.2d 249, 255, 261 (1997) (holding that the North Carolina Constitution guarantees to every child the right to a "sound basic education," denial of which is "a denial of a fundamental right"); *see also* Kelly Thompson Cochran, Comment, *Beyond School Financing: Defining the Constitutional Right to an Adequate Education*, 78 N.C. L. REV. 399, 401 & nn.13–14 (noting the holding of *Leandro*); James Martin, Note, *North Carolina's Court Fails North Carolina's Children:* Leandro v. State *and the Case For Equal School Funding*, 33 WAKE FOREST L. REV. 745, 748–56 (1998) (discussing the details of the *Leandro* case); William Kent Packard, Note, *A Sound, Basic Education: North Carolina Adopts an Adequacy Standard in* Leandro v. State, 76 N.C. L. REV. 1481, 1483–95, 1501–16 (1998) (discussing the *Leandro* case and analyzing the court's holding).

67. *See* Fullilove v. Klutznick, 448 U.S. 448, 519 (1980) (Marshall, J., concurring in the judgment) (noting that strict scrutiny is "strict in theory, but fatal in fact"), *overruled in part by* Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995). *But see Adarand*, 515 U.S. at 237 (stating that strict scrutiny need not be " 'strict in theory, but fatal in fact' " (quoting *Fullilove*, 448 U.S. at 519 (Marshall, J., concurring in the judgment)).

68. 426 U.S. 229 (1976).

69. *See id.* at 242; *see also* Personnel Adm'r v. Tenney, 442 U.S. 256, 280 (1979) (holding that a hiring preference for veterans does not violate the Equal Protection Clause even though it disproportionately and inherently impacts women because there was no evidence of a discriminatory intent); *Arlington Heights*, 429 U.S. at 270 (holding that the government's refusal to re-zone a parcel of land to permit the construction of low-income

policies might prompt strict judicial scrutiny if discriminatory intent is evident.[70] The *Davis* Court considered an equal protection challenge to the Washington, D.C. Police Department's use of a verbal skills test as a prerequisite to employment.[71] The plaintiffs alleged that the test bore no relationship to job performance and that it disproportionately excluded black applicants.[72] Although the Court recognized that disproportionate impact on a certain race is a factor to consider when determining the underlying purpose, it refused to apply strict scrutiny to the use of the verbal skills test and stated that "[s]tanding alone, it does not trigger" strict scrutiny analysis.[73] According to the Court, evidence of the police department's positive efforts to recruit black officers and the fact that the examination was related to the new officers' training program outweighed any potential inference of discriminatory intent.[74]

Although the facts of *Davis* failed to convince the Court that a discriminatory purpose existed, Wake County's student assignment plan may provide the facts necessary to cross the threshold set forth in *Davis*. Scholars argue that "[s]egregation by race is strongly related to segregation by poverty."[75] Furthermore, research reveals the correlation between race and poverty, as well as between race and academic achievement.[76] For example, in North Carolina alone, of

---

housing did not violate the Equal Protection Clause because the plaintiffs failed to show an invidious discriminatory intent).

70. *See Davis*, 426 U.S. at 242.

71. *See id.* at 232.

72. *See id.* at 233, 235.

73. *Id.* at 242 (citation omitted).

74. *See id.* at 246.

75. GARY ORFIELD, THE GROWTH OF SEGREGATION IN AMERICAN SCHOOLS: CHANGING PATTERNS OF SEPARATION AND POVERTY SINCE 1968, A REPORT OF THE HARVARD PROJECT ON SCHOOL DESEGREGATION TO THE NATIONAL SCHOOL BOARDS ASSOCIATION 1 (1993); *see generally* RACE, POVERTY, AND AMERICAN CITIES (John Charles Boger & Judith Welch Wegner eds., 1996) (providing a collection of essays that explore the relationship between race and poverty in America's urban centers); GARY ORFIELD & JOHN T. YUN, RESEGREGATION IN AMERICAN SCHOOLS, A REPORT OF THE CIVIL RIGHTS PROJECT, HARVARD UNIVERSITY 16–17 (1999).

76. *See generally* THE BLACK-WHITE TEST SCORE GAP (Christopher Jencks & Meredith Phillips eds., 1998) (examining several issues related to the discrepancies in performance on standardized tests between African-American and Caucasian students); ORFIELD, *supra* note 75, at 1 (identifying discrepancies among African-Americans and Caucasians in the incidence of poverty and academic achievement); William L. Taylor, *The Continuing Struggle for Equal Educational Opportunity*, *in* RACE, POVERTY, AND AMERICAN CITIES 463 (John Charles Boger & Judith Welch Wegner eds., 1996) (analyzing recurring obstacles to equal educational achievement and proposing a political agenda to facilitate equal educational opportunity); *see also* Johnathan Goldstein, *Riley's Visit Energizes High School*, NEWS & OBSERVER (Raleigh, N.C.), Feb. 23, 2000, at 1B (" 'We must look at the stark reality that there is a continuing achievement gap between

the 400,000 African-American students within its school systems, more than half failed year-end standardized math and reading tests, while eighty percent of the white students passed both exams.[77] This problem, however, is not confined to North Carolina. Studies show that white students on average perform substantially better on standardized tests than African-American students.[78] The Harvard Project on Desegregation issued a report concluding that "[a] student in an intensely segregated African-American and Latino school was [fourteen] times as likely to be in a high poverty school as a student in a school with less than a tenth black and Latino students."[79] The national data is even more telling: "Three-fifths of all high poverty schools in the U.S. have majorities of black and Latino students."[80] Furthermore, "[thirty] percent of poor children in schools with a high proportion of *students living in poverty* score in the lowest tenth percentile, three times the percentage of those who are in schools with a low proportion of students living in poverty."[81]

Therefore, the overwhelming impact of Wake County's new student assignment plan, which considers these disparate factors, will most likely fall on the county's minority students.[82] But, as *Davis* instructed, although "an invidious discriminatory purpose may often be inferred from the totality of the relevant facts," a mere showing of

---

the rich and the poor and between whites and minority students.' " (quoting Richard Riley, Secretary of Education)); Tim Simmons, *Teachers Should Get Bonuses for Closing Learning Gap*, NEWS & OBSERVER (Raleigh, N.C.), Mar. 2, 2000, at 3A [hereinafter Simmons, *Teacher Bonuses*] ("With the exception of Asian-American students, the test scores of North Carolina's minorities consistently lags behind those of white children.").

77. *See* Simmons, *Teacher Bonuses*, *supra* note 76, at 3A.

78. *See* William L. Taylor, *The Continuing Struggle for Equal Educational Opportunity*, *in* RACE, POVERTY, AND AMERICAN CITIES 463, 465 (John Charles Boger & Judith Welch Wegner eds., 1996) (footnote omitted). Studies show that "black children born in 1971 scored an average of 189 on [standardized] reading tests" at age nine, "236 when they were thirteen, and 274" at age seventeen. *Id.* Comparatively, white students "born in 1971 scored 221, 263, and 295" at the same points in time. *Id.* Although the racial disparity decreased nearly fifty percent by the time the children were seventeen, this data is striking. *See id.* In a study sponsored by the Harvard Project on Desegregation, "among the 5,047 schools with [ninety to one hundred] percent African-American and Latino students, [fifty-seven] percent were high poverty schools." ORFIELD & YUN, *supra* note 75, at 22.

79. ORFIELD & YUN, *supra* note 75, at 22.

80. *Id.*

81. Taylor, *supra* note 78, at 469 (emphasis added). In contrast, "30 percent of poor children who are in low-poverty schools score in the top half, compared with only 16 percent who are in high-poverty schools." *Id.* (footnote omitted).

82. *See* Simmons, *School Plan Signals*, *supra* note 2, at 1A ("Of all of [Wake] county's public school students who either read below grade level or come from low-income families, about 58 percent are African-American and 11 percent are members of other minority groups.").

a racially disproportionate impact is not enough to shift the standard of review to strict scrutiny.[83] Unlike *Davis*, in addition to the circumstantial statistical data from which a court can infer a discriminatory purpose, statements of Wake County officials may support an inference of discrimination. For example, an attorney for the school board was quoted as saying "[w]e're really trying to look at educationally driven factors that might have (integrated schools) as a byproduct."[84] This statement exemplifies the implication that maintaining a certain level of racial balance, which Wake County had been so successful in attaining, was the motivating factor behind this new plan.

These arguments aside, the willingness of courts to adopt this line of reasoning is questionable. Such a bold step would indicate that courts are not willing to support any student assignment plan that does not resemble a neighborhood school system without regard to diversity. Also, the language of *Croson* and *Adarand* would seem to reject this logic. In *Adarand*, the Court went to great pains to clarify that the extension of suspect status to all race-based measures would not automatically invalidate every provision that considers race.[85] The Court stated, "we wish to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact,' "[86] and that "[t]he unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it."[87] In *Croson*, Justice O'Connor suggested other race-neutral means by which the City of Richmond could have furthered its goal of increasing minority participation in the local construction industry that did not pit members of one race against members of another.[88] Wake County's plan considers and employs race-neutral means. Thus, these cases suggest that Wake County's facially race-neutral student assignment plan would at least require analysis beyond *Croson*. If the Court in fact intended to strike every provision that directly and indirectly impacts race, regardless of narrow tailoring, its reassurance in *Adarand* would be mere hyperbole and its suggestions in *Croson* would be superfluous.

---

83. Washington v. Davis, 426 U.S. 229, 242 (1976).

84. Silberman, *Schools Facing*, *supra* note 53, at 1A.

85. *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 237 (1995).

86. *Id.* (quoting Fullilove v. Klutznick, 448 U.S. 448, 519 (1980) (Marshall, J., concurring in the judgment)).

87. *Id.*

88. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 507–08 (1989).

Moreover, *Davis* instructs that despite a racially disproportionate impact, a court is not likely to infer a discriminatory purpose from a facially race-neutral classification.[89] Absent this inference, the classification would not trigger heightened scrutiny and the rational basis standard would apply.[90] Neither *Adarand* nor *Croson* overruled this distinction.[91] A plaintiff challenging Wake County's race-neutral student assignment plan, therefore, would have to prove that the school board intended to racially discriminate before a reviewing court would apply strict judicial scrutiny.[92] This requires the plaintiff to satisfy a requirement "that is virtually impossible to meet."[93] Wake County's burden, therefore, would probably be limited to showing that the two-tiered system is rationally related to its pedagogical interest in diversity.

Wake County's plan may also be subjected to strict scrutiny under the state constitution. When a fundamental right is at issue, North Carolina courts apply the federal test of strict scrutiny, regardless of whether a suspect classification is present.[94] In *Leandro v. State*,[95] the North Carolina Supreme Court concluded that the right to a "sound basic education" is a fundamental right guaranteed by the North Carolina Constitution.[96] *Leandro* involved an equal opportunity challenge to the current school financing system, which, the plaintiffs alleged, created educational disparities between wealthy and poor school districts.[97] The plaintiffs alleged that these wealth

89. *See* Washington v. Davis, 426 U.S. 229, 246 (1976).

90. *See id.* at 235.

91. *See Adarand*, 515 U.S. at 246 (Stevens, J., dissenting).

92. *See generally* Gomillion v. Lightfoot, 364 U.S. 339, 347–48 (1960) (holding a redistricting plan unconstitutional under the Fifteenth Amendment because of its disproportionate and intentional impact on racial minorities).

93. ORFIELD & YUN, *supra* note 75, at 6.

94. *See* State *ex rel.* Utilities Comm'n v. Carolina Util. Customers Ass'n, 336 N.C. 657, 680–81, 446 S.E.2d 332, 346 (1994) (" 'The North Carolina cases applying the equal protection clause of the state and federal constitutions to challenged classifications have used the same test the federal courts use . . . .' " (quoting Duggins v. North Carolina Bd. of Certified Pub. Accountant Examiners, 294 N.C. 120, 131, 240 S.E.2d 406, 413 (1978))); Town of Beech Mountain v. County of Watauga, 324 N.C. 409, 412, 378 S.E.2d 780, 782 (1989) ("When a legislative act . . . interferes with the exercise of a fundamental right, the upper tier or 'strict scrutiny' standard is applied, requiring the government to demonstrate that the challenged statutory classification is necessary to promote a compelling governmental interest.").

95. 346 N.C. 336, 488 S.E.2d 249 (1997).

96. *Id.* at 357, 488 S.E.2d at 261.

97. *See id.* at 342, 488 S.E.2d at 252. *Leandro* represents a trend of school finance challenges across the country. For an excellent review of school financing arguments, see Cochran, *supra* note 66, at 402–58. *See also* Martin, *supra* note 66, at 767–79 (discussing the three waves of school finance litigation); Packard, *supra* note 66, at 1497–500 (same).

disparities denied their children "a sufficient education to meet the minimal standard for a constitutionally adequate education."[98] The North Carolina Supreme Court held that the right to a free public education is guaranteed by article I, section 15[99] and article IX, section 2(1)[100] of the North Carolina Constitution. The court also held that this guaranteed right to a "sound basic education"[101] "prepar[es] students to participate and compete in the society in which they live and work."[102] A fundamental right of equal access to a sound basic education notwithstanding, the court refused to extend this right to equal funding or equal educational opportunities in all districts.[103] As a result, the fundamental right to a sound basic education in North Carolina does not require the State to make up for the discrepancies in funding caused by local taxing schemes. The court then remanded the case to determine whether the funding system in fact denied students their right to a sound basic education.[104] If so, the defendants will be required to prove that the funding system was " 'necessary to promote a compelling governmental interest.' "[105]

On remand, the trial court must decide what constitutes a violation of the right to a sound, basic education. The North Carolina Supreme Court has suggested several factors that the trial court

98. *Leandro*, 346 N.C. at 342, 488 S.E.2d at 252.

99. "The people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right." N.C. CONST., art. I, § 15.

100. "The General Assembly shall provide by taxation and otherwise for a general and uniform system of free public schools, ... wherein equal opportunities shall be provided for all students." N.C. CONST., art. IX, § 2(1).

101. *Leandro*, 346 N.C. at 347, 488 S.E.2d at 255. The Court provided a lengthy definition of "a sound basic education," including "sufficient ability to read, write, and speak the English language and a sufficient knowledge of fundamental mathematics and physical science ... [and] of geography, history, and basic economic and political systems," as well as "sufficient ... skills" to prepare students for further education or employment. *Id.*

102. *Id.* at 345, 347, 488 S.E.2d at 254–55. Earlier, the North Carolina Court of Appeals found no right to a qualitatively adequate education in the state constitution. *See* Leandro v. State, 122 N.C. App. 1, 11, 468 S.E.2d 543, 550 (1996).

103. *See Leandro*, 346 N.C. at 349, 488 S.E.2d at 256. The Court stated that "the North Carolina Constitution requires that all children have the opportunity for a sound basic education, but it does not require that equal educational opportunities be afforded to students in all of the school districts of the state." *Id.* at 351, 488 S.E.2d at 257. Furthermore, "[a]ny disparity in school funding among the districts resulting from local subsidies is directly attributable to Article IX, Section 2(2) [which allows a local government to help finance their school programs] itself ... [and] a constitution cannot violate itself." *Id.* at 352, 488 S.E.2d at 258.

104. *See id.* at 357, 488 S.E.2d at 261.

105. *Id.* (quoting Town of Beech Mountain v. County of Watauga, 324 N.C. 409, 412, 378 S.E.2d 780, 782, *cert. denied*, 493 U.S. 954 (1989)).

should consider in deciding this question, including student performance on standardized tests.[106] Thus, the plaintiffs in *Leandro* may be able to establish an inadequate education claim based on the evidence submitted at trial that revealed significant discrepancies in standardized test scores.[107]

Similarly, future plaintiffs may bring inadequate education claims against Wake County by alleging that a state policy is not providing students an opportunity to receive a sound basic education as evidenced by poor performance on standardized tests. The potential for litigation is particularly acute here, where evidence links poverty and race to poor academic achievement.[108] Wake County's new student assignment plan, however, appears to contribute to, rather than interfere with, the right to a sound basic education by preventing the resegregation of schools by race and class. This two-tiered assignment plan promotes learning and diversity by limiting the number of poor and low performing students in each classroom. Also, the plan is narrowly drawn to serve Wake County School District's compelling interest in providing all of its students with a constitutionally adequate education. Given the alternative—segregated neighborhood schools—the North Carolina State Constitution may require Wake County to establish an assignment plan that takes this social science evidence into consideration.

A reviewing court should resist the urge to heighten the standard of review applicable to Wake County's new student assignment plan and adhere to a rational basis review of the wealth and academic achievement classifications. Several law and policy considerations support a deferential review of the board's decision. First, neither wealth nor education is a suspect classification warranting strict scrutiny.[109] Second, control over the operation of schools is predominantly a local concern.[110] Third, schools are endowed with

106. *See Leandro*, 346 N.C. at 355–57, 488 S.E.2d at 259–60 (suggesting that the trial court could consider legislative goals and standards, per-pupil expenditures, and standardized test scores in determining whether schools are providing a sound, basic education, but that these are neither exclusive nor dispositive); *see also* Packard, *supra* note 66, at 1494–95, 1506–16 (discussing the various factors and analyzing the potential outcomes based on each factor).

107. *See Leandro*, 346 N.C. at 342, 488 S.E.2d at 252; Packard, *supra* note 66, at 1486 n.39 (reporting that only 19.2% of students in the rural districts performed at or above proficiency level on the standardized end-of-grade tests and that 37.3% of students statewide performed at or above the proficiency level).

108. *See supra* notes 75–81 and accompanying text (discussing the correlation between race and poverty and race and standardized test scores).

109. *See infra* notes 114–19 and accompanying text.

110. *See infra* notes 120–27 and accompanying text.

the mission to prepare children for the future.[111] Additionally, placing a judicial harness on school powers has consistently been recognized as detrimental to school authority and student learning.[112] Finally, applying strict scrutiny to Wake County's plan risks the silent return to segregated schools.[113]

First, non-suspect classifications[114] and non-fundamental rights[115]

---

111. *See infra* notes 128–34 and accompanying text.

112. *See infra* notes 135–44 and accompanying text.

113. *See infra* notes 145–49 and accompanying text.

114. Non-suspect classifications are any classifications that do not grant disparate treatment to groups that historically have been the subject of discrimination. Traditionally, only the following three classifications have been considered "suspect" by the Court: (1) race, *see, e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995) (holding that "all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny"); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493–98 (1989) (extending strict scrutiny to any racial classification, regardless of intent); Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 291 (1978) (opinion of Powell, J.) ("Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination."); (2) national origin, *see, e.g.*, Hernandez v. Texas, 347 U.S. 475, 482 (1954) (holding that the defendant, who was of Mexican descent, was entitled to a jury selected without regard to national origin); Korematsu v. United States, 323 U.S. 214, 216 (1944) (acknowledging that restrictions based on national origin are "immediately suspect"); Hirabayashi v. United States, 320 U.S. 81, 100 (1943) ("Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality."); and (3) alienage, *see, e.g.*, *In re* Griffiths, 413 U.S. 717, 722 (1973) (holding that the state failed to meet its burden for establishing guidelines to practice law based on alienage); Graham v. Richardson, 403 U.S. 365, 376 (1971) (holding that a state law denying welfare benefits based on alienage violates the Equal Protection Clause). *But see* Plyler v. Doe, 457 U.S. 202, 223–30 (1982) (refusing to extend suspect status to illegal aliens and applying an intermediate level of scrutiny to strike down a Texas statute denying free public education to children of illegal aliens). Other classifications, however, have been characterized by the Court as "quasi-suspect" and enjoy "heightened" scrutiny. These include gender-based classifications, *see, e.g.*, United States v. Virginia, 518 U.S. 515, 534 (1996) (holding that Virginia failed to show an "exceedingly persuasive justification" for excluding women from the Virginia Military Institute); Craig v. Boren, 429 U.S. 190, 199 (1976) (holding that Oklahoma did not show an "important governmental interest" for establishing different legal drinking ages for males and females), and statutes restricting the rights of illegitimate children, *see, e.g.*, Clark v. Jeter, 486 U.S. 456, 465 (1988) (concluding that Pennsylvania's six year statute of limitations for paternity actions does not withstand heightened scrutiny).

115. Fundamental rights are rights judicially determined to be fundamental to basic human life. They include those rights guaranteed by the Constitution, other than in the Equal Protection arena, or those rights that are so important so as to be implicitly granted by the Constitution. Specifically, fundamental rights include the following: (1) interstate travel, *see, e.g.*, Shapiro v. Thompson, 394 U.S. 618, 630–31 (1969) (holding that a statute requiring a one year residency as a prerequisite to receiving welfare assistance violates the basic right to travel provided by the Constitution), *overruled on other grounds by* Edelman v. Jordan, 415 U.S. 651 (1974); (2) the right to vote, *see, e.g.*, Harper v. Virginia Bd. of Elections, 383 U.S. 663, 670 (1966) (stating that "the right to vote is too precious, too fundamental to be so burdened or conditioned" by a poll tax); (3) access to the courts, *see,*

are subject to mere rationality review, which is the least demanding level of review. Under this standard, the classification is analyzed with substantial deference toward the policy-maker.[116] Examined under these principles, Wake County's new student assignment plan appears to be constitutional. Wake County's purported purpose for the two-tiered plan is to maintain "diverse student populations in each school" because it believes that such diversity "is critical to ensuring academic success for all students."[117] At a minimum, this interest in diversity is a legitimate pedagogical objective.[118] The question remains whether the plan adopted is rationally related to this legitimate governmental objective. Considering the link between race, poverty, and academic achievement,[119] a court would likely find

---

e.g., Boddie v. Connecticut, 401 U.S. 371, 381 (1971) (holding a Connecticut statute, which required the payment of court fees and costs for the service of process, invalid because it denied indigents access to courts); and (4) marriage, *see, e.g.*, Loving v. Virginia, 388 U.S. 1, 12 (1967) ("Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival." (quoting Skinner v. Oklahoma, 316 U.S. 535, 541 (1942))). The Court has failed, however, to extend heightened scrutiny to wealth and necessities. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 29 (1973) (holding that wealth discrimination in a school financing case does not invoke strict scrutiny); James v. Valtierra, 402 U.S. 137, 140–43 (1971) (holding that a state constitutional provision requiring popular referendums to approve low-rent housing projects does not violate the Equal Protection Clause); Dandridge v. Williams, 397 U.S. 471, 485 (1970) (holding that rational basis review applies to economic and social welfare classifications).

116. *See, e.g.*, City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976) (per curiam) (articulating the standard as "rationally related to a legitimate state interest"). Other cases have extended the level of deference such that a statute or regulation will only be found unconstitutional if it is "arbitrary." *See, e.g.*, United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 177–79 (1980) ("The only remaining question is whether Congress achieved its purpose in a patently arbitrary or irrational way .... Where, as here, there are plausible reasons for Congress' action, our inquiry is at an end."); McGowan v. Maryland, 366 U.S. 420, 425 (1961) ("The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective."); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911) (noting that the law will be stricken only if "purely arbitrary"); *see also* Cochran, supra note 66, at 438–39 (discussing the traditional rational relation test).

117. *Student Assignment 6200*, *supra* note 56.

118. Courts' willingness to assume, without analysis, that an interest may be compelling suggests that legitimacy is a readily surmountable standard. *See* Eisenberg v. Montgomery County Pub. Sch., 197 F.3d 123, 130, 134 (4th Cir. 1999), *cert. denied*, 120 S. Ct. 1420 (2000) ("We will assume, without so holding, as the *Tuttle* court assumed, that diversity may be a compelling government interest .... No inference may here be taken that we are of opinion that racial diversity is a compelling government interest."); Tuttle v. Arlington County Sch. Bd., 195 F.3d 698, 705, 707 (4th Cir. 1999), *cert. dismissed*, 120 S. Ct. 1552 (2000) ("We will assume, without so holding, that diversity may be a compelling government interest ...."); Wessmann v. Gittens, 160 F.3d 790, 800 (1st Cir. 1998) (finding that the Boston Latin School's diversity policy did not satisfy the *Bakke* standard for a compelling governmental interest in diversity in the public education context); *see also supra* note 35 and accompanying text (discussing the *Tuttle* and *Eisenberg* holdings).

119. *See supra* notes 75–81 and accompanying text (discussing the correlation between

that basing student placements on socioeconomic status and academic performance would result in a diverse classroom. Thus, because these factors are traditionally subject only to deferential review, Wake County's plan should survive a constitutional attack.

Second, deference to Wake County is consistent with the most persistent theme and "deeply rooted"[120] "tradition in public education:"[121] "local control over the operation of schools."[122] The Supreme Court even recognized a school board's "broad discretionary powers" in *Swann v. Charlotte-Mecklenburg Board of Education* when it completely usurped local control over the school district's student assignment policy.[123] The Court has reiterated this proposition in desegregation cases repeatedly[124] and explicitly reaffirmed it in *Freeman v. Pitts*.[125] In *Freeman*, the Court declared that " 'local autonomy of school districts is a vital national tradition' "[126] that must be restored by "[r]eturning schools to the control of local authorities *at the earliest practicable date*."[127] Requiring a school board to show that a pedagogical decision complies with the non-deferential strict scrutiny strips the local authority of its discretionary power and impedes the effective operation of public schools. Rational basis review, on the other hand, allows local authorities to examine their school's individual needs and employ their discretionary powers with legitimate, distinctly tailored interests in mind.

Third, returning control of policy decisions to local authority is not only a "national tradition,"[128] but is paramount to the school's

---

race, poverty, and academic achievement).

120. Milliken v. Bradley, 418 U.S. 717, 741 (1974).

121. *Id.*

122. *Id.*

123. 402 U.S. 1, 16 (1971) (acknowledging the "broad power" of school authorities "to formulate and implement educational policy"); *supra* note 6 (discussing *Swann* in light of the history of desegregation in American public schools).

124. *See* Missouri v. Jenkins, 515 U.S. 70, 99 (1995); Freeman v. Pitts, 503 U.S. 467, 490 (1992); Board of Educ. v. Dowell, 498 U.S. 237, 247–48 (1991); *see also* Boger, *supra* note 1, at 1750 n.156 (noting several Supreme Court cases that have expressed concern for maintaining local authority over public schools).

125. 503 U.S. 467 (1992).

126. *Id.* at 490 (quoting Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406, 410 (1977)).

127. *Id.* (emphasis added). The *Freeman* Court addressed the issue of whether a school could be declared unitary with respect to only some *Green* factors or whether a system as a whole must comply with the factors indicated in *Green* before that system could be declared unitary. *See id.* at 485; *supra* note 6 (discussing *Green*). The Court concluded that a school can attain incremental unitary status. *See Freeman*, 503 U.S. at 490–91.

128. *Freeman*, 503 U.S. at 490 (quoting *Dayton Bd. of Educ.*, 433 U.S. at 410).

ability to perform its "unique mission."[129] In *Brown I*,[130] Chief Justice Warren stated that, "education is perhaps the most important function of state and local governments .... [I]t is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment."[131] The Court later spoke of the "singular importance" of public primary education "in the preparation of individuals for participation as citizens, and in the preservation of values on which our society rests,"[132] and asserted that "the inculcation of fundamental values necessary to the maintenance of a democratic political system"[133] is one of "the objectives of public education."[134] School administrators, therefore, are uniquely responsible for the academic and social development of each child.

Additionally, the assertion that school districts can effectively educate children under a judicial magnifying glass is doubtful, if not implausible. The Court has consistently recognized the unique nature of public education and analyzed other constitutional claims arising within the educational context with these principles in mind.[135] A lower court should likewise limit its constitutional analysis of student assignment plans to a standard of review that allows genuine consideration of the school's interests. Although deferential, rational basis review requires a school board to formulate policies that

129. Zahler, *supra* note 30, at 996.

130. 347 U.S. 483 (1954); *supra* note 6 (discussing *Brown I* and its progeny).

131. *Brown I*, 347 U.S. at 493.

132. Ambach v. Norwick, 441 U.S. 68, 76 (1979).

133. *Id.* at 77.

134. Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 681 (1986).

135. *See, e.g.*, Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 664–65 (1995) (holding that random drug testing of student athletes in public schools does not violate the Fourth and Fourteenth Amendment protections against unreasonable searches and seizures); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988) (holding that the contents of a school newspaper is a curricular matter within the school's discretion and therefore, the principal's significant edits did not implicate the First Amendment); *Bethel*, 478 U.S. at 685 (holding that a sexually suggestive student government speech was not protected by First Amendment free speech and expression rights); New Jersey v. T.L.O., 469 U.S. 325, 339–41 (1985) (holding that requiring school administrators to have probable cause before conducting a search and seizure would hamper the school's interests and articulating a "reasonable suspicion" test for Fourth Amendment cases in the public primary school context); Ingraham v. Wright, 430 U.S. 651, 664 (1977) (holding that "the Eighth Amendment does not apply to the paddling of children as a means of maintaining discipline in public schools"); Goss v. Lopez, 419 U.S. 565, 581–84 (1975) (holding that a student's due process rights under the Fourteenth Amendment are limited in cases of short-term school suspension); Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 514 (1969) (upholding students' First Amendment rights to passive political expression in the form of wearing black armbands to protest the Vietnam War).

purposefully further legitimate pedagogical interests. A student assignment plan based on illegitimate interests should be apparent and will be struck down.[136] Strict scrutiny, however, brings with it the underlying presumption of "stigmatic harm" and invalidity, which school boards would have to overcome.[137] This standard fails to consider adequately the nature of public, primary schools. Unlike government contracts,[138] professional schools,[139] or merit-based, entry-exam elementary and secondary schools,[140] assignment to primary public schools is not a zero-sum game—the furtherance of diversity in this context does not hinder any individual citizen's rights.[141] Every child who wants to attend public school will receive a public education. Although differences exist between schools from state to state and within districts, courts have never recognized parents' right to choose which public school their child will attend.[142] School systems must decide how best to allocate their students among the schools within their district. These decisions lack the potential to stigmatize students and they do not breed the notions of inferiority associated with affirmative action decisions because they reflect only the school's interest in providing a diverse education rather than "reflect upon the character of students or their ability to perform."[143] Thus, the need to " 'smoke out' "[144] illegitimate uses of race or race-related classifications, which underlie a court's use of strict scrutiny, is not present in the public education context.

Finally, strict scrutiny analysis could yield results that are inconsistent with the goals embodied in the *Brown* progeny.[145] If a court deems Wake County's plan unconstitutional, the expected result would be a judicial mandate to return to neighborhood schools

136. *See* Lemon v. Bossier Parish Sch. Bd., 444 F.2d 1400, 1401 (1971) (holding that a new student assignment plan, which was based on achievement test scores, was obviously geared toward resegregation because it was implemented only one term after the school system was declared unitary).

137. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989).

138. *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 204–10 (1995); *Croson*, 488 U.S. at 477–83.

139. *See* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 272–75 (1978); Hopwood v. Texas, 78 F.3d 932, 935–38 (5th Cir. 1996).

140. Wessmann v. Gittens, 160 F.3d 790, 792–94 (1st Cir. 1998).

141. *See* Boger, *supra* note 1, at 1763–65 (discussing the differences between public primary education and affirmative action).

142. *See* Boger, *supra* note 1, at 1764 & n.210; *see also* Pierce v. Society of Sisters, 268 U.S. 510, 534–35 (1925) (holding that parents have a *qualified* right to direct the upbringing of their children by choosing between public and private schooling).

143. Boger, *supra* note 1, at 1633–65.

144. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989).

145. *See supra* note 6 (discussing *Brown* and its progeny).

where children attend the school closest to their homes.[146] Given the nearly pervasive level of neighborhood segregation today, such a decision may result in the resegregation of American schools.[147]

Although the Supreme Court has held that school systems are not responsible for segregation caused by private choices,[148] persuasive justifications exist for voluntarily undertaking to prevent this phenomenon. Diversity in public schools gives many students "their first relatively extended interracial experiences" because of the widespread residential segregation noted above.[149] This attribute of diverse schools is not simply Pollyannaish, but is requisite to a sound, basic public education in today's multicultural society. The modern world is increasingly diverse and students must be taught how to live and work in a pluralistic society.[150] Desegregation of public schools has made substantial headway in this area. Desegregation of public schools has led to increased tolerance among students,[151] minority academic achievement,[152] occupational success,[153] and residential choices.[154] Furthermore, "graduates of desegregated schools are more

146. *See* Boger, *supra* note 1, at 1726–28.

147. *See id.* at *5–6 & n. 18; ORFIELD & YUN, *supra* note 75, at 11–15, 20 tbl.17; *see also Race-Conscious Admissions*, *supra* note 30, at 950 (noting the "prevalence of residential segregation").

148. *See* Freeman v. Pitts, 503 U.S. 467, 495 (1992); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 32 (1971).

149. Zahler, *supra* note 30, at 1024; *Race-Conscious Admissions*, *supra* note 30, at 950; *supra* note 147 and accompanying text (noting the prevalence of residential segregation).

150. *See* Zahler, *supra* note 30, at 1022–23. As noted above, schools are not solely armed with the responsibility to teach students reading, writing, and arithmetic, but have the responsibility to "awaken[] the child to cultural values, ... prepar[e] him for later professional training, and ... help him to adjust normally to his environment." Brown v. Board of Educ., 347 U.S. 483, 493 (1954); *see also* Leandro v. State, 346 N.C. 336, 347, 488 S.E.2d 249, 255 (1997) (including knowledge of skills to enable a student to perform successfully in a "changing society" and competitively in the job market in the definition of a "sound, basic education"); *supra* notes 128–134 and accompanying text (discussing the unique function of public education).

151. *See Race-Conscious Admissions*, *supra* note 30, at 950; Zahler, *supra* note 30, at 1023–24.

152. *See* Robert L. Crain & Rita E. Mahard, *Minority Achievement: Policy Implications of Research*, *in* EFFECTIVE SCHOOL DESEGREGATION: EQUITY, QUALITY AND FEASIBILITY 55, *passim* (Willis D. Hawley, ed. 1981); Boger, *supra* note 1, at 1766 & n.216; *Race-Conscious Admissions*, *supra* note 30, at 950–51; Zahler, *supra* note 30, at 1025–26.

153. *See* James M. McPartland & Jomills Henry Braddock II, *Going to College & Getting a Good Job: The Impact of Desegregation*, *in* EFFECTIVE SCHOOL DESEGREGATION: EQUITY, QUALITY AND FEASIBILITY 141, *passim* (Willis D. Hawley, ed. 1981); Boger, *supra* note 1, at 1766 n.216; *Race Conscious Admissions*, *supra* note 30, 950–51; Zahler, *supra* note 30, at 1024.

154. *See* McPartland & Braddock, *supra* note 153, at 152; Boger, *supra* note 1, at 1766 n.216.

likely as adults to freely choose desegregated colleges, neighborhoods, places of work, and schools for their children, reducing the need for future public policies in these areas."[155] If school boards are required by judicial fiat to assign students to schools based solely on where they live, we will "float[] back toward an educational pattern that has never in the nation's history produced equal and successful schools. There is no good evidence that it will work now."[156] Wake County's student assignment plan could prevent this resegregation and subsequent educational deterioration from recurring.

Wake County has reason to fear that recent federal court decisions will dictate the composition and appearance of its classrooms. Recent Fourth Circuit decisions have made it harder for school systems to support their elective integration efforts. But absent such affirmative action by school systems, Wake County public schools risk silently returning to segregation.[157] This regression would engender a sense of inferiority in a large number of children. Significant gains have been made in the education of North Carolina's youth since the 1970s.[158] A departure from this commitment to equality will surely end this progress and will likely foster a steep regressive curve in academic achievement. Wake County's plan is a logical and constitutional approach to this problem. By focusing on socioeconomic status and academic skills, Wake County has identified non-racial integration indicators that should not trigger heightened scrutiny. Furthermore, the plan reflects Wake County's commitment to a diverse and rewarding education for all of its students. Wake County should be commended for its commitment to education, North Carolina's youth, and society.

ELIZABETH JEAN BOWER

155. McPartland & Braddock, *supra* note 153, at 152.

156. ORFIELD & YUN, *supra* note 75, at 28.

157. *See id.* at 339 ("[Case studies] show that courts and many communities across the United States are quietly turning back to segregation, assuming it will work this time.").

158. *See* Taylor, *supra* note 78, at 466 (relating the rise in academic achievement of minority students to desegregation).

Potential Violence to the Bottom Line—Expanding Employer Liability for Acts of Workplace Violence in North Carolina

In 1995, a recently terminated employee returned to his former workplace with a gun and opened fire on his former colleagues killing two of them.[1] On May 4, 1999, a North Carolina jury found the employer liable for the two deaths and awarded nearly eight million dollars in damages to the employees' estates.[2] North Carolina employers will certainly take notice of this case, if for no other reason than the substantial size of the jury award.

Recent studies support the notion that the workplace is no bastion of safety.[3] The news media vigorously report high profile incidents of workplace violence[4]—such as shootings, robberies, and rapes.[5] While grim and attention grabbing, the news reports often fail

---

1. *See* Terry Hammond, *Workplace Violence: North Carolina Jury Awards $7.9 Million to Families of Two Killed in Plant Shootings*, DAILY LAB. REP. (BNA), May 6, 1999, *available in* Westlaw, BNA-DLR database.

2. *See id.*

3. According to the National Crime Victimization Survey, U.S. Bureau of Labor Statistics, nearly one million people are victims of workplace violence each year. *See* THOMAS CAPOZZOLI & R. STEVE MCVEY, MANAGING VIOLENCE IN THE WORKPLACE 2 (1996). Also, a 1993 American Management Association survey found that 20% of the respondents have experienced an act of workplace violence since 1990 with 8% reporting that the act resulted in a fatality. *See id.*; Barbara Etorre & Catherine Romano, *Reengineering: The HR Perspective*, HR FOCUS, June 1, 1994, at 1. Also, a 1999 Society for Human Resource Management study found that 57% of survey respondents reported an act of workplace violence between January 1996 and July 1999. *See* Reports of Workplace Violence Increase, Employers Step-up Security, OCCUPATIONAL HEALTH AND SAFETY REPORTS, 594 (1999) [hereinafter Shem Study]. These results represented a 48% increase in reports of workplace violence compared to Shem's 1996 survey. *See id.* Finally, in 1998, 709 workplace homicides caused by workplace violence were reported. *See id.*; John Perez, *Guardians of Security; Workplace Safety Under Scrutiny*, AUSTIN AMERICAN-STATESMAN, Aug. 6, 1999, at D1. These homicides represent 12% of all workplace fatalities. *See* Shem Study.

4. *See, e.g.*, Lisa Grace Lednicer, *Two State Agencies Boost Security as Result of Threats; Possible Danger from Disgruntled Ex-Employees Prompts the Actions*, PORTLAND OREGONIAN, Jan. 5, 2000, at C5 (reporting that after a former Oregon Department of Human Services employee told his wife that he might injure the agency's staff, the agency took precuationay measures and required proof of identification for entry into the agency's building); *Seattle Man Arrested in Shipyard Shooting*, AUGUSTA CHRON., Jan. 6, 2000, at A3 (reporting that a Seattle shipyard shooting was an act of workplace violence). *See generally* Sue Anne Pressley, *Year of Mass Shootings Leaves Scar on U.S.; Sense of Safety Suffers as Fewer Believe 'It Can't Happen Here'*, WASH. POST, Jan. 3, 2000, at A1 (discussing how the numerous incidents of violence in 1999 left the public with an "acute . . . awareness that violent tragedy can occur anywhere").

5. Workplace violence, as used in this Note, encompasses: (1) an employee acting

to reveal the full extent of the problem. In 1998 alone, 709 homicides, 1.5 million simple assaults, 396,000 aggravated assaults, 51,000 rapes and sexual assaults, and 84,000 robberies resulted from workplace violence.[6] Moreover, workplace violence is the leading cause of on-the-job deaths for female workers and the second-highest cause for men.[7] Deaths resulting from workplace violence are the fastest growing type of homicide in the United States.[8]

The human costs and economic consequences of workplace violence are undoubtedly high. Nationally, workplace violence costs employers 876,000 lost workdays and sixteen million dollars annually in lost wages.[9] In addition, employers lose revenue, incur litigation costs, and must combat decreased employee morale as a result of workplace violence.[10] In 1993, the National Safe Workplace Institute

---

violently in the workplace thereby injuring a fellow employee; (2) an employee acting violently in the workplace, thereby injuring a customer; (3) a third party entering the workplace and injuring an employee; and (4) a third party entering the workplace and injuring a customer.

6. *See Workplace Violence: Job Homicides Decline in 1998, Non-Fatal Assaults Still High, OSHA Says*, OCCUPATIONAL SAFETY & HEALTH DAILY (BNA), Sept. 21, 1999, *available in* Westlaw, BNA-OSHD database. From 1992 through 1996, nearly two million workers were victims of violent crimes or violence threatened in the workplace. *See Workplace Violence: Two Million Workers Attacked, Threatened on Job Each Year, Justice Department Says*, EMPLOYMENT POL'Y & L. DAILY (BNA), July 27, 1998, *available in* Westlaw, BNA-EPLD database. For the twelve months from July 1992 to July 1993, " '[o]ne out of every four employees was harassed, threatened or attacked.' " Mary Helen Yarborough, *Securing the American Workplace*, HR FOCUS, Sept. 1994, at 1 (quoting Joseph A. Kinney, Executive Director of the National Safe Workplace Institute).

7. *See* Rick Garr, *ABA: Workplace Violence Bigger Threat Than You Know*, S. FLA. BUS. J. (Miami), Dec. 3, 1999, at 8; *Workplace Violence: CAL/OSHA Conference Outlines Approaches For Preventing On-the-Job Assaults, Murders*, OCCUPATIONAL SAFETY & HEALTH DAILY (BNA), Apr. 20, 1994, *available in* Westlaw, BNA-OSHD database (citing a California Division of Labor Statistics and Research study).

8. *See* LYNNE FALKIN MCCLURE, RISKY BUSINESS: MANAGING EMPLOYEE VIOLENCE IN THE WORKPLACE 2 (1996).

9. *See* Garr, *supra* note 7, at 8. A less conservative study estimated that workplace violence annually costs employers 1.751 million lost work days and at least $55 million in lost wages. *See* CAPOZZOLI & MCVEY, *supra* note 3, at 2 (referencing The National Crime Victimization Survey).

10. *See Workplace Violence: Employers That Ignore Hazards Face Potential Liability Problems, Groups Told*, OCCUPATIONAL SAFETY & HEALTH DAILY (BNA), Mar. 3, 1997, *available in* Westlaw, BNA-OSHD database (stating that workplace violence damages employee morale, productivity, and public confidence). A recent survey the extent of unpleasant interactions among co-workers revealed the following: 12% of the respondents quit to avoid an unpleasant co-worker; 10% decreased their time spent at work; 53% lost work time worrying about the unpleasantness; 37% decreased their commitment to the organization; and 22% decreased their work output. *See* Kerry Hall, *Uncivil Liberties Incivility Permeates the Workplace and Cuts Into the Bottom Line, A New Study Shows*, NEWS & REC. (Greensboro, N.C.), Dec. 12, 1999, at F1; *see also* MCCLURE, *supra* note 8, at 152 (stating that employers face increased health and disability costs

estimated the total annual economic cost of workplace violence to be $4.2 billion.[11]

Not surprisingly, most employers are concerned about minimizing losses due to workplace violence. This Note explores ways in which employers can limit their exposure to liability for acts of workplace violence under North Carolina law.[12] More specifically, the Note reviews the theories under which North Carolina courts have held employers liable for workplace violence.[13] For each liability theory, this Note then assesses the likelihood of employer liability and recommends actions that employers can take to limit their liability risk.[14] In addition, this Note evaluates how North Carolina courts have applied the North Carolina Workers' Compensation Act[15] when employees sue their employers in tort for injuries suffered due to workplace violence, and it suggests that North Carolina employers should not assume that an employee's recovery under workers' compensation bars a related tort action.[16]

To minimize the costs associated with workplace violence, North Carolina employers must understand the different theories under which they may be held liable. With this understanding, employers can assess their potential liability by measuring their current workplace environment's safety regulations and safety procedures in light of North Carolina law. To that end, this Note reviews several theories of liability under which North Carolina employers may be held liable for acts of workplace violence.[17]

The common-law doctrine of respondeat superior is the traditional theory of liability under which employers may be held liable for the tortious acts of their employees.[18] According to this doctrine, employer liability arises if the employee's tortious behavior occurs while the employee is the employer's agent. In North Carolina, agency is established when the employer expressly authorizes the employee's actions or when the employee commits the

---

because workplace violence increases overall physical and mental health costs).

11. *See* Yarborough, *supra* note 6, at 1.

12. For a broader treatment of employer liability, see PHILLIP D. DICKINSON, WORKPLACE VIOLENCE & EMPLOYER LIABILITY 5–10, 20–26 (1997); Ann E. Phillips, Comment, *Violence in the Workplace: Reevaluating the Employer's Role,* 44 BUFF. L. REV. 139, 149–93 (1996).

13. *See infra* notes 18–88 and accompanying text.

14. *See infra* notes 106–94 and accompanying text.

15. Act of Mar. 11, 1929, ch. 120, 1929 N.C. Sess. Laws 117 (codified as amended at N.C. GEN. STAT. §§ 97-1 to 97-200 (1999)).

16. *See infra* notes 89–105 and accompanying text

17. *See infra* notes 18–105.

18. *See* CAPOZZOLI & MCVEY, *supra* note 3, at 3.

tortious act "within the scope of . . . and in furtherance of his master's business."[19] Acts of workplace violence are usually intentional torts, and North Carolina courts generally have held that intentional tortious conduct is neither employer-authorized nor within the employee's scope of employment.[20] *Snow v. DeButts*[21] illustrates the North Carolina Supreme Court's analysis of employer liability under respondeat superior. In *Snow*, the court found that one of the defendant employer's managers acted outside the scope of his employment when he assaulted the plaintiff employee after the employee criticized the employer at a public hearing.[22] The *Snow* court concluded that the assault exceeded the scope of the employee's implied authority and that the employer did not authorize the assault.[23] Thus, the employer was not held liable for the plaintiff employee's damages under respondeat superior.[24]

On rare occasions, however, a court will conclude that the employer authorized, either explicitly or implicitly, the employee's intentionally tortious action. In *Robinson v. McAlhaney*,[25] the plaintiff claimed that the defendant's employee assaulted him during the repossession of his property.[26] The plaintiff argued that under respondeat superior the defendant employer was liable for damages resulting from the assault because the attacker was the defendant's employee who was acting in the course and scope of his employment at the time of the assault.[27] The *Robinson* court held that whether the attacker was the defendant's employee and whether the attacker was acting in the scope of his employment were factual issues for the jury to decide.[28]

In addition to respondeat superior, other liability theories have developed that hold employers liable for injuries caused by workplace

19. Snow v. DeButts, 212 N.C. 120, 122, 193 S.E. 224, 226 (1937); *see also* Troxler v. Charter Mandala Ctr., Inc., 89 N.C. App. 268, 271, 365 S.E.2d 665, 668 (1988) ("To be within the scope of employment, an employee, at the time of the incident, must be acting in furtherance of the principal's business and for the purpose of accomplishing the duties of his employment.").

20. *See* Brown v. Burlington Indus., Inc., 93 N.C. App. 431, 437, 378 S.E.2d 232, 235, (1989). *See generally* RESTATEMENT (SECOND) OF AGENCY § 219 (1958) (setting forth the elements of respondeat superior).

21. 212 N.C. 120, 193 S.E. 224 (1937).

22. *See id.* at 125–26, 193 S.E. at 228.

23. *See id.*

24. *See id.*

25. 214 N.C. 180, 198 S.E. 647 (1938).

26. *See id.* at 182, 198 S.E. at 649.

27. *See id.*

28. *See id.* at 183, 198 S.E. at 650.

violence. Typically, plaintiffs are more successful in recovering damages from employers under these additional theories than under respondeat superior. The two most common liability theories are (1) negligent hiring and (2) negligent supervision and retention. Although often litigated together, these two theories possess different legal elements and they apply to different factual scenarios. Given these distinctions, this Note discusses the two theories separately.

Under the theory of negligent hiring, a plaintiff must prove the following: (1) the tortious act occurred,[29] (2) the employee was incompetent for the job,[30] (3) the employer knew or should have known of the employee's incompetence but nevertheless hired the employee,[31] and (4) causation.[32] Although North Carolina's courts recognize the tort of negligent hiring,[33] its applicability to workplace violence is unresolved because few North Carolina cases have addressed this issue.[34] Nevertheless, a review of case law from other jurisdictions reveals that negligent hiring cases, premised on acts of workplace violence, usually turn on two interrelated issues—duty and

29. *See* Medlin v. Bass, 327 N.C. 587, 591, 398 S.E.2d 460, 463 (1990) (quoting S.A. Walters v. Durham Lumber Co., 163 N.C. 536, 541, 80 S.E. 49, 51 (1939)); B.B. Walker Co. v. Burns Int'l Security Serv., Inc., 108 N.C. App. 562, 567, 424 S.E.2d 172, 175 (1993).

30. *See Medlin*, 327 N.C. at 591, 398 S.E.2d at 462–63 (establishing that the employee who has an inherent tendency for violence or who has acted violently in the past satisfies the incompetence element).

31. *See id.*

32. *See id.* At least one jurisdiction has added the additional requirement that the employer owe a legal duty to the plaintiff. *See* Baugher v. A. Hattersley & Sons, Inc., 436 N.E.2d 126, 128 (Ind. Ct. App. 1982) (holding that a claim of negligent hiring was not established because employer owed no legal duty to plaintiffs because they were not customers, patrons, or invitees).

33. *See, e.g.*, *Medlin*, 327 N.C. at 590–91, 398 S.E.2d at 463; O'Connor v. Corbett Lumber Corp., 84 N.C. App. 178, 182–83, 352 S.E.2d 267, 270–71 (1987); *see also* Alex B. Long, Note, *Addressing the Cloud Over Employee References: A Survey of Recently Enacted State Legislation*, 39 WM. & MARY L. REV. 177, 183 (1997) (stating that almost all states recognize the tort of negligent hiring). For a comprehensive discussion of the theory of negligent hiring, see John C. North, Note, *The Responsibility of Employers for the Actions of Their Employees: The Negligent Hiring Theory of Liability*, 53 CHI.-KENT. L. REV. 717, 717–30 (1977).

34. This issue was raised in *Medlin* when the plaintiff student claimed that her school was liable, under a theory of negligent hiring, for the school principal's assault on her. *See Medlin*, 327 N.C. at 589–90, 398 S.E.2d at 461. While North Carolina case law is not well developed in this area, the weight of authority in other jurisdictions clearly establishes that the tort of negligent hiring extends to acts of workplace violence. *See, e.g.*, Rahmel v. Lehndorff, 76 P. 659, 660–61 (Cal. 1904) (en banc) (holding that a claim of negligent hiring could be asserted against a hotel owner who hired an individual with a known history of violence or disorderly conduct when the employee assaulted a customer); Abbott v. Payne, 457 So. 2d 1156, 1157 (Fla. Dist. Ct. App. 1984) (holding that an employer has a duty to investigate a prospective employee's background and the failure to do so in a reasonable manner exposes the employer to liability for negligent hiring practices).

foreseeability.[35] Employers have a well-established duty to hire competent employees.[36] In the context of workplace violence, this duty requires that employers reasonably and accurately assess potential employees' backgrounds to determine whether they pose a foreseeable safety risk to other employees or customers.[37] To satisfy this duty, employers must reasonably investigate a potential employee's background before hiring the individual.[38]

Although a negligent hiring claim focuses the court's attention on the employer's pre-hire actions,[39] the employer's responsibility

---

35. *See, e.g.*, Golden West Broadcasters, Inc. v. Superior Court, 171 Cal. Rptr. 95, 98–99 (Cal. Ct. App. 1981) (affirming grant of summary judgment because the parties conceded that the violent employee's supervisor had no knowledge of the employee's violent tendencies); Hall v. SSF, Inc., 930 P.2d 94, 99 (Nev. 1996) (holding that evidence of the defendant's employee's past fights was admissible because it helped the plaintiff establish that the defendant "knew or should have known" of the employee's past actions and violent tendencies); Santamarina v. Citrynell, 609 N.Y.S.2d 902, 903 (N.Y. App. Div. 1994) (affirming summary judgment on negligent hiring claim because the plaintiff failed to establish that the defendant employer "had any knowledge of a propensity of violence on the part of the employee); *see also* Stephen J. Beaver, Comment, *Beyond the Exclusivity Rule: Employer's Liability for Workplace Violence*, 81 MARQ. L. REV. 103, 110 (1997) (reviewing cases regarding workplace violence and workers' compensation).

36. *Cf.* Ponticas v. K.M.S. Investments, 331 N.W.2d 907, 913–15 (Minn. 1983) (holding that the defendant employer had a duty to exercise reasonable care in hiring its employees and that the defendant breached this duty when it hired an employee who then acted violently in the workplace).

37. *See* Beaver, *supra* note 35, at 110.

38. *See* Lindbergh Porter, Jr., *Employment Torts: High Risk Components of Wrongful Discharge Lawsuits*, *in* 25TH ANNUAL INSTITUTE ON EMPLOYMENT LAW 65, 102 (PLI Lit. & Admin. Prac. Course Handbook Series No. H4-5237, Oct. 1996). Employers may utilize several approaches to satisfy their duty of reasonably investigating the backgrounds of potential employees prior to hiring them. First, employers may perform psychological tests on job candidates to uncover latent violent tendencies. *See* CHARLES E. LABIG, PREVENTING VIOLENCE IN THE WORKPLACE 52–54 (1995); GERALD W. LEWIS & NANCY C. ZARE, WORKPLACE HOSTILITY MYTH AND REALITY 88 (1999). *But see infra* notes 122–27 and accompanying text (reviewing the inaccuracies and difficulties in certain psychological screening techniques). Second, well-trained employees of the potential should conduct interviews that include open-ended questions about how the interviewee handled a situation when she felt she was treated unfairly. *See* STEVE ALBRECHT, FEAR AND VIOLENCE ON THE JOB: PREVENTION SOLUTIONS FOR THE DANGEROUS WORKPLACE 125–27 (1997); CAPOZZOLI & MCVEY, *supra* note 3, at 101–02; MICHAEL MANTELL, TICKING BOMBS DIFFUSING VIOLENCE IN THE WORKPLACE 60–66 (1994). Third, the employer could gather background information on the employee that includes driving, military, credit, work, and criminal records. *See* LEWIS & ZARE, *supra*, at 89; *infra* notes 131–34 and accompanying test (discussing potential problems that arise from using criminal records in the hiring process). Finally, employers should verify all information submitted on the job application, including checking applicant provided references. *See* Kimberly Gee Smith, *Violence in the Workplace: The Armed and Angry Employee*, 29-FALL BRIEF 8, 19 (Fall 1999).

39. *See* Frank C. Morris, Jr., *Workplace Privacy Issues: Avoiding Liability*, SD52 ALI-ABA 697, 760 (1999), *available in* Westlaw, ALI-ABA database (reviewing examples

does not end with the hiring decision, because employers have ongoing duties to provide reasonable supervision and to make reasonable employee retention decisions. In North Carolina, the breach of either post-hire duty results in the tort of negligent supervision and retention.[40] Unlike a negligent hiring claim, the locus of attention for negligent supervision and retention is on the actions an employer takes after hiring an employee and whether the employer failed to act when confronted with knowledge that one of its employees posed a potential threat to safety.

To prove negligent supervision and retention, a plaintiff must show the following: (1) the employer knew of an employee's incompetence prior to the incident in question, (2) the employer failed to take reasonable actions to remedy the incompetence, and (3) the plaintiff suffered an injury as a result of the employer's inaction and employee incompetence.[41] Moreover, the plaintiff must overcome a presumption that the employer properly performed its duty by showing, "by the greater weight of the evidence,"[42] that the plaintiff was injured due to the employer's negligence in retaining the incompetent employee.[43] Courts tend to pay specific attention to the adequacy of supervision and the reasonableness of employers' responses to alleged employee misconduct—particularly violent behavior.[44]

North Carolina courts have recognized claims of negligent supervision and retention when an employee commits an act of workplace violence that injures the plaintiff.[45] In *Lamb v. Littman*,[46] the North Carolina Supreme Court reversed a nonsuit decision against a plaintiff employee who asserted a claim of negligent hiring

---

of cases when employers were held liable for negligent hiring claims arising from the employer's failure to take reasonable precautions in the pre-hire employment decision).

40. *See* Smith v. Privette, 128 N.C. App. 490, 494, 495 S.E.2d 395, 398 (1998) (citing Braswell v. Braswell, 330 N.C. 363, 373, 410 S.E.2d 897, 903 (1991)).

41. *See Smith*, 128 N.C. App. at 494, 495 S.E.2d at 398; *Braswell*, 330 N.C. at 373, 410 S.E.2d at 903; Graham v. Hardee's Food Systems, 121 N.C. App. 382, 385, 465 S.E.2d 558, 560 (1996) (quoting Hogan v. Forsyth Country Club Co., 79 N.C. App. 483, 495, 340 S.E.2d 116, 124 (1986)). *See generally* Morris, *supra* note 39, at 759–63 (reviewing negligent retention and supervision).

42. *Braswell*, 330 N.C. at 374, 410 S.E.2d at 904.

43. *See id.* at 376, 410 S.E.2d at 904–05.

44. *See* VAUGHAN BOWIE, COPING WITH VIOLENCE: A GUIDE FOR THE HUMAN SERVICES 35–53 (1996) (describing effective strategies for intervening in a workplace conflict); LEWIS & ZARE, *supra* note 38, at 67–80 (identifying employee behaviors that indicate violent propensities).

45. *See generally* Porter, *supra* note 38, at 109–12 (reviewing the elements of negligent supervision and retention claims in jurisdictions outside of North Carolina).

46. 128 N.C. 361, 38 S.E. 911 (1901).

and retention when the evidence suggested that the employer knew that the employee-supervisor was surly, violent, and ill-tempered and nevertheless retained him as a supervisor.[47] The *Lamb* court reasoned that the supervisor's reputation and prior reports of his aggressive workplace behavior constituted sufficient notice to trigger the employer's duty to take reasonable steps to protect the other employees.[48] In addition to the notice element, the court emphasized that the aggressor was a supervisor charged with caring for the very person he injured.[49] Thus, the relative status of the parties involved may be important to a court in determining an employer's liability for workplace violence.

More recently, in *Hogan v. Forsyth Country Club*,[50] the plaintiff informed her employer that a fellow employee sexually harassed her, but the employer's supervisory staff took little, if any, action to prevent the reoccurrence of sexual harassment.[51] The *Hogan* court reasoned that the employee's report of sexual harassment, if true, placed her employer on notice that a supervisor threatened workplace safety.[52] Additionally, the court found that the employer's complete disregard of the employee's report and apparent failure to act were enough proof for a reasonable jury to conclude that the employer was negligent.[53]

Lamb and *Hogan* demonstrate that a plaintiff's claim of negligent retention and supervision against an employer may prevail when an employee causes injury to the plaintiff in an act of workplace violence. As evidenced by the numerous lower court dismissals of such cases sustained by North Carolina appellate courts,[54] maintaining

47. *See id.* at 362–63, 38 S.E. at 911–12. The supervisor injured the plaintiff employee, a ten-year-old mill sweep, when he pushed the plaintiff to the floor. *See id.*

48. *See id.*

49. *See id.*

50. 79 N.C. App. 483, 340 S.E.2d 116 (1986).

51. *See id.* at 492, 340 S.E.2d at 122.

52. *See id.*

53. *See id.*; *see also* Shorter v. Mooresville Cotton Mills, 198 N.C. 27, 30–31, 150 S.E. 499, 500 (1929) (sustaining a judgment for a plaintiff when the plaintiff had warned the employer in the morning that a co-employee was dangerous and later that afternoon the co-employee's incompetence caused plaintiff's hand to be damaged).

54. *See, e.g.*, Braswell v. Braswell, 330 N.C. 363, 375–76, 410 S.E.2d 897, 903–05 (1991); Wegner v. Delly-Land Delicatessen, Inc., 270 N.C. 62, 65–66, 153 S.E.2d 804, 807 (1967) (holding that the evidence was insufficient to establish a prima facie case when no evidence suggested that the employer knew the employee was a "high tempered, quarrelsome or dangerous man"); O'Connor v. Corbett Lumber Corp., 84 N.C. App. 178, 182–83, 352 S.E.2d 267, 270–71 (1987) (denying plaintiff's claim when a prisoner in a work-release program inflicted personal injuries and property damages on the plaintiff because the complaint was pleaded insufficiently); *cf.* Pleasants v. Barnes, 221 N.C. 173, 177, 19

a negligent retention and supervision claim is quite difficult. In *Braswell v. Braswell*,[55] the North Carolina Court of Appeals dismissed the plaintiff's case because the court found that the employer did not know nor have reason to know of its employee's violent, domestic tendencies because the employee was "otherwise known as stable and even-tempered."[56] The *Braswell* court also suggested that plaintiffs would have much greater difficulty overcoming the presumption that an employer fulfilled its duty of due care when an employee acted violently outside the workplace or when off duty.[57] Further, the *Braswell* court rejected the argument that section 317 of the RESTATEMENT (SECOND) OF TORTS[58] could be a basis for establishing a claim of negligent supervision and retention in North Carolina,[59] thus indicating that North Carolina courts will not allow plaintiffs to make out prima facie cases of negligent supervision and retention based solely on the fact that an employee used his employer's chattel in committing an act of violence.

In addition to respondeat superior, negligent hiring, and negligent supervision and retention, an employer may also be liable based on its general duty to provide a safe working environment for its employees. Under the Occupational Safety and Health Act of 1970 (the "OSH Act"),[60] employers must provide "a place of

---

S.E.2d 627, 629 (1942) (holding that the employer had insufficient notice of co-employee's dangerousness when one employee complained of the work methods his co-employee was utilizing).

55. 330 N.C. at 363, 410 S.E.2d at 903.

56. *Id.* at 374, 410 S.E.2d at 903.

57. *See id.* at 374, 410 S.E.2d at 903–04.

58. Section 317 of the RESTATEMENT (SECOND) OF TORTS provides that:

> A master is under a duty to exercise reasonable care so to control his servant while acting outside the scope of his employment as to prevent him from intentionally harming others ... if (a) the servant ... is using a chattel of the master, and (b) the master (i) knows or has reason to know that he has the ability to control his servant, and (ii) knows or should know of the necessity and opportunity for exercising such control.

RESTATEMENT (SECOND) OF TORTS § 317 (1965).

59. *See Braswell*, 330 N.C. at 374–75, 410 S.E.2d at 904. At the intermediate appellate level, Judge Green relied on *O'Connor v. Corbett Lumber Corp.*, 84 N.C. App. at 182–86, 352 S.E.2d at 270–72 (1987), as authority for holding that North Carolina recognized section 317 of the RESTATEMENT (SECOND) OF TORTS as a viable basis for alleging negligent hiring and retention. *See* Braswell v. Braswell, 98 N.C. App. 231, 239–42, 390 S.E.2d 752, 757–58, (Green, J., concurring in part and dissenting in part). Judge Green further contended that the plaintiff made out a prima facie case of negligent supervision or retention because the sheriff's department could have prevented the act of violence by not giving the gun used to kill the decedent to the deputy. *See id.* at 242, 410 S.E.2d at 758 (Green, J., concurring in part and dissenting in part).

60. Pub. L. No. 91-596, 84 Stat. 1590 (1970) (codified as amended at 29 U.S.C. §§ 651–678 (1994 & Supp. IV 1998).

employment which [is] free from recognized hazards that are causing or likely to cause death or serious physical harm."[61] A breach of this general duty provides an injured plaintiff or the government with a cause of action against the employer.[62]

Traditionally, a safe working environment was interpreted to mean an environment where employees were not exposed unreasonably to risks from production processes.[63] Conventional inquiries questioned whether the employer provided safety training on machinery, whether the work site had adequate ventilation and lighting, and whether the work equipment was ergonomically correct.[64] Recently, however, the duty to provide a safe workplace has been extended to include an environment that decreases the likelihood of workplace violence.[65] Even though the OSH Act does not reference workplace violence specifically, much less establish related standards, this silence does not relieve employers from the duty to provide a work environment free from threats of workplace violence.[66]

The OSH Act can be used to sanction employers when they should reasonably expect that workplace violence may occur because of the general working conditions.[67] The Occupational Safety and Health Administration (OSHA) issued guidelines in 1996 to help its inspectors identify when employers breach their general duty to provide a safe work environment.[68] These guidelines identify

---

61. 29 U.S.C. 654(a)(1) (1994 & Supp. IV 1998). Congress enacted the OSH Act in 1970 "to assure as far as possible for every working man and woman . . . safe and healthful working conditions." *Id.* § 654(b).

62. *See, e.g.*, Maulden v. High Point Bending & Chair Co., 196 N.C. 122, 123, 144 S.E. 557, 558 (1928) (citing Jefferson v. Raleigh, 194 N.C. 479, 481, 140 S.E. 76, 76 (1927)); DICKINSON, *supra* note 12, at 1–9.

63. *See Maulden*, 196 N.C. at 123–24, 144 S.E. at 558.

64. *See id.*; David J. Kolesar, Note, *Cumulative Trauma Disorders: OSHA's General Duty Clause and the Need for an Ergonomics Standard*, 90 MICH. L. REV. 2079, *passim* (1992) (reviewing the OSH Act's general duty clause and ergonomics).

65. *See* DICKINSON, *supra* note 12, at 1–9.

66. *See* Smith, *supra* note 38, at 9; *see also* LEWIS & ZARE, *supra* note 38, at 3–4 (noting that since the passage of the OSH Act in 1970, the workplace has become much safer in terms of both the physical and psychological working environments).

67. *See* Beaver, *supra* note 35, at 126; Phillips, *supra* note at 12, at 144. The OSH Act's general duty violations are classified as either "serious" or "non-serious." *See* 29 U.S.C. § 666(b), (c) (1994 & Supp. IV 1998). The maximum penalty assessable for a "serious" violation is $70,000 and for a "non-serious" violation, the maximum fine is $7,000 per day that the violation remains uncorrected. *See* Smith, *supra* note 38, at 9.

68. *See* Richard T. Sampson & Jonathan R. Topazian, *Violence in the Workplace*, FOR THE DEFENSE, Dec. 1996, at 20. For a compilation of the OSHA promulgated guidelines for health care and social service workers, see RICHARD V. DENENBERG & MARK BRAVERMAN, THE VIOLENCE-PRONE WORKPLACE: A NEW APPROACH TO DEALING

potential sources of violations and assist employers' compliance with the OSH Act.[69] Although OSHA has stated that its guidelines do not form the basis of general duty violations[70] and that issuing citations to employers who violate the OSH Act's general duty requirement will not reduce workplace violence,[71] OSHA has issued citations when employers create a workplace where an unreasonable risk of potential workplace violence exists.[72] Thus, employers should not overlook their OSHA obligations when assessing their potential liability for acts of workplace violence.

In light of the general duty to create a working environment that is reasonably safe from acts of workplace violence, many employers undertake safety measures and initiatives to comply with this duty.[73] In so doing, employers may expose themselves to liability under the fifth liability theory—assumption of duty. This theory is based on the premise that when an employer, by its actions or words, assumes a duty to protect a third party,[74] that employer may be held liable if it fails to perform its assumed duty. North Carolina has adopted the position of section 324A of the RESTATEMENT (SECOND) OF TORTS

WITH HOSTILE, THREATENING, AND UNCIVIL BEHAVIOR 247–55 (1999).

69. *See* Sampson & Topazian, *supra* note 68, at 21. The guidelines that OSHA drafted applied specifically to health care and social service workers and night retail establishment. *See id.* Some commentators, however, have suggested that the general principles set forth in the guidelines apply to all industries. *See id. See generally* Beaver, *supra* note 35, at 126–27 (summarizing the general nature of the guidelines and the obligations that these guidelines impose). Furthermore, the four main components of the violence prevention program suggested in the OSHA guidelines are arguably relevant to all businesses. *See* Smith, *supra* note 38, at 10. The four components are as follows: (1) securing a commitment by management and employees to prevent workplace violence; (2) analyzing the workplace for safety concerns; (3) controlling and preventing workplace violence; and (4) providing health and safety training. *See id.*

70. *See Workplace Violence: OSHA Tells Field Not to Use Workplace Violence Guidelines as Basis for Citations*, OCCUPATIONAL SAFETY & HEALTH DAILY (BNA), Apr. 10, 1996, *available in* Westlaw, BNA-OSHD database.

71. *See Enforcement: OSHA Official Tells Conference Citations Not Best Approach to Violence*, OCCUPATIONAL SAFETY & HEALTH DAILY (BNA), Nov. 24, 1995, *available in* Westlaw, BNA-OSHD database (summarizing position of Ray Donnelly, OSHA's director of general industry compliance assistance); *see also infra* note 155 (providing examples of unreasonable risk warranting an OSHA citation).

72. *See Employers Face Catch-22 in Addressing Hazard, Attorney Tells Conference Attendees*, 24 O.S.H. Rep. (BNA) No. 45, at 2331 (Apr. 12, 1995).

73. To satisfy the general duty requirement, OSHA requires employers "to do everything reasonably necessary to protect employees' life, safety, and health, including furnishing safety devices and safeguards and adopting practices reasonably adequate to create a safe and healthful workplace." LABIG, *supra* note 38, at 62. Addressing security issues and providing training concerning workplace violence are two of the most effective ways to comply with the general duty requirement. *See id.*

74. The third party can be either a fellow employee or a customer.

that allows the assumption of a duty to protect a third party which may lead to tort liability if the protection is negligently provided.[75] More specifically, North Carolina recognizes that (1) a duty is created when an employer assumes the protection of a third party while rendering the services necessary for the third party's protection, (2) this duty is breached when reasonable care is not used, and (3) the third party relied on the protective measures to her detriment.[76] Employers must be concerned with identifying the point at which they assume a duty to protect third parties and the actions they must undertake to satisfy this assumed duty.

North Carolina courts have not addressed specifically the point at which the employer assumes a duty of reasonable protection. In the cases presented thus far, North Carolina courts have assumed, without analysis, that a duty to protect employees exists and that this duty may be breached when workplace violence harms an employee.[77] Courts in other jurisdictions, however, have approached the question of how employers assume a duty to protect their employees more analytically.[78] These courts have articulated four theories under which employers may assume a duty to protect their employees[79]—

---

75. *See* RESTATEMENT (SECOND) OF TORTS § 324A (1965).

76. *See* Matternes v. City of Winston-Salem, 286 N.C. 1, 19, 209 S.E.2d 481, 491 (1974); Mozingo v. Pitt City Mem. Hosp. Inc., 101 N.C. App. 578, 587, 400 S.E.2d 747, 752 (1991).

77. *See* Holshouser v. Shaner Hotel Group Properties, 134 N.C. App. 391, 398–99, 518 S.E.2d 17, 24 (1999) (asserting that an employer may be liable for breaching its duty to protect employees when an employee was assaulted in the employer's parking lot), *aff'd*, 351 N.C. 330, 330, 524 S.E.2d 568, 568–69 (2000); Wake County Hosp. Sys., Inc. v. Safety Nat'l Cas. Corp., 127 N.C. App. 33, 38–42, 487 S.E.2d 789, 792–94 (1997) (assuming that the employee's estate can collect workers' compensation for the employee's death that resulted when a co-employee abducted the employee from the defendant's parking lot and subsequently murdered her). North Carolina courts impose a "positive duty [on employers] to use ordinary care in providing employees with reasonably safe methods and means to do the work for which they are employed." Maulden v. High Point Bending & Chair Co., 196 N.C. 122, 123, 144 S.E. 557, 558 (1928) (citing Jefferson v. Raleigh, 194 N.C. 479, 481, 140 S.E. 76, 76 (1927)). This positive duty, however, traditionally has been applied to job duties that employers required of employees. *See, e.g.*, *Jefferson*, 194 N.C. at 481, 140 S.E. at 76.

78. *See, e.g.*, Fettke v. City of Wichita, 957 P.2d 409, 414 (Kan. 1998) (holding that the police department's policy not to disclose the identity of any police officer involved in a shoot-out to the media did not create an independent duty to protect the plaintiff officer from the risk of retaliation from individuals involved in the shoot-out); Brooks v. National Convenience Stores, Inc., 897 S.W.2d 898, 902–03 (Tex. App. 1995) (holding that employer did not assume a duty to protect the employee from harm when the employer did not have control over the security defects on the lease premises).

79. *See generally* Phillips, *supra* note 12, at 149–93 (reviewing a different theoretical basis for finding that an employer has a duty to protect its employees); Porter, *supra* note 38, at 160–82 (reviewing theories under which courts have found a duty for employers to

voluntary assumption of contractual obligations,[80] a special relationship between employer and employee,[81] special circumstances,[82] or a statutory provision.[83] Because North Carolina courts have not yet adopted an analytical framework for examining under what circumstances an employer assumes a duty to protect its employees, North Carolina employers should proceed cautiously when implementing workplace safety measures or when assuring employees that they are committed to providing a safe workplace.[84]

Under negligent misrepresentation—the fifth liability theory discussed in this Note—an employer can be held liable when a former employee commits an act of workplace violence at his new place of employment. This theory of liability allows a plaintiff to recover from the perpetrator's former employer for injuries suffered due to workplace violence when the perpetrator's former employer provided the current employer with a positive recommendation that omitted

---

protect their employees from violence); Tanja Lueck Thompson, Note, *Weapons in the Workplace: The Effect of Tennessee's Concealed Weapons Statute on Employer Liability*, 28 U. MEM. L. REV. 281, 286 (1997).

80. Courts have found that an employer has a contractual obligation, either express or implied, to protect its employees when the employer undertakes action to protect employees. *See* Vaughn v. Granite City Steel Div. of Nat'l Steel Corp., 576 N.E.2d 874, 879–80 (Ill. App. Ct. 1991) (holding that voluntary statements published in the employee manual implied the defendant employer's duty to protect its employees).

81. *See* Lillie v. Thompson, 332 U.S. 459, 461–62 (1947) (per curiam) (holding that because of the employer's special relationship with the employee, who was a female, the employer had a duty to protect its employee). *But see* Parham v. Taylor, 402 So. 2d 884, 885–86 (Ala. 1981) (limiting liability to "the most extraordinary and highly unusual circumstances" rather than rejecting the idea of a special employer-to-employee relationship imposing a duty on the employer to protect the employee).

82. The special circumstances are usually when the employer knows or has reason to know that workplace violence is likely to harm an employee. For example, in *Isaacs v. Huntington Memorial Hospital*, the plaintiff doctor was shot in the hospital parking lot during an attempted robbery. *See* 695 P.2d 653, 655 (Cal. 1985). The plaintiff claimed that the defendant hospital had a duty to provide adequate parking lot security because the hospital was in a high crime area and there had been several thefts near the parking lot. *See id.* The California Supreme Court recognizing a "special circumstance" held that determining whether the assault was foreseeable was a jury question. *See id.* at 659.

83. *See infra* notes 154–61 and accompanying text (discussing liability under the Act).

84. Employers may seem better off not implementing workplace safety measures because they expose themselves to liability under the assumption of duty theory. While employers undertake some risk when adopting safety measures, one should remember that this risk only develops when the employer adopts and then negligently performs the safety measures. Furthermore, by adopting safety measures, employers comply with their duty under the OSH Act to provide a safe work environment and may limit their liability in terms of negligent supervision and retention claims. Moreover, employers may benefit from increased employee moral by providing a safe work environment. Finally, affirmative acts to prevent workplace violence may allow an employer to avoid negative publicity when workplace violence occurs on a job site.

mention of past acts of violence or similar misbehavior.[85] In *Randi W. v. Muroc Joint Unified School District*,[86] the California Supreme Court held that the former employer of a vice principal accused of sexual assault could be liable for negligent misrepresentation when the former employer gave the principal a positive recommendation but did not disclose that disciplinary measures had been taken against him for alleged sexual misconduct.[87]

To establish a claim for negligent misrepresentation in North Carolina, a plaintiff must show that (1) the defendant negligently supplied the plaintiff with false information, (2) the plaintiff relied on this false information in the course a business-related transaction, and (3) the plaintiff's pecuniary interests were negatively affected because of her reliance on the false information.[88] While these elements seem applicable to workplace violence cases, the state courts have not decided whether negligent misrepresentation applies to employers who provide employment recommendations but omit information concerning past violent acts. North Carolina courts may eventually

---

85. *See* Anthony J. Sperber, Comment, *When Nondisclosure Becomes Misrepresentation: Shaping Employer Liability for Incomplete Job References*, 32 U.S.F. L. REV. 405, *passim* (1998) (reviewing the basis for negligent misrepresentation claims and relevant state trends). To date, no jurisdiction has created an affirmative duty for past employers to give a former employee a reference. *See* Long, *supra* note 33, at 185–86. Thus, employers may refuse to provide references. *See id.* (citing Moore v. St. Joseph Nursing Home, Inc., 459 N.W.2d 100, 102 (Mich. Ct. App. 1990) (describing employers' duty to give references as a moral or social obligation)).

86. 929 P.2d 582 (Cal. 1997).

87. *See id.* at 584; *see also Workplace Violence: Judge Allows Plaintiffs to Seek Damages Over Recommendation of Violent Employee*, 1995 Daily Lab. Rep. (BNA) No. 160, at D-7 (Aug. 18, 1995) (discussing Jerner v. Allstate Insurance Co., an unpublished Florida Circuit Court opinion, which held a past employer liable under the theory of negligent misrepresentation), *available in* Westlaw, BNA-LB database. In *Jerner*, the former employer—Allstate—provided the perpetrator's new employer with a recommendation that said the perpetrator had voluntarily resigned when, in reality, Allstate had required the resignation because the perpetrator came to work with a gun. *See id.* After being fired again, the perpetrator shot five employees at his new place of business. Allstate was held liable because it had provided a misleading reference that contributed to the employees' deaths. *See id. But see* Cohen v. Wales, 518 N.Y.S.2d 633 (N.Y. App. Div. 1987) (holding that the school district, which recommended a teacher for a job with another school district but failed to reveal that the teacher had been charged with sexual misconduct, was not liable when the teacher molested a pupil).

88. *See* Roberson v. William, 240 N.C. 696, 701, 83 S.E.2d 811, 814–15 (1954) (allowing a negligent misrepresentation claim involving a timber sale for less than half the market value to go to the jury); Ausley v. Bishop, 133 N.C. App. 210, 218, 515 S.E.2d 72, 78 (1999) ("The tort of negligent misrepresentation occurs when ... [an individual] supplies false information for the guidance of others in a business transaction, without exercising reasonable care in obtaining or communicating information." (quoting Fulton v. Vickery, 73 N.C. App. 382, 388, 326 S.E.2d 354, 358 (1985) (reviewing the primary elements of a negligent misrepresentation claim))).

interpret, as other jurisdictions have, the definition of negligent misrepresentation broadly enough to allow such an extension.

While the contours of employer liability for workplace violence remain largely undefined, North Carolina courts have been clear that such liability exists. Though some North Carolina employers may assume that any such liability will extend only to customers because North Carolina's Workers' Compensation Act[89] bars their employees' claims, that assumption may prove erroneous.[90] Under North Carolina's Workers' Compensation Act, an employee who suffers an injury as a result of his employment may not bring an action in tort against his employer when the injury is compensable under the statute.[91] The key question facing North Carolina employers is whether the state courts will deem an employee's injuries due to workplace violence compensable under the Workers' Compensation Act. Resolution of this issue will dictate whether employees may recover in tort against their employers when workplace violence caused the injury.[92] North Carolina courts, however, have not provided clear guidelines on the applicability of the Act to such situations.[93]

Currently, North Carolina courts apply a three-prong test for determining when an employee's injury is compensable under the Workers' Compensation Act.[94] First, the employee's injury must be an accident[95] and must not be "expected or designed by the person

89. Act of Mar. 11, 1929, ch. 120, 1929 N.C. Sess. Laws 117 (codified as amended at N.C. GEN. STAT. §§ 97-1 to 97-200 (1999)).

90. *See generally* LABIG, *supra* note 38, at 72–76 (reviewing California's workers' compensation laws and concluding that some forms of workplace violence perpetrated against an employee are not covered under the worker's compensation system); *supra* note 77 and accompanying text (reviewing North Carolina cases where the courts held that workers' compensation did not bar workplace violence claims).

91. *See* N.C. GEN. STAT. § 97-10.1 (1999); Wake County Hosp. Sys., Inc. v. Safety Nat'l Cas. Corp., 127 N.C. App. 33, 40–42, 487 S.E.2d 789, 793–94 (1997). *See generally* Jennifer Moyer Gaines, Comment, *Employer Liability for Domestic Violence in the Workplace: Are Employees Walking A Tightrope Without a Safety Net?*, 31 TEX. TECH L. REV. 139, 144–45 (2000) (stating that workers' compensation laws limit employee recoveries from employers and noting that not all acts of workplace violence are covered by workers' compensation laws).

92. *See* George A. Staton & Greg J. Thompson, *A Practical Perspective on Employer Violations and the Americans with Disabilities Act,* 35 APR-ARIZ. ATT'Y 32, 32 (1999) (noting that the exclusivity principle of workers' compensation is being eroded in the area of workplace violence).

93. *See* Holshouser v. Shaner Hotel Group Properties, 134 N.C. App 391, 518 S.E.2d 17 (1999), *aff'd*, 351 N.C. 330, 524 S.E.2d 568 (2000).

94. *See* Shaw v. Smith & Jennings, Inc., 130 N.C. App. 442, 445, 503 S.E.2d 113, 116 (1998).

95. *See id.*

who suffers the injury."[96] Second, the employee's injury must arise out of the employee's employment with the employer.[97] North Carolina courts have defined the term "arising out of" as "refer[ing] to the origin or causal connection of the accidental injury or death to the employment."[98] Finally, the employee's injury must be within the course of the employee's employment;[99] courts have defined the term "within the course of" to "refer[ ] to the time, place and circumstances under which the injury occurred."[100]

No clear answer to the question of coterminous coverage exists, even though the North Carolina Supreme Court, without comment, recently affirmed *Holshouser v. Shaner Hotel Group Properties*,[101] a case that initially seems to support the notion that North Carolina allows an injured employee to recover under both workers' compensation and tort law. The *Holshouser* court rejected the defendant employer's assertion that the plaintiff employee was barred from suing in tort because workers' compensation covered the plaintiff's injuries suffered as a result of an act of workplace violence.[102] While the court's decision seems to indicate that, at least in some instances, North Carolina courts will permit an injured employee to sue her employer in tort for injuries suffered due to workplace violence, the contours of this rule remain vague. This vagueness stems from the apparent conflict between *Holshouser* and *Wake County Hospital Services v. Safety National Casualty Corp.*[103]—

96. *Id.* (citations omitted).

97. *See id.*

98. Ross v. Mark's, Inc., 120 N.C. App. 607, 610, 463 S.E.2d 302, 304 (1995) (citing Gallimore v. Marilyn's Shoes, 292 N.C. 399, 402, 233 S.E.2d 529, 531 (1977)).

99. *See Shaw,* 130 N.C. App. at 445, 503 S.E.2d at 116.

100. Schmoyer v. Church of Jesus Christ of Latter Day Saints, 81 N.C. App. 140, 142, 343 S.E.2d 551, 552 (1986) (citations omitted).

101. 134 N.C. App. 391, 518 S.E.2d 17 (1999), *aff'd*, 351 N.C. 330, 524 S.E.2d 568 (2000). In *Holshouser*, the hotel required the plaintiff employee to park in a back parking lot even though hotel management knew that violent criminal activities recently occurred in the parking lot. The plaintiff was raped in the parking lot just before she was scheduled to start her shift. *See id.* at 393, 518 S.E.2d at 20–21.

102. *See id.* at 401–02, 518 S.E.2d at 25–26. The court of appeals reversed summary judgment for the employer on the theory that the plaintiff's claim was not barred by workers' compensation because the attack was outside the scope of plaintiff's employment. *See id.* at 402, 518 S.E.2d at 26. More specifically, the *Holshouser* court reasoned that the hazard the plaintiff encountered was a " 'hazard to which ... [she] would have been equally exposed [to] apart from [her] employment' " and thus the rape did not arise out her employment. *Id.* at 401, 518 S.E.2d at 26 (quoting Bartlett v. Duke Univ., 284 N.C. 230, 233, 200 S.E.2d 193, 195 (1973)).

103. 127 N.C. App. 33, 487 S.E.2d 789 (1997). In *Wake County Hospital Services*, the plaintiff was killed on a nearby street after a fellow employee abducted her from the employee parking lot. At the time of her abduction, the plaintiff was carrying work-

a case with facts similar to *Holshouser* in which the court of appeals barred the plaintiff from suing her employer in tort because of available coverage under workers' compensation. More specifically, it is unclear whether the North Carolina Supreme Court accepted the court of appeal's artificial distinction[104] of *Holshouser* from *Wake County Hospital Services* or overruled *Wake County Hospital Services* in its decision. The answer to this issue will determine largely the breadth of employers' liability to employees for injuries suffered due to workplace violence.[105]

While North Carolina's workers' compensation law, as applied to employee injuries suffered due to workplace violence, is unsettled, employers should not assume that workers' compensation will shield them from tort liability when an employee is injured due to workplace violence. This potentially broader liability gives employers an added incentive to create working environments that reduce the risk of violent acts occurring in the workplace. Analyzing a potential plaintiff's likelihood of recovery under the theories of liability identified earlier is an effective way to design workplace safety measures to reduce the possibility of workplace violence and limit any resulting liability. Given the well-established nature of respondeat superior, a logical place to start such an analysis is with this theory.

The key to a successful respondeat superior claim, and arguably the most difficult element to prove, is establishing that the employee's conduct falls within the scope of the employment. Most acts of workplace violence will fall outside the scope an employee's job because employers usually do not explicitly or implicitly authorize their employees to act violently toward each other or to customers. Consequently, a claim of respondeat superior seems likely to fail when applied to damages resulting from workplace violence. Nevertheless, to guard against litigation, employers should ensure that employees do not interpret employer conduct or policies as

---

related materials. *See id.* at 37, 487 S.E.2d at 791.

104. The *Holshouser* Court distinguished its case from *Wake County Hospital Services* by focusing on the following differences: (1) the plaintiff was not carrying work-related materials; (2) the abduction took place in an overgrown wooded area, not on a street; (3) the assailant was not a co-employee; (4) the employee had not yet reported to work; and (5) there had been reports of criminal activity on the hotel premises. *See id.* at 402, 518 S.E.2d at 26.

105. One potential touchstone for employer liability that may emerge from the North Carolina Supreme Court's affirmation of *Holshouser* is that workers' compensation may not cover an employee who encounters a hazard that would have occurred regardless of "employee" status. *See id.* (citations omitted).

implicitly authorizing violent acts.[106] For example, an employer who knows that certain employees act aggressively toward each other but fails to take corrective action may be perceived as sanctioning and thereby authorizing violent conduct because an employee could reasonably interpret the employer's inaction as authorizing such behavior.[107]

Employers also should be particularly cognizant of how their employees interact with the public. Employers who require their employees to engage in potentially adversarial conduct with customers, such as repossessing property for non-payment, have a heightened duty to make sure that the employees are not aggressive or violent toward customers.[108] To this end, employers need to train their employees to deal with hostile or demanding customers without becoming threatening, angry, or physically aggressive.[109] Along the same lines, employers can reduce the stress that these employees experience to reduce the risk of a violent outburst.[110] Part of creating a comfortable work environment involves hiring people capable of performing the job. As many human resource professionals admit, hiring qualified people is an exceptionally difficult and demanding task.[111] Nevertheless, this task is critical for overall business success.[112]

Effective hiring practices are a key way for employers to reduce

106. To prevent such misunderstandings, employers should investigate all claims of aggressive employee behavior and take corrective action as necessary. *See* MANTELL, *supra* note 38, at 135–60; *see also* LABIG, *supra* note 38, at 99–109 (suggesting that intervention is one of the best ways to prevent workplace violence and recommending the formation of company violence response teams to conduct such interventions). In addition, employers should adopt a written zero-tolerance policy to workplace violence that defines what is meant by zero-tolerance and communicate this policy to employees. *See* ALBRECHT, *supra* note 38, at 130–38.

107. When employees exhibit aggressive behavior toward customers and the employer is aware of such behavior but does nothing to stop it, the customer may have at least a colorable argument that the employee believed that the aggressive behavior was part of the scope of the employment. *See* Robinson v. McAlhaney, 214 N.C. 180, 182–83, 198 S.E. 647, 649–50 (1938).

108. *See, e.g.*, *Robinson*, 214 N.C. at 182–83, 198 S.E. 647, 649–50 (1938).

109. *See Tips for Minimizing Violent Injuries*, WORKERS' COMPENSATION MONITOR, Feb. 11, 2000 [hereinafter *Tips*].

110. *See* LABIG, *supra* note 38, at 135–36 (stating that "stressed" workers are subject to twice the threat of violence and harassment compared to employees with lower stress levels); MANTELL, *supra* note 38, at 226–27 (suggesting mechanisms of stress management for employees). Employers should create a comfortable work environment for employees and ensure that any customer service quotas are attainable and reasonable. *See* CAPOZZOLI & MCVEY, *supra* note 3, at 34–35.

111. *See Look Beyond Normal Qualifications To Find the Ideal Job Candidate*, HR ON CAMPUS, Dec. 1998, at A1.

112. *See id.*

their liability for acts of workplace violence.[113] Employers are increasingly faced with plaintiffs who claim that the employer's negligent hiring of the violent employee lead to their injuries.[114] Reasonably investigating every potential hire's job history prevents negligent hiring claims, because such an investigation negates the inference that the defendant failed to satisfy the applicable standard of care.[115] A reasonable investigation rebuts the plaintiff's claim that the employer knew or should have known that the potential hire either had an inherent tendency to act violently or that the potential hire had acted violently in a prior workplace. Because notice is required to establish a negligent hiring claim, a reasonable investigation will cause the plaintiff's claim to fail.

The crucial decision for employers is to determine what degree of inquiry into a potential hire's past employment history or her psychological make-up constitutes a reasonable investigation. Presently, no simple formula exists to define the appropriate scope.[116] Nevertheless, three well-settled points serve as guidelines. First, employers must conduct some type of pre-employment investigation.[117] Second, employers hiring for positions that require contact with the public are required to conduct a more thorough investigation for their actions to qualify as reasonable.[118] Third, criminal background checks of potential employees are generally not

113. *See* Beth Lindamood, *Prevention Programs Target Workplace Violence*, WORKERS' COMPENSATION MONITOR, May 1998, at Safety and Health 1; *Tips*, *supra* note 109.

114. *See* DICKINSON, *supra* note 12, at 20–22.

115. *See id.*

116. *See* CAPOZZOLLI & MCVEY, *supra* note 3, at 97 (noting that there are no clear guidelines for how thoroughly an employer must investigate a potential employee's background and suggesting that the safest rule is more investigation rather than less).

117. Courts in other jurisdictions have held that employers who conduct no investigation into potential employees' backgrounds during the pre-hire stage breached their duty of due care. *See* Weiss v. Furniture in the Raw, 306 N.Y.S.2d 253, 255 (N.Y. Civ. Ct. 1969) (holding the defendant employer liable because it hired an unqualified employee without making any inquiry into the employee's past); Estate of Arrington v. Fields, 578 S.W.2d 173, 178 (Tex. App. 1979) (holding employer accountable for information that employer could have obtained by conducting a reasonable pre-hire investigation of employee).

118. *See* Connes v. Molalla Transport Sys., Inc., 831 P.2d 1316, 1322 (Colo. 1992) (requiring criminal background check depending on nature and extent of employee contact with the public); Ponticas v. K.M.S. Investments, 331 N.W.2d 907, 913 (Minn. 1983) (holding that the scope of a reasonable investigation depends on the extent of the risk to others). *See generally* Kristine L. Hayes, Note, *Prepostal Prevention of Workplace Violence: Establishing an Ombuds Program as One Possible Solution*, 14 OHIO ST. J. ON DISP. RESOL. 215, 221 (1998) (discussing employer's duty to conduct reasonable investigations of employees).

required to deem an investigation reasonable.[119]

As part of the pre-hiring investigation process, employers should screen potential hires for violent tendencies.[120] Checking the potential hire's references and asking about any gaps of employment are generally sufficient to avoid a claim of negligent hiring;[121] however, some employers may wish to screen potential hires more aggressively. One way to screen applicants more aggressively is to administer integrity or honesty tests.[122] Generally, the tests contain questions regarding politics, personal finances, family relationships, church affiliations, and drinking and smoking habits.[123] Although the idea of such testing may sound appealing, it is wrought with problems. No consensus exists as to the accuracy of the tests.[124] Moreover, these tests are not "routinely designed to detect aggressiveness or violent tendencies ... [and] ... they bear little substantial relationship to the types of conduct at issue in traditional negligent hiring claims."[125] Furthermore, the tests may be inappropriate under the Americans with Disabilities Act (ADA)[126] when the individual being tested has a

119. *See* Abraham v. S.E. Onorato Garages, 446 P.2d 821, 825 (Haw. 1968); Evans v. Morsell, 395 A.2d 480, 484 (Md. 1978); Butler v. Hurlbut, 826 S.W.2d 90, 93 (Mo. Ct. App. 1992); *see also* MANTELL, *supra* note 38, at 53 (suggesting appropriate ways an employer may inquire into a candidate's history of criminal convictions). *See generally* Dermot Sullivan, Note, *Employee Violence, Negligent Hiring, and Criminal Records Checks: New York's Need to Reevaluate Its Priorities to Promote Public Safety,* 72 ST. JOHN'S L. REV. 581, 600–05 (1998) (arguing that a legal duty should be created requiring employers to check the criminal background of each potential hire).

120. *See* LABIG, *supra* note 38, at 51–52; MANTELL, *supra* note 38, at 46–49.

121. *See* Porter, *supra* note 38, at 119.

122. Honesty and integrity tests are allowed under the Federal Employee Polygraph Protection Act of 1988, Pub. L. No. 100-347, 102 Stat. 646 (1988) (codified as amended at 29 U.S.C. §§ 2001–2009 (1994 & Supp. IV 1998)). *See* DICKINSON, *supra* note 12, at 36–38. The Federal Employee Polygraph Protection Act prohibits most private sector employees from using a polygraph or like procedure to screen employees. *See id.* at 36.

123. *See* DICKINSON, *supra* note 12, at 39–40; *see also* CAPOZZOLI & MCVEY, *supra* note 3, at 98–99 (reviewing different psychological screening tests and suggesting that certain questions on standard psychological screening tests are inappropriate for use in the workplace).

124. *See* Beaver, *supra* note 35, at 116. For a thorough empirical study of integrity testing's reliability, see Deniz S. Ones and Chockalingam Viswesvaran, *Integrity Testing in* Organizations, *in* DYSFUNCTION BEHAVIOR IN ORGANIZATIONS: NON-VIOLENT DYSFUNCTIONAL BEHAVIOR 243, 243–76 (Ricky W. Griffin et al. eds., 1998) (reviewing integrity testing's reliability and validity and determining that some integrity testing provides valuable information for employers).

125. Katrin U. Byford, Comment, *The Quest for the Honest Worker: A Proposal for Regulation of Integrity Testing,* 49 SMU L. REV. 329, 361 (1996).

126. Act of July 26, 1990, Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified as amended at 42 U.S.C.A. §§ 12101–12213 (1995 & Supp. 2000). For a general introduction to the ADA, see DENENBERG & BRAVERMAN, *supra* note 68, at 240–46.

qualifying disability, such as a mental impairment.[127] The tests may also be inappropriate under equal employment laws when the tests pose highly personal questions.[128]

A second way to screen more aggressively is to perform a criminal background check on all applicants. Although Title VII of the Civil Rights Act of 1964[129] does not prevent the use of criminal background checks in employment screening, an employer may exclude a potential hire from a job because of her criminal background only if the crime directly relates to the person's ability to perform the job.[130] In addition, courts and the Equal Employment Opportunity Commission (EEOC) have ruled that an employer cannot have a broad policy of not hiring applicants with criminal convictions.[131]

Employers who check the criminal backgrounds of potential employees should follow a few simple guidelines to reduce their Title VII exposure.[132] First, the employer should require the disclosure of all convictions, including felonies and misdemeanors, on the employment application.[133] Second, the employer should consider whether the conviction is job-related and only disqualify the applicant if the conviction relates to anticipated job performance.[134] Third, the employer should not place an employee in circumstances where, due to its knowledge of the employee's conviction record, the employee

127. *See* Beaver, *supra* note 35, at 116. The key question for determining whether the test implicates ADA coverage is whether it is considered a test of mental health. *See* DICKINSON, *supra* note 12, at 38. *See generally* Staton & Thompson, *supra* note 92, at 33–34 (reviewing which employees with mental illnesses qualify for ADA coverage).

128. *See* DICKINSON, *supra* note 12, at 38.

129. Act of July 2, 1964, Pub. L. No. 88-352, 78 Stat. 253 (1964) (codified as amended at 42 U.S.C. § 2000e (1994 & Supp. III 1997)).

130. *See* LABIG, *supra* note 38, at 57–58; Louis P. DiLorenzo and Darren J. Carroll, *The Growing Menance: Violence in the Workplace*, 67-Jan. N.Y. ST. B.J. 24, 25 (1995); Morris, *supra* note 39, at 774.

131. *See* Morris, *supra* note 39, at 774 (reviewing criteria that an employer must satisfy to determine that an employee, because of her criminal record, is incompetent for the position to which she applied). The Eighth Circuit has held that an employee can make out a prima facie case of racial discrimination when an employer has a policy of refusing to hire anyone for employment who has been convicted of a non-traffic related crime because such a practice is not job-related and operates to disqualify a higher percentage of blacks than whites from employment with the employer. *See* Green v. Missouri Pac. R.R. Co., 523 F.2d 1290, 1298–99 (8th Cir. 1975).

132. *See* Steven C. Bednar, *Employment Law Dilemmas: What to Do When the Law Forbids Compliance*, 12 BYU J. PUB. L. 175, 178–79 (1997).

133. *See id.* at 179. The employer should also include with this question a notice that making false statements on the employment application is grounds for dismissal. *See* MANTELL, *supra* note 38, at 53.

134. *See* Bednar, *supra* note 132, at 179; Morris, *supra* note 39, at 772–73.

foreseeably may act in a violent manner.[135]

Employers should exclude from their criminal background checking process any inquiry into a potential employee's arrest record,[136] because the EEOC has stated clearly that considering an arrest record when deciding whether to offer an applicant a position is illegal.[137] The EEOC's position, however, does not mean that an employer cannot require applicants to disclose prior arrests on the application and disqualify any applicant who fails to make a truthful disclosure on the theory that the applicant falsified information on the application.[138] But employers who request arrest information put themselves in the position of having to explain why they requested such information if it is not considered during the hiring process.[139] Formulating a convincing answer is difficult, especially because a stand-alone arrest is not evidence of any criminal activity, so it is not considered to be an accurate predictor of a potential employee's character traits.[140] Moreover, the EEOC has suggested that merely requesting arrest record information from applicants may violate Title VII because "such requests tend to discourage minority applicants and encourage false or incomplete answers from which the applicant may be penalized."[141] Thus, employers may expose themselves to a greater liability under Title VII for checking arrest records than they face by excluding arrest record checks from their pre-employment background check.

Employers cannot assume that their duty to investigate their

---

135. *See* Bednar, *supra* note 132, at 179.

136. *See* MANTELL, *supra* note 38, at 53; Ramona L. Paetzold, *Workplace Violence and Employer Liability: Implications for Organizations*, *in* 23B DYSFUNCTIONAL BEHAVIOR IN ORGANIZATIONS: VIOLENT AND DEVIANT BEHAVIOR 143, 151 (Ricky W. Griffin et al. eds., 1998). In *Gregory v. Litton Systems, Inc.*, the employer withdrew a job offer after it discovered that the applicant had been arrested numerous times, because the employer had a policy of hiring no one with more than one arrest. 316 F. Supp. 401, 403 (C.D. Cal. 1970). The court held that the employer's policy was discriminatory and had no business justification. *See id.*

137. *See* EEOC Decision No. 74–92 (1974), *available in* 1974 WL 3853.

138. *See* Jimerson v. Kisco Co., 404 F. Supp. 338, 341–42 (E.D. Mo. 1975).

139. *See* Kurt H. Decker, *Employment Privacy Law for the 1990's*, 15 PEPP. L. REV. 551, 563 (1998) (stating that use of arrest records during the employment screening process raised privacy concerns).

140. *See id.*

141. Morris, *supra* note 39, at 775; *accord Litton Systems*, 316 F. Supp. at 403. A 1962 study showed that only 33% of employers would hire a person who had been arrested and acquitted of assault. *See* Gary T. Lowenthal, *The Disclosure of Arrest Records to the Public Under the Uniform Criminal History Records Act*, 28 JURIMETRICS J. 9, 13 (1987) (citing Schwartz & Skolnick, *Two Studies of Legal Stigma*, 10 SOCIAL PROBLEMS 133, 134–38 (1962)).

employees ceases after the hiring decision.[142] In North Carolina, employers have a duty to investigate complaints about current employees' violent tendencies and, if substantiated, take appropriate remedial steps to safeguard the workplace.[143] Failure to satisfy this duty may result in employer-liability for acts of workplace violence under a theory of negligent supervision and retention.[144]

To avoid liability under a theory of negligent supervision and retention, employers must be cognizant that any act of employee violence or misbehavior, no matter how slight, may lead to future liability if left unchecked.[145] Consequently, employers should develop mechanisms for employees to report incidents of actual or suspected workplace violence and ensure that each reported incident is investigated and handled appropriately.[146] At the same time, however, employers must not assume that any act of workplace violence or tendency to be aggressive is an automatic ground to dismiss the employee.[147] Rather, employers should base their actions on the legal standard of care that inquires as to whether they acted reasonably when they knew, or should have known, that an employee posed a threat to a third party's safety. Experts have suggested that reasonable responses to incidents of workplace violence may include the following: (1) requiring employee counseling, (2) placing the

142. *See* Morris, *supra* note 39, at 763 (reviewing general principles of negligent supervision and cases where the employer failed to exercise reasonable care after hiring an employee).

143. *See* Mills v. Brown & Wood, Inc., 940 F. Supp. 903, 910 (E.D.N.C. 1996) (holding that a supervisor's use of inappropriate language on one occasion was insufficient to trigger liability for the defendant employer's failure to investigate the supervisor for possible sexual harassment); *cf.* Bryant v. Thalhimer Bros., 113 N.C. App. 1, 10–11, 437 S.E.2d 519, 524–25 (1993) (holding an employer liable for employee's emotional distress when the employee complained of sexual harassment and the employer did nothing in response to the complaint).

144. *See* Leftwich v. Gaines, 134 N.C. App. 502, 513–14, 521 S.E.2d 717, 726 (1999) (stating that a plaintiff must show that the employer either knew or had reason to know of the employee's incompetent behavior and that the employer's failure to act allowed the employee's incompetent behavior to injure the plaintiff) (quoting Smith v. Privette, 128 N.C. App. 490, 494–95, 495 S.E.2d 395, 398 (1998)).

145. *See Mills*, 940 F. Supp. at 910 (suggesting that employers must investigate reported threats of workplace violence but holding that the use of foul language on one occasion did not constitute a threat of workplace violence).

146. *See* DICKINSON, *supra* note 12, at 61–62; *see also* ALBRECHT, *supra* note 38, at 79–82 (discussing the need for management intervention when an employee exhibits violent tendencies at work). For suggestions on how threat reports should be handled and investigated, see CAPOZZOLI & MCVEY, *supra* note 3, at 119–22.

147. In some instances, this standard requires that the violent employee be dismissed because dismissal is the only reasonable action; however, in other instances, an array of alternatives constitute reasonable actions.

employee in a new job assignment with less public contact, (3) reprimanding the employee, (4) instituting a zero-tolerance policy for workplace violence, and (5) training employees on anger and stress management.[148]

Finally, employers must be aware that their decision to terminate or take adverse action against employees due to a violent act or threats of violence may implicate the ADA.[149] In a case decided in Florida, an employee was terminated because he brought a firearm onto company property.[150] Prior to this event, the employee was diagnosed with a mental disorder and the employee argued that the poor judgment exhibited in bringing the weapon to work was a symptom of the mental disorder.[151] Because the employee qualified for ADA coverage, the court allowed the jury to consider the plaintiff's claim.[152] Thus, employers must consider whether the employee exhibiting violent behavior is covered under the ADA before making termination and discipline decisions. When an employee has committed a violent act in the workplace but is also covered by the ADA, the employer must decide whether a reasonable accommodation can be made with respect to the employee's disability while also providing for the safety of the other employees.[153]

Besides reasonably investigating current employees' workplace behavior and potential employees' past employment histories, employers have a general duty to maintain a safe workplace pursuant to Occupational Safety and Health Act (the "OSH Act").[154] Occupational Safety and Health Administration (OSHA) investigators have cited a few employers under the general duty requirement for workplace violence,[155] but the fines for preliminary

148. *See* DICKINSON, *supra* note 12, at 62, 65 (recommending zero-tolerance policy, training, and record keeping of incidents of aggressive behavior); MCCLURE, *supra* note 8, at 165–67 (recommending employee counseling, training, and stress management classes).

149. *See* LABIG, *supra* note 38, at 71–72; Bednar, *supra* note 132, at 186–88.

150. *See* Hindman v. GTE Data Serv., Inc., No. 93-1046-CIV-T-17, 1994 WL 371396, at *1 (M.D. Fla. June 24, 1994).

151. *See id.*

152. *See id.* at *3

153. *See id.* at *3–4; LABIG, *supra* note 38, at 72.

154. *See supra* note 60 and accompanying text (discussing OSHA's general duty provision as well as Congress's underlying intent).

155. For instance, in 1995, the Dairy Barn chain was cited by OSHA for "a serious violation of the agency's general duty clause," *Employers Face Catch-22 in Addressing Hazard, Attorney Tells Conference Attendees*, 24 O.S.H. Rep. (BNA) No. 45, at 2231 (Apr. 12, 1995), when three employees were shot during robberies. In settlement, Dairy Barn agreed to hire crime prevention personnel, train its workforce in safety procedures, and provide OSHA with status reports. *See id.* at 2231–32.

citations were relatively insubstantial.[156] The scarcity of OSHA citations issued for breaches of the general duty regulation for workplace violence indicates that OSHA is either not interested or is unable to use the general duty regulation as an effective mechanism to motivate employers to create safer workplaces.[157] Consequently, employers face minimal liability for workplace violence under the OSH Act.

While the threat of liability under the OSH Act's general duty requirement is minimal, employers should take compliance with the general duty seriously because plaintiffs may use a breach of an OSHA regulation to establish negligence.[158] In North Carolina, violations of OSHA regulations are not negligence per se.[159] Nevertheless, plaintiffs can use OSHA regulation violations to establish that an employer had a duty and breached that duty.[160] Consequently, OSHA violations can lead to a finding of negligence. While the case law on this issue is limited,[161] the North Carolina Court of Appeals has followed other jurisdictions that limit the class of plaintiffs who can use OSHA violations as evidence of negligence to

156. Fines for preliminary citations range from $750 to $5000. *See* Phillips, *supra* note 12, at 145 (citing *Employer Liability, OSHA Criminal Acts, Workplace Violence Discussed at ABA Meeting*, 24 O.S.H. Rep. (BNA) No. 12, at 624 (Aug. 17, 1994); *Psychiatric Hospital in Chicago Cited by OSHA for Workplace Violence*, 23 O.S.H. Rep. (BNA) No. 22, at 646 (Oct. 27, 1993)).

157. Prior to issuing a citation for the breach of the general duty, OSHA must find that: (1) the workplace was not free of hazards, (2) the employer knew of the hazards, (3) the Labor Department had specified specific steps to reduce the hazard that the employer should have undertaken, and (4) suggested steps were both feasible and likely to produce results. *See* DICKINSON, *supra* note 12, at 6. The fact that the Labor Department has not issued many specific steps to reduce the hazards of workplace violence may be a partial explanation for the few OSHA citations for workplace violence.

158. *See, e.g.*, Sloan v. Miller Bldg. Corp., 119 N.C. App. 162, 168, 458 S.E.2d 30, 33 (1995) (plaintiff attempted to establish negligence based on violation of OSHA general safety duty and repeated violation of OSHA's regulations for maintaining safe outrigger scaffolds); Cowan v. Laughridge Constr. Co., 57 N.C. App. 321, 324, 291 S.E.2d 287, 289 (1982) (plaintiff attempted to establish negligence based on violation of OSHA guardrail regulation).

159. *See Cowan*, 57 N.C. App. at 324, 291 S.E.2d at 289; *see also* Geiger v. Guilford College Community Volunteer Firemen's Assoc., 668 F. Supp. 492, 497 (M.D.N.C. 1987) ("[A] violation of OSHA regulations is not negligence per se under North Carolina law.").

160. Some jurisdictions have limited the class of plaintiffs who can use OSHA violations as evidence of negligence to employees. *See, e.g.*, Trowell v. Brunswick Pulp & Paper Co., 522 F. Supp. 782, 784 (D.S.C., Charleston Division 1981) (holding OSHA does not create a duty of compliance with respect to non-employee plaintiffs in a negligence suit).

161. The author was unable to find any North Carolina case that established that a plaintiff could use a breach of OSHA's general duty regulation to establish negligence in maintaining a workplace that is unsafe due to incidents of workplace violence.

employees when it held that invitees can use an OSHA violation as some evidence of negligence.[162] Because North Carolina seems willing to allow non-employees to use OSHA violations to establish negligence, employers should take steps to comply with the general duty requirement to provide a safe working environment under the OSH Act.

When complying with the OSH Act's general duty requirement, employers must be aware that the very actions they take to avoid workplace violence may be interpreted as the voluntary assumption of an additional duty to protect employees. Employers may unintentionally assume such a duty if employees or customers rely on the employer's assertions that the employer is taking measures to create a safe workplace. For instance, employers who adopt a zero tolerance policy for workplace violence,[163] prohibit concealed weapons in the workplace,[164] and form workplace violence intervention teams[165] may enhance their legal duty to provide a safe workplace because the employee reasonably relies on these initiatives to protect his safety.[166] As a result, employers should only propose and promulgate anti-workplace violence initiatives that they are able to enforce.

Employers are in a "Catch-22" because they assume a duty to protect employees and customers when they undertake safety measures to prevent workplace violence but are required to undertake such measures pursuant to their OSHA general duty obligations. Thus, arguably, employers should take the minimal steps necessary to comply with the Act and not adopt innovative safety measures and protocols if their sole goal is to prevent liability for acts of workplace violence.[167] No easy answers exist to this dilemma. Each employer will have to weigh the potential cost and benefits of adopting safety procedures that exceed their OSHA duties. Clearly, however, employers must effectively implement any workplace safety initiative they undertake.

This same imperative applies to employers providing references

---

162. *See Cowan*, 57 N.C. App. at 324–25, 291 S.E.2d at 289–90 (holding that plaintiff who was an invitee could use evidence of an OSHA violation to establish negligence).

163. *See* ALBRECHT, *supra* note 38, at 129–42; DENENBERG & BRAVERMAN, *supra* note 68, at 179–80.

164. *See* DENENBERG & BRAVERMAN, supra note 68, at 238–39; Smith, *supra* note 38, at 16.

165. *See* DENENBERG & BRAVERMAN, *supra* note 68, at 214; LABIG, *supra* note 38, at 92–94; LEWIS & ZARE, *supra* note 38, at 94.

166. *See* LABIG, *supra* note 38, at 65–66.

167. *See* Bednar, *supra* note 132, at 188–99.

to future employers. An employer should either give a complete and accurate reference or none at all. Whether North Carolina courts will extend the tort of negligent misrepresentation to the scenario in which a past employer gives a prospective employer a reference but omits information concerning past acts of violence is unresolved.[168] A plaintiff would face several obstacles in convincing the North Carolina courts to make such an extension. First, a general practice exists of omitting negative employee information in employment recommendations. Thus, employers should know that the recommendations are inherently incomplete and not reliable to reveal negative information.[169] Second, North Carolina requires that the tortfeasor make the misrepresentation in the course of a transaction,[170] and, arguably, no transaction exists when a past employer gives a prospective employer information about an employee. Finally, when the plaintiff is not the new employer but an employee or customer of the new employer, the past employer did not communicate directly with the plaintiff. Therefore, the communication requirement between the defendant and the plaintiff is not satisfied. Notwithstanding these factors, North Carolina employers must remember that plaintiffs in other jurisdictions with similar definitions of negligent misrepresentation have been successful.[171] Through prudent actions, such as refusing to provide any employer recommendations, employers can shield themselves almost entirely from even the possibility of liability under the theory of negligent misrepresentation.[172] No jurisdiction has held that employers have a duty to give employee recommendations, and liability under the tort of negligent misrepresentation can only attach when an employer makes some type of disclosure. Thus, no disclosure equals no liability.

A nondisclosure policy, however, may not be best alternative

168. *Cf.* Paetzold, *supra* note 136, at 151–52 (recognizing that the possibility of liability for negligent referral is small but possible).

169. *See* Deborah Daniloff, *Employer Defamation: Reasons and Remedies for Declining References and Chilled Communications in the Workplace,* 40 HASTINGS L.J. 687 (1989) (noting that employers are reducing the amount of information that they provide in job references).

170. *See* Ausley v. Bishop, 133 N.C. App. 210, 218, 515 S.E.2d 72, 78 (1999) (quoting Fulton v. Vickery, 73 N.C. App. 382, 388, 326 S.E.2d 354, 358 (1985)).

171. *See* Sperber, *supra* note 85, at 408–09 (citing recent decisions where employers held liable because of incomplete employee job references).

172. *See* D. Scott Landry & Randy Hoffman, *Walking a Fine Line on Employee Job Reference Information: New Law Provides Statutory Immunity to Encourage Disclosure by Former Employers,* 43 LA. BUS. J. 457, 457–58 (1996) (stating employers are reluctant to provide recommendations).

because employee job references serve several important functions.[173] References help employers hire skilled employees and determine which prospective employee are most appropriate for their organizations.[174] Also, job references provide an incentive for employees to remain committed to their jobs because they know that a positive job recommendation can help their long-term career advancement.[175] Thus, employers should establish policies and procedures that provide employees and their future employers with job recommendations while also limiting their liability for disclosure of this information.[176]

North Carolina's legislature has greatly assisted employers' ability to disclose employee information without exposing themselves to liability.[177] If an employer decides to provide recommendations to prospective employers, it should make sure that the recommendations represent an accurate reflection of the employer's professional experience with the former employees. North Carolina General Statute section 1-539.12 grants employers immunity from civil liability when they disclose employment information about a current or past employee.[178] To qualify for this immunity, the disclosure must meet several conditions. First, the disclosure must relate to the employee's job history or job performance.[179] Under the statute, job history and job performance are defined very broadly.[180] They include information about the suitability of the employee for re-employment,[181] the employee's job-related skills, abilities, and traits,[182] and the reason why the employee is no longer working for the employer.[183] Second, the employer cannot provide information

173. *See* Sperber, *supra* note 85, at 406–08 (discussing the emergence of "select omissions" in employee references).

174. *See id.*

175. *See id.*

176. *See* Morris, *supra* note 39, at 764–65.

177. *See generally* Markita D. Cooper, *Beyond Name, Rank and Serial Number: "No Comment" Job Reference Policies, Violent Employees and the Need for Disclosure-Shield Legislation*, 5 VA. J. SOC. POL'Y & L. 287, 306–39 (1998) (reviewing the impetus behind states' passage of immunity laws for employee recommendations, listing the states who have passed such laws, and identifying the key differences among enacted state immunity laws).

178. *See* N.C. GEN. STAT. § 1-539.12 (1999). To date, no North Carolina appellate court has interpreted or applied this statute.

179. *See id.*

180. *See id.*

181. *See id.* § 1-539.12(b)(1).

182. *See id.* § 1-539.12(b)(2).

183. *See id.* § 1-539.12(b)(3).

that it knows to be, or that it should know to be, false.[184] Third, the information must be correct.[185] Finally, the disclosure must be at the request of the employee or the employee's prospective employer.[186] Also of significance is that the complaining plaintiff employee has the burden of proving, by a preponderance of the evidence, that the disclosed information was false and that the employer knew or should have known that the information was false.[187]

Employers should take great care to ensure that their employee recommendation procedures comply with the statute and that the information that the recommendations are based on is correct.[188] Employers are shielded from liability for providing accurate recommendations, but incomplete disclosure may expose them to a negligent misrepresentation claim. Also, employers should require written authorization from the employee prior to providing anyone with an employment recommendation.[189] The authorization should state who will receive the recommendation and that the employee understands that the recommendation may contain positive as well as negative information.[190] Another prudent practice involves a policy in which the terminated employee must "sign off" on the reference letter that the former employer will provide to prospective employers.[191] The employee and employer should sign an agreement indicating that the letter is truthful and that the employee holds the employer harmless should the employer send the job reference out to a prospective employer.[192] Also, regardless of whether the employer elects to release references to prospective employers, the employer should maintain accurate records of all employees' past job performance.[193] Employers should limit recommendations to

184. *See id.* § 1-539.12(a)(2).
185. *See id.* § 1-539.12(a)(1).
186. *See id.* § 1-539.12(a).
187. *See id.*
188. *See id.*
189. *See* Morris, *supra* note 39, at 771 (sample request for recommendation letter).
190. *See id.*
191. *See* Felhaber, Larson, Fenlon, & Vogt, P.A., *Agreement on a Specific Reference Letter May Protect the Employer,* MINNESOTA EMPLOYMENT LAW LETTER, June 1997, *available in* Westlaw, 7 No. 4 SMMNEMPLL 1.
192. *See id.*
193. This practice requires documenting any disciplinary actions or corrective measures taken against the employee. The employee should be made aware of this documentation procedure and be informed of what her job performance file contains. *See id.*; *cf.* Jones, Walker, Waechter, Poitevent, Carrere, & Denegre L.L.P., *Employer Wins Age Case by Carefully Documenting Performance Deficiencies,* LOUISIANA EMPLOYMENT LAW LETTER, March 1999, *available in* Westlaw, 7 No. SMLAEMPLL 3 (reviewing a case where employer was not held liable for an age discrimination claim because the employer

information documented in employee job performance files and ensure that the recommendation accurately reflects all the information in the file.[194]

North Carolina employers face liability for acts of workplace violence under several different theories of liability.[195] While the contours of theories under which an employer will be held responsible for acts of workplace violence are still developing, the trend indicates that North Carolina employers will face a great volume of litigation stemming from acts of workplace violence. To respond effectively to this trend, North Carolina employers need to do more than answer and defend each complaint that arises against them. Instead, North Carolina employers should carefully review their current hiring processes to ensure that they are screening potential employees for violent tendencies. Performing such screening is difficult because employers must ensure that their hiring practices comply with the American with Disabilities Act and Title VII. In addition, North Carolina employers should also be aware that retaining or improperly supervising employees who on prior occasions have acted violently in the workplace can subject them to liability. Therefore, employers should develop a mechanism to encourage reporting and resolving incidents of workplace violence.

Employers also need to recognize that the acts they undertake to guard against workplace violence may be interpreted as a voluntarily assumption of the duty of protection. While such an assumption seems counterproductive, realistically employers must undertake initiatives to provide safe working environments to comply with OSHA's general duty to provide a safe workplace and because employees, customers and the community expect safe places to work and conduct business. In short, employers should choose safety initiatives that are practical and then make sure that the initiatives are implemented.

JULES M. DAVIS

had maintained records showing the employee's performance deficiencies that supported the employers rationale for terminating the employee).

194. *See id.*

195. *See supra* notes 18–88 and accompanying text.

Revisiting *Rutledge*: A Survey of Recent Developments in Occupational Disease Law Under the North Carolina Workers' Compensation Act

During the past two decades, the number of cases in North Carolina involving workers' compensation for occupational disease has increased tremendously.[1] *Rutledge v. Tultex Corp./Kings Yarn*,[2] decided in 1983, marked the onset of this increased litigation. Prior to *Rutledge*, an employee could be compensated for occupational disease only to the extent that the disease was attributable to or caused by his or her employment.[3] Thus, while causation was the critical issue, the courts had difficulty articulating a standard for determining whether a causal link existed between the disease and the employment.[4] In particular, when both work-related and non-

1. *See, e.g.*, Rutledge v. Tultex Corp./Kings Yarn, 308 N.C. 85, 301 S.E.2d 359 (1983); Hilliard v. Apex Cabinet Co., 305 N.C. 593, 290 S.E.2d 682 (1982); Hansel v. Sherman Textiles, 304 N.C. 44, 283 S.E.2d 101 (1981); Morrison v. Burlington Indus., 304 N.C. 1, 282 S.E.2d 458 (1981); Fuller v. Motel 6, 526 S.E.2d 480, 2000 N.C. App. LEXIS 150 (2000); Jarvis v. Food Lion, Inc., 134 N.C. App. 363, 517 S.E.2d 388, *review denied by* 351 N.C. 356, 1999 N.C. LEXIS 1326, at *1 (Nov. 4, 1999); Keel v. H & V Inc., 107 N.C. App. 536, 421 S.E.2d 362 (1992); Perry v. Burlington Indus., Inc., 80 N.C. App. 650, 343 S.E.2d 215 (1986); Preslar v. Cannon Mills Co., 80 N.C. App. 610, 343 S.E.2d 209 (1986); Lumley v. Dancy Const. Co., Inc., 79 N.C. App. 114, 339 S.E.2d 9 (1986); Calloway v. Mills, 78 N.C. App. 702, 338 S.E.2d 548 (1986); McHargue v. Burlington Indus., 78 N.C. App. 324, 337 S.E.2d 584 (1985); Grant v. Burlington Indus., 77 N.C. App. 241, 335 S.E.2d 327 (1985); Gibson v. Little Cotton Mfg. Co., 73 N.C. App. 143, 325 S.E.2d 698 (1985); Robinson v. J.P. Stevens & Co., 57 N.C. App. 619, 292 S.E.2d 144 (1982); Lumpkins v. Fieldcrest Mills, 56 N.C. App. 653, 289 S.E.2d 848 (1982); Hyatt v. Waverly Mills, 56 N.C. App. 14, 286 S.E.2d 837 (1982); Moore v. J.P. Stevens & Co., 47 N.C. App. 744, 269 S.E.2d 159 (1980).

North Carolina defines occupational disease as "[a]ny disease . . . which is proven to be due to causes and conditions which are characteristic of and peculiar to a particular trade, occupation or employment . . . excluding all ordinary diseases of life to which the general public is equally exposed outside of the employment." N.C. GEN. STAT. § 97-53(13) (1999). Occupational diseases were first made compensable under the North Carolina Workers' Compensation Act in 1935. *See* Act of Mar. 26, 1935, ch. 123, § 1(a), 1935 N.C. Sess. Laws 130 (codified as amended at N.C. GEN. STAT. § 97-52 (1999)).

2. 308 N.C. 85, 101, 301 S.E.2d 359, 369–70 (1983) (allowing compensation to the full extent of disability even when non-work-related factors significantly contributed to the disease).

3. *See* Morrison v. Burlington Indus., 304 N.C. 1, 18, 282 S.E.2d 458, 470 (1981) (holding that when work-related and non-work-related factors contribute to a disability, a plaintiff may be compensated only for "that portion of the disability caused, accelerated or aggravated by the occupational disease").

4. *See Rutledge*, 308 N.C. at 94, 301 S.E.2d at 365 (comparing the majority and dissenting opinions in *Hansel v. Sherman Textiles*, 304 N.C. 44, 283 S.E.2d 101 (1981), and in *Morrison*, 304 N.C. at 1, 282 S.E.2d at 458); *Hansel*, 304 N.C. at 52, 283 S.E.2d at 106

work-related factors contributed to the disease, courts faced the difficult task of apportioning causation among the contributing factors.[5]

Rutledge radically simplified the legal landscape by requiring a claimant seeking compensation under the North Carolina Workers' Compensation Act[6] (the "Act") to show merely (1) that she suffered from an occupational disease, and (2) that her last injurious exposure to the conditions causing the disease occurred while she was working for the defendant.[7] According to *Rutledge*, a disease is "occupational" when employment exposes a worker to any risk that causes the disease or significantly contributes to the disease's development.[8] Accordingly, diseases originating outside of the employment setting became compensable if employment "significantly contributed to the disease."[9] Indeed, according to the *Rutledge* court, a claimant's last employer would be liable for the full extent of disability if working conditions "proximately augmented the disease or preexisting condition to any extent, *however slight.*"[10]

(noting that an award cannot be sanctioned unless it is shown that "the disease was incident to or the result of the particular employment") (quoting Booker v. Duke Med. Ctr., 297 N.C. 458, 475, 256 S.E.2d 189, 200 (1979)).

5. *See Morrison*, 304 N.C. at 6–7 & n.2, 282 S.E.2d at 463 & n.2. (finding that only fifty-five percent of the claimant's disability resulted from work-related factors and awarding compensation for that amount); *Hansel*, 304 N.C. at 54–55, 283 S.E.2d at 107 (requiring apportionment in a case in which non-work-related factors contributed to the disease).

6. Act of Mar. 11, 1929, ch. 120, 1929 N.C. Sess. Laws 117 (codified as amended at N.C. GEN. STAT. §§ 97-1 to 97-200 (1999)).

7. *See Rutledge*, 308 N.C. at 89, 301 S.E.2d at 362. In articulating the standard for determining causation in occupational disease cases, the North Carolina Supreme Court relied on the language of section 97-57 of the North Carolina General Statutes, which states that "[i]n any case where compensation is payable for an occupational disease, the employer in whose employment the employee was last injuriously exposed to the hazards of such disease . . . shall be liable." N.C. GEN. STAT. § 97-57 (1999).

8. *See Rutledge*, 308 N.C. at 101, 301 S.E.2d at 369–70.

9. *Id.* Under the last injurious exposure rule, the claimant will be compensated by the employer responsible for the last exposure to the conditions that caused or significantly contributed to the disease's development, regardless of how long the employment relationship lasted. *See id.* at 89, 301 S.E.2d at 362; *see also* Haynes v. Feldspar Producing Co., 222 N.C 163, 164–65, 22 S.E.2d 275, 275–76 (1942) (affirming the Commission's award of compensation to the claimant who contracted silicosis from exposure to silica dust from working in North Carolina feldspar mines for 28 years although he only worked for the defendant for four months); LEONARD T. JERNIGAN JR., NORTH CAROLINA WORKERS' COMPENSATION: LAW AND PRACTICE § 16-3 (2d ed. 1995) ("[A]ssume that an employee developed byssinosis (cotton dust disease) while working for one employer for 30 years, and then changed employers for the last six months of his work history. If he was injuriously exposed . . . during these last few months, the last employer would be solely liable.").

10. *Rutledge*, 308 N.C. at 102, 301 S.E.2d at 370 (emphasis added).

Rutledge's departure from precedent sparked tremendous controversy and delivered a devastating blow to employers by threatening to tip the scales in favor of employees.[11] The four-to-three decision was met with both a strong dissent[12] and a legislative effort to overturn the decision.[13] Despite criticism, *Rutledge* became the law and was closely followed in subsequent cases.

Recently, several North Carolina cases have appeared to retreat from *Rutledge*'s causation standard by requiring a successful claimant to show that her exposure *while in the defendant's employ* "caused or significantly contributed to" her disease.[14] In effect, these cases collapse the two separate elements required by *Rutledge*—causation, which is inherent in the definition of occupational disease, and last

11. *Rutledge* was criticized because it marked an abandonment of North Carolina precedent that required apportionment of causation and allowed compensation of a disability only to the extent the disability was caused by employment. *See* Gregory Stuart Smith, Note, *Workers' Compensation*—Rutledge v. Tultex Corp./Kings Yarn: *Leaving Precedent in the Dust?*, 62 N.C. L. REV. 573, 573–74 (1984); *see also supra* notes 34–48 and accompanying text (describing pre-*Rutledge* precedents). While the court did not expressly overrule *Morrison* and other decisions requiring apportionment, the precedential value of these cases diminished significantly. *See* Smith, *supra*, at 574. The significant contribution standard established in *Rutledge* was more favorable to employees because it allowed compensation for the full extent of the disability if employment (1) was a primary cause of the disease or (2) augmented a pre-existing disease. *See Rutledge*, 308 N.C. at 101–02, 301 S.E.2d at 369–70.

12. *See Rutledge*, 308 N.C. at 109–31, 301 S.E.2d at 374–87 (Meyer, J., dissenting). Justice Meyer, joined by Justice Copeland and Chief Justice Black, reasoned that chronic obstructive lung disease was not a single disease but a general name for a combination of diseases and that the claimant's condition should not have been designated an occupational disease. *See id.* at 121, 126, 301 S.E.2d at 381, 384 (Meyer, J., dissenting). The dissenters argued that, by lumping all of the claimant's specific lung diseases under the rubric " 'chronic obstructive lung disease' " and collectively calling them an occupational disease, the majority thereby avoided the apportionment requirement espoused in previous cases. *Id.* (Meyer, J., dissenting); *see also* Smith, *supra* note 11, at 578–79 (discussing the dissenting opinion's criticism of the *Rutledge* court's failure to examine the causes of each of the claimant's specific lung diseases independently).

13. *See* S. 471, 1983 Leg., Reg. Sess. (N.C. 1983). Textile manufacturers hired former North Carolina Supreme Court Justice Huskins, author of the *Morrison* opinion, to draft a bill to invalidate *Rutledge* and require apportionment. *See* Elizabeth Leland, *Ex-Justice Hired to Write Bill to Stymie Compensation Ruling*, NEWS & OBSERVER (Raleigh, N.C.), May 5, 1983, at 1A. The bill caught the attention of the local press and led victims of byssinosis to march inside the state legislative building, forcing legislators to observe their severe disabilities. *See* Elizabeth Leland, *Workers Unite to Urge Rejection of Change in Compensation Law*, NEWS & OBSERVER (Raleigh, N.C.), May 19, 1983, at 1C [hereinafter Leland, *Workers Unite*]. The bill was introduced in the Senate but never made it beyond committee hearings due to strong opposition expressed during the hearings.

14. *See* Hardin v. Motor Panels, Inc., 524 S.E.2d 368, 371–72, 2000 N.C. App. LEXIS 5, at *6–10 (2000); Jarvis v. Food Lion, Inc., 134 N.C. App. 363, 367–68, 517 S.E.2d 388, 391, *review denied by* 351 N.C. 356, 1999 N.C. LEXIS 1326, at *1 (Nov. 4, 1999); Locklear v. Stedman Corp./Sara Lee Knit Products, 131 N.C. App. 389, 393–94, 508 S.E.2d 795, 798 (1998); Baker v. City of Sanford, 120 N.C. App. 783, 463 S.E.2d 559 (1995).

injurious exposure. After a brief discussion of the history of the North Carolina Workers' Compensation Act and the court's decision in *Rutledge*,[15] this Note evaluates two of the most recent North Carolina Court of Appeals occupational disease cases and discusses the current trend toward tempering *Rutledge*'s causation analysis.[16] The Note also examines whether North Carolina courts have continued to apply the last injurious exposure rule as enunciated in *Rutledge*.[17] Finally, the Note proposes changes in the state's existing workers' compensation law to foster effective resolution of occupational disease cases.[18]

To put the present cases in context, it is imperative to understand the history of the North Carolina Workers' Compensation Act and the pre-*Rutledge* cases that set the stage for the *Rutledge* decision. In 1929, the General Assembly adopted the North Carolina Workers' Compensation Act[19] in response to the inequities of common law fault-based remedies for on-the-job injuries.[20] Under the common law, it was difficult for employees injured on the job to be compensated promptly and adequately.[21] Because workers' claims were based on negligence, employers could assert many effective defenses, including the fellow servant rule, assumption of risk, and contributory negligence.[22] In drafting the Workers' Compensation Act, legislators hoped to "provide speedy compensation to an employee for an injury arising out of and in the course of his employment, without requiring the employee to show any fault by the employer,"[23] and also to promote "uniformity,

15. *See infra* notes 18–65 and accompanying text.

16. *See infra* notes 66–98 and accompanying text.

17. *See infra* notes 99–114 and accompanying text.

18. *See infra* notes 115–45 and accompanying text.

19. Act of Mar. 11, 1929, ch. 120, 1929 N.C. Sess. Laws 117 (codified as amended at N.C. GEN. STAT. §§ 97-1 to 97-200 (1999)). The Act was originally denominated The North Carolina Workmen's Compensation Act. *See id.* at ch. 120, § 1(a).

20. *See* JERNIGAN, *supra* note 9, § 1-1.

21. *See id.*

22. *See* John Richard Owen, Note, *The North Carolina Workers' Compensation Act of 1994: A Step in the Direction of Restoring Balance*, 73 N.C. L. REV. 2502, 2504 (1995). At common law, an employer escaped liability if a worker was injured by the negligence of a fellow worker, or "fellow servant." *See id.* at 2504 n.27. Under the assumption of risk defense, a negligent employer who contributed to an injury was not liable if the injury resulted from ordinary employment risks. *See id.* at 2504 n.28. Further, a worker's claim was barred if the worker's negligence contributed to the injury to any extent. *See id.* at 2504 n.29.

23. James R. Martin, Comment, *A Proposal to Reform the North Carolina Workers' Compensation Act to Address Mental-Mental Claims*, 32 WAKE FOREST L. REV. 193, 194 (1997); *see also* JERNIGAN, supra note 9, § 1-2 (noting that "the employee no longer had to prove negligence on the part of the employer"); MARK A. ROTHSTEIN ET AL.,

efficiency, predictability, and fairness."[24] The Industrial Commission, an independent review board that adjudicates claims, was created to aid in the accomplishment of these goals.[25]

At the core of the workers' compensation system is the principle of balance, or quid pro quo, between employers and employees.[26] The system guarantees a worker regular income benefits and medical coverage, regardless of fault, when that worker is injured.[27] In return, the employer receives immunity from litigation over injuries covered by the Act.[28] Although the original North Carolina Workers' Compensation Act covered only physical injuries,[29] the Act was amended in 1935 to allow compensation for occupational diseases.[30] In 1971, coverage was extended further to allow compensation for more diseases. For example, prior to the 1971 amendment, section 97-53(13) allowed compensation for "[i]nfection or inflammation of the skin or eyes or other external contact surfaces or oral or nasal cavities."[31] After amendment, section 97-53(13) defined occupational disease as "[a]ny disease . . . which is proven to be due to causes and conditions which are characteristic of and peculiar to a particular . . .

EMPLOYMENT LAW § 6.24 (2d ed. 1999) (noting that the nation's first workers' compensation statutes were designed to replace common law fault remedies with no-fault coverage).

24. Joan T.A. Gabel, *Escalating Inefficiency in Workers' Compensation Systems: Is Federal Reform the Answer?*, 34 WAKE FOREST L. REV. 1083, 1083 (1999).

25. The Industrial Commission, a governmental agency under the authority of the Department of Commerce, is charged with resolving workers' compensation claims. *See* JERNIGAN, *supra* note 9, § 1-3. Employers and employees with disputes over compensation may apply for an initial hearing before a commissioner or deputy commissioner. *See id.* §§ 24-1 to -2. Decisions at the initial hearing may be appealed to the full Commission, *see id.* § 25-1, and then to the North Carolina Court of Appeals, *see id.* § 26-1.

26. *See* Gabel, *supra* note 24, at 1083–84.

27. *See* JERNIGAN, *supra* note 9, §§ 1-2, 17-1, 29-1.

28. *See* N.C. GEN. STAT. § 97-10.1 (1999) ("If the employee and the employer are subject to and have complied with the provisions of this Article, then the rights and remedies herein granted to the employee . . . shall exclude all other rights and remedies of . . . at common law or otherwise on account of such injury.").

29. *See* Act of Mar. 11, 1929, ch. 120, 1929 N.C. Sess. Laws 117 (codified as amended at N.C. GEN. STAT. §§ 97-1 to 97-200 (1999)); *see also* ROTHSTEIN ET AL., *supra* note 23, § 6.24 (noting that, because conventional tort liability had extended to only "accidental" injuries, the country's early workers' compensation statutes did not address occupational diseases).

30. *See* Act of Mar. 26, 1935, ch. 123, 1935 N.C. Sess. Laws 130 (codified as amended at N.C. GEN. STAT. § 97-52 (1999)) (stating that disability or death caused by occupational disease would be compensable in the same manner as disability or death resulting from an accidental injury).

31. Act of Mar. 26, 1935, ch. 123, § 1(b), 1935 N.C. Sess. Laws 130, *amended by* Act of June 14, 1971, ch. 547, 1971 N.C. Sess. Laws 477 (codified at N.C. GEN. STAT. § 97-53(13) (1999)).

employment, but excluding all ordinary diseases of life to which the general public is equally exposed."[32] As a result, workers brought increasing numbers of claims. Legislation was proposed to reduce the number of claims brought, but it ultimately proved unsuccessful.[33] Employers, however, were able to gain relief from the courts.

In at least two North Carolina Supreme Court decisions prior to *Rutledge*, the court concluded that apportionment between work-related and non-work-related factors was appropriate.[34] In *Morrison v. Burlington Industries*,[35] the Industrial Commission attributed only fifty-five percent of the plaintiff's chronic obstructive lung disease to work-related byssinosis and calculated her compensation accordingly.[36] The supreme court determined that the evidence overwhelmingly supported the Commission's findings and affirmed the apportionment of damages.[37]

In *Hansel v. Sherman Textiles*,[38] medical testimony demonstrated that the plaintiff's chronic obstructive lung disease was caused by work-related byssinosis and non-work-related asthma and chronic bronchitis.[39] The Commission concluded that the plaintiff had a compensable occupational disease and awarded her full compensation.[40] The North Carolina Supreme Court found sufficient evidence to support the Commission's factual findings, but believed that the findings did not justify the Commission's conclusions as to causation and award.[41] Consequently, the court remanded the case for a determination of the relative contributions of occupational and non-occupational factors.[42] Thus, as in *Morrison*, the court required the Commission to determine what percentage of the claimant's disability was due to her occupational disease.

Critics scrutinized the apportionment rule espoused in *Morrison*

---

32. Act of June 14, 1971, ch. 547, 1971 N.C. Sess. Laws 477 (codified at N.C. GEN. STAT. § 97-53(13) (1999)).

33. *See* S. 471, 1983 Leg., Reg. Sess. (N.C. 1983); Leland, *Workers Unite*, *supra* note 13, at 1C; Smith, *supra* note 11, at 582.

34. *See* Morrison v. Burlington Indus., 304 N.C. 1, 6–7, 282 S.E.2d 458, 463 (1981); Hansel v. Sherman Textiles, 304 N.C. 44, 54–55, 283 S.E.2d 101, 107 (1981). These two cases were decided on the same day.

35. 304 N.C. 1, 282 S.E.2d 458 (1981).

36. *See id.*, 304 N.C. at 2, 282 S.E.2d at 461.

37. *See id.*, 304 N.C. at 6–7, 282 S.E.2d at 463.

38. 304 N.C. 44, 283 S.E.2d 101 (1981).

39. *See id.* at 54, 283 S.E.2d at 107. There was also evidence that the claimant was a cigarette smoker. *See id.* at 56, 283 S.E.2d at 109.

40. *See id.* at 54, 283 S.E.2d at 107.

41. *See id.* at 50, 283 S.E.2d at 105.

42. *See id.* at 60, 283 S.E.2d at 110.

and *Hansel.* One commentator pointed out that the *Morrison* court apportioned causation between work- and non-work-related factors despite the absence of an express apportionment provision in the statute.[43] Another asserted that the *Morrison* court departed from precedent, created an illusory distinction between accident-based claims and occupational disease claims,[44] and expropriated the legislature's function by judicially creating law.[45] In his dissenting opinion in *Morrison*, Justice Exum argued that neither the facts nor precedent supported the majority's apportionment rule.[46] He stated that no apportionment was necessary because Morrison's cotton dust exposure had "significantly contributed" to her disease and ultimate disability.[47] Justice Exum, concurring in the result in *Hansel*, reiterated his "significant contribution" standard and commented on the difficulties inherent in apportioning the contribution of work-related and non-work-related causes.[48]

Perhaps it was this difficulty in apportioning causation between work and non-work-related causes of occupational disease that led the court to abandon the *Morrison-Hansel* rule in *Rutledge v. Tultex Corp./Kings Yarn.*[49] By characterizing chronic obstructive lung disease as an occupational disease, *Rutledge* "severely limit[ed]" the pre-*Rutledge* requirement of apportionment.[50] Justice Exum, now writing for the majority,[51] evaded the rule espoused in *Morrison* and

---

43. *See* ARTHUR LARSON & LEX K. LARSON, LARSON'S WORKERS' COMPENSATION LAW § 52.06[4][d], at 52–69 (1999).

44. *See* Stanley Hammer & Kenneth L. Hardison, Comment, *Workers' Compensation—You Take (45% of) My Breath Away*—Morrison v. Burlington Industries, *304 N.C. 1, 282 S.E.2d 458 (1981)*, 4 CAMPBELL L. REV. 107, 120 (1981) ("An accident need not be the sole cause of disability if the employment reasonably contributes to the disability, whereas in occupational disease cases, the occupational disease must be the exclusive cause of disability.").

45. *See* Hammer & Hardison, *supra* note 44, at 125.

46. *See* Morrison v. Burlington Indus., 304 N.C. 1, 19, 282 S.E.2d 458, 470 (1981) (Exum, J., dissenting).

47. *Id.* at 44, 282 S.E.2d at 484 (Exum, J., dissenting).

48. *See* Hansel v. Sherman Textiles, 304 N.C. 44, 66 & n.8, 283 S.E.2d 101, 113 & n.8 (1981) (Exum, J., concurring in result) ("We ask too much of the medical profession if we require it to assess in terms of mathematical percentages the relative contributions of the various possible causes of such diseases.").

49. 308 N.C. 85, 301 S.E.2d 359 (1983); *see also* Smith, *supra* note 11, at 573–74 (noting that the *Rutledge* court held that apportionment is unnecessary when a worker's disability is caused solely by chronic obstructive lung disease that has been significantly contributed to by job conditions).

50. *See* Smith, *supra* note 11, at 573–74.

51. Justice Exum had dissented in *Morrison*, contending that apportionment was contrary to the significant contribution standard previously adopted by the court. *See Morrison*, 304 N.C. at 24–34, 282 S.E.2d at 473–79 (Exum, J., dissenting).

Hansel by stating that the issue of "whether a textile worker's *chronic obstructive lung disease* may be an occupational disease" was one of first impression.[52] Justice Exum abandoned the apportionment rule since he believed it impossible to assign percentages to the various causes of an occupational disease.[53]

In *Rutledge*, the plaintiff, who had worked in textile mills her entire life, developed a cough and shortness of breath.[54] At the time of her hearing before the deputy commissioner, she suffered from "chronic obstructive pulmonary disease [with elements] of pulmonary emphysema and chronic bronchitis" and could only perform sedentary work.[55] The deputy commissioner determined, however, that her condition was also partially caused by twenty-nine years of smoking a pack of cigarettes per day.[56] Based on these findings, the deputy commissioner concluded that the plaintiff's chronic obstructive lung disease did not result solely from cotton dust exposure while working for the defendant.[57] The full Commission adopted the deputy commissioner's decision as its own and denied compensation.[58]

The supreme court rejected the Commission's analysis.[59] According to the court, the last injurious exposure rule, which required merely that the exposure " 'proximately augment[] the disease to any extent, however slight,' " was the proper standard for occupational disease cases in which there was a pre-existing condition.[60] For the first time since the 1971 amendment of the North Carolina Workers' Compensation Act, the court defined occupational diseases falling under the section 97-53(13) catchall provision: a disease is "occupational" if it "exposed the worker to a greater risk of contracting th[e] disease than members of the public generally, and provided the worker's exposure to [the hazardous condition or substance] significantly contributed to, or was a significant causal factor in, the disease's development."[61] The court

52. *Rutledge*, 308 N.C. at 100–01, 301 S.E.2d at 369.
53. *See id.* at 94–95, 301 S.E.2d at 365–66.
54. *See id.* 308 N.C. at 87, 301 S.E.2d at 361–62.
55. *Id.* at 87, 301 S.E.2d at 362 (alterations in original).
56. *See id.* at 87–88, 301 S.E.2d at 361–62.
57. *See id.* at 88, 301 S.E.2d at 362.
58. *See id.*
59. *See id.* at 90, 301 S.E.2d at 363.
60. *Id.* at 89, 301 S.E.2d at 362 (quoting Haynes v. Feldspar Producing Co., 222 NC. 163, 166, 22 S.E.2d 275, 277 (1942)).
61. *Id.* at 101, 301 S.E.2d at 369–70. The court recognized that the "significant contribution" standard put a heavier burden on claimants than in accident cases or in other states. *See id.* at 105, 301 S.E.2d at 371. The Virginia Supreme Court, for example,

commented that, in making the "significant contribution" determination, the Commission may consider medical testimony, the extent of the worker's on-the-job exposure to hazardous conditions, the extent of non-work-related contributing factors, and the way in which the disease matured in relation to the plaintiff's work history.[62]

Taking these factors into account, the *Rutledge* court concluded that there was sufficient evidence for the Commission to find that the plaintiff suffered from a compensable occupational disease.[63] Consequently, the court remanded the matter to the Commission for a new determination of Rutledge's entitlement to compensation based on the "significant contribution" standard.[64]

The decision was criticized by many who felt that the court had departed from precedent.[65] Nevertheless, *Rutledge* became the law and has never been explicitly overruled. Recent decisions of the North Carolina Courts of Appeals, however, while not explicitly abandoning *Rutledge*, appear to depart from the "significant contribution" standard and substitute a stricter standard of proof for causation.

In *Jarvis v. Food Lion, Inc.*,[66] the plaintiff sought workers' compensation for carpal tunnel syndrome that she allegedly developed while working as a cashier for the defendant grocery store.[67] The deputy commissioner denied the claim, partly because he determined that the plaintiff failed to prove causation.[68] The court commented that she had failed to demonstrate that her condition was " 'characteristic of and peculiar to her employment and to which the general public is not equally exposed outside of the employment' "[69]

---

requires only that the claimant show that her " 'employment [was] a contributing factor to the disability.' " *Id.* at 104, 301 S.E.2d at 371 (quoting Bergmann v. L. & W. Drywall, 278 S.E.2d 801, 803 (Va. 1981)). The court's justification for this principle was that it was attempting to strike a fair balance between the employer and the employee in the administration of the Workers' Compensation Act. *See id.* at 105, 301 S.E.2d at 371. The "significant contribution" standard was first suggested in *Note, Compensating Victims of Occupational Disease*, 93 HARV. L. REV. 916, 932 (1980).

62. *See Rutledge*, 308 N.C. at 105, 301 S.E.2d at 372 (citing Booker v. Duke Med. Ctr., 297 N.C. 458, 476, 256 S.E.2d 189, 200 (1979)).

63. *See id.* at 106, 301 S.E.2d at 372.

64. *See id.* at 108, 301 S.E.2d at 373.

65. *See supra* notes 11–13 and accompanying text.

66. 134 N.C. App. 363, 517 S.E.2d 388 (1999), *review denied by* 351 N.C. 356, 1999 N.C. LEXIS 1326, at *1 (Nov. 4, 1999).

67. *See id.* at 364, 517 S.E.2d at 389.

68. *See id.*

69. *Id.* (quoting the Commission's Opinion & Award denying the plaintiff's claim); *see also* Hansel v. Sherman Textile, 304 N.C. 44, 52, 283 S.E.2d 101, 105–06 (1981) (describing the burden of proof for a plaintiff seeking compensation for an occupational

as required by section 97-53(13). The Commission affirmed the deputy commissioner's decision and accorded no weight to a diagnosing physician's testimony that the plaintiff's condition was "work-related and that her job was at least aggravating her pain in her arms and wrist"[70] because the doctor based his conclusions on the plaintiff's statements and his personal observations of cashiers in grocery stores.[71] The doctor's conclusions were problematic because they were not supported by any direct evidence, such as a physical examination or observation of the plaintiff herself, but by indirect observation of similarly situated employees.

The North Carolina Court of Appeals affirmed the Commission's decision, holding that, given the Commission's failure to give weight to the diagnosing physician's testimony, the plaintiff had failed to establish by the greater weight of the evidence that her carpal tunnel was an occupational disease.[72] The court noted that the Commission is the exclusive judge of witness credibility and may refuse to give any weight to a witness's testimony.[73] The court also noted that an appeal from the Industrial Commission is limited to a consideration of whether the Commission's findings are supported by any relevant evidence and whether its findings support its conclusions[74] even if substantial evidence would support a different decision.[75] The court thus agreed with the Commission that the diagnosing physician did not have adequate information to make a determination regarding causation.[76]

By setting aside the insufficiency of the evidence to prove causation, the Commission seemed to require sole causation in *Jarvis*. The Commission stated that there was not sufficient medical evidence to prove that the plaintiff's job responsibilities caused her carpal tunnel syndrome. The Commission noted "[t]here is

---

disease).

70. *Jarvis*, 134 N.C. App. at 364, 517 S.E.2d at 389.

71. *See id.* at 365–66, 517 S.E.2d at 390.

72. *See id.* at 366, 517 S.E.2d at 390.

73. *See id.* ("The Commission 'is the sole judge of the credibility of the witnesses and the weight to be given to their testimony, and may reject a witness' testimony entirely if warranted by disbelief of that witness.' ") (quoting Pittman v. Int'l Paper Co., 132 N.C. App. 151, 156, 510 S.E.2d 705, 709 (1999)).

74. *See Jarvis*, 134 N.C. App. at 367, 517 S.E.2d at 391; Lowe v. BE&K Constr. Co., 121 N.C. App. 570, 573, 468 S.E.2d 396, 397 (1996).

75. *See Jarvis*, 134 N.C. App. at 367, 517 S.E.2d at 391; Thompson v. Tyson Foods, Inc., 119 N.C. App. 411, 414, 458 S.E.2d 746, 748 (1995); Carroll v. Burlington Indus., 81 N.C. App. 384, 387–88, 344 S.E.2d 287, 289 (1986), *aff'd per curiam*, 319 N.C. 395, 354 S.E.2d 237 (1987).

76. *See Jarvis*, 134 N.C. App. at 368, 517 S.E.2d at 392.

insufficient evidence of record from which to prove . . . that plaintiff's carpal tunnel syndrome is an occupational disease which was due to the causes and conditions characteristic of and *peculiar to* her employment with defendant-employer."[77]

Even prior to *Rutledge*, however, the North Carolina Supreme Court had explicitly rejected the notion of requiring sole causation. In *Booker v . Duke Medical Center*,[78] the court decided that the occupational exposure did not have to be the sole originating cause of a worker's disease for that disease to be compensable.[79] Even when other, non-work-related factors have contributed to the disease, the plaintiff may be compensated if working conditions aggravated her condition.[80] Therefore, employment does not have to be the sole cause of the disease as suggested in *Jarvis*.

The North Carolina Court of Appeals also seemed to deviate from the significant contribution standard when it decided *Hardin v. Motor Panels, Inc.*[81] The claimant alleged that she developed carpal tunnel syndrome while working for the defendant Motor Panels, Inc.[82] The claimant had worked as a clerical assistant for the defendant for five years when an unfavorable performance review forced her to resign.[83] She subsequently worked for four different employers but was forced to quit each job because of increased pain and numbness in her hands.[84] The Industrial Commission denied Hardin's claim for workers' compensation because there was insufficient evidence that her employment with the defendant rather than with subsequent employers caused or "significantly contributed" to her carpal tunnel syndrome.[85]

---

77. *Id.* at 366, 517 S.E.2d at 390 (emphasis added).

78. 297 N.C. 458, 256 S.E.2d 189 (1979). In *Booker*, the claimant's decedent was an employee at the medical center's clinical chemistry laboratory, where he performed tests on blood, some of which was contaminated with hepatitis. *See id.* at 461, 256 S.E.2d at 192. He contracted serum hepatitis in 1971 and died of the disease three years later. *See id.* at 464, 256 S.E.2d at 193. The North Carolina Court of Appeals refused to find that Booker had an occupational disease because the disease was caused by a single event and not by a series of events. *See Booker*, 32 N.C. App. 185, 192, 231 S.E.2d 187, 190 (1977). In reversing the court of appeals's decision, the North Carolina Supreme Court commented that an increase in the claimant's risk of contracting a compensable disease was sufficient causation to allow recovery for occupational disease under the North Carolina Workers' Compensation Act. *See Booker*, 297 N.C. at 472, 256 S.E.2d at 198.

79. *See id.* at 473, 256 S.E.2d at 199; Smith, *supra* note 11, at 576.

80. *See Booker*, 297 N.C. at 472, 256 S.E.2d at 199.

81. 524 S.E.2d 368, 2000 N.C. App. LEXIS 5 (Jan. 18, 2000).

82. *See id.* at 370, 2000 N.C. App. LEXIS 5, at *1.

83. *See id.* at 370, 2000 N.C. App. LEXIS 5, at *1–2.

84. *See id.* at 370, 2000 N.C. App. LEXIS 5, at *2–3.

85. *Id.* at 370–71, 2000 N.C. App. LEXIS 5, at *4.

On appeal, however, the court of appeals announced that a stricter standard than the significant contribution standard was required to find that the plaintiff had an occupational disease. The court stated that, to be compensated for occupational disease, the plaintiff had to prove "by the preponderance of the competent, credible evidence that her disability [was] causally related to her employment with the defendant."[86] As in *Jarvis*, the court of appeals limited its review of the Industrial Commission's opinion to two questions: "(1) whether there is *any* competent evidence in the record to support the Commission's findings of fact, and (2) whether those findings of fact support the Commission's conclusions of law."[87] Under this standard of review, the Industrial Commission's decision would stand so long as some evidence supported its findings.[88] The court found competent evidence in the record to support the Commission's findings and affirmed the Commission's conclusions.

The *Jarvis* and *Hardin* decisions illustrate that the North Carolina Court of Appeals has not followed a consistent standard for determining when a plaintiff's condition may be classified as an occupational disease. The element that has produced the most confusion relates to causation—an issue that was thought to have been clarified in *Rutledge*. The *Rutledge* court had held that a plaintiff was entitled to worker's compensation if she could show that her employment with the defendant employer significantly contributed to her resulting disability. One caveat, however, was that this employer must have supplied the last injurious exposure the employee had to the hazards causing the disease.

In *Jarvis* and *Hardin*, the court abandons the *Rutledge* holding on the issue of causation. In these and other recent cases, the court of appeals set forth different interpretations of the "significant exposure" standard that have exacerbated the problems associated with causation. For example, in *Baker v. City of Sanford*,[89] the court noted that, for the employee's employment to constitute a "significant contributing" factor, the employee has to prove that without the employment, the occupational disease "would not have

86. *Id.* at 372, 2000 N.C. App. LEXIS 5, at *11 (citing Phillips v. U.S. Air, Inc., 120 N.C. App. 538, 541–42, 463 S.E.2d 259, 261 (1995)).

87. *Id.* at 371, 2000 N.C. App. LEXIS 5, at *4–5 (citing Locklear v. Steadman Corp./Sara Lee Knit Prods., 131 N.C. App. 389, 393, 508 S.E.2d 795, 797 (1998)); *see also* Hedrick v. PPG Indus., 126 N.C. App. 354, 357, 484 S.E.2d, 853, 856 (1997) (noting that appellate courts will not disturb the Commission's findings if the findings are supported by any competent evidence even if contrary evidence exists).

88. *See Hardin*, 524 S.E.2d at 374, 2000 N.C. App. LEXIS 5, at *5.

89. 120 N.C. App. 783, 463 S.E.2d 559 (1995).

developed to such an extent that it caused the physical disability which resulted in claimant's incapacity for work."[90] Three years later in *Locklear v. Stedman Corp./Sara Lee Knit Products*,[91] the court interpreted the "significant contribution" standard to mean that the employment more likely than not caused the occupational disease.[92] Thus, the plaintiff had to prove by a preponderance of the evidence that the disease was caused primarily by the employment.

The standard followed by the court of appeals in these recent cases deviates from the original meaning of "significant contribution" articulated in *Rutledge*. In *Rutledge*, the North Carolina Supreme Court interpreted section 97-57 of the North Carolina General Statutes[93] to mean that the plaintiff does not have to show that solely the conditions of her employment with defendant-employer caused the disease. As stated previously, the determination of whether a claimant may be compensated under section 97-57 is a two-step process. The plaintiff must first prove that she has an occupational disease. Then, the plaintiff must prove that her "last injurious exposure" to the disease occurred while she was employed by the defendant.[94] To satisfy the first requirement, the *Rutledge* court determined that the plaintiff had to show that her occupation exposed her to a greater risk of developing the disease than members of the general public, and that her employment "significantly contributed to, or was a significant causal factor in, the disease's development."[95] The North Carolina Supreme Court noted that this test prevails even if other non-work-related factors also substantially contribute to or significantly cause the disease. The court defined significant as " 'having or likely to have influence or effect: deserving to be considered: important, weighty, notable.' "[96] According to the court, therefore, factual inquiry is "whether the occupational exposure was such a significant factor in the disease's development that without it the disease would not have developed *to such an extent* that it caused the physical disability which resulted in claimant's

90. *Id.* at 788, 463 S.E.2d at 563 (quoting Rutledge v. Tultex Corp./Kings Yarn, 308 N.C. 85, 102, 301 S.E.2d 359, 370 (1983)).

91. 131 N.C.App. 389, 508 S.E.2d 795 (1998).

92. *See id.* at 393–94, 508 S.E.2d at 798.

93. *See* N.C. GEN. STAT. § 97-57 (1999) ("In any case where compensation is payable for an occupational disease, the employer in whose employment the employee was last injuriously exposed to the hazards of such disease . . . shall be liable.").

94. *Rutledge*, 308 N.C. at 89, 301 S.E.2d at 362.

95. *Id.* at 101, 301 S.E.2d at 369–70.

96. *Id.* at 101–02, 301 S.E.2d at 370 (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1971)).

incapacity for work."[97] Thus, if the plaintiff proves that the disease is occupational and that the defendant "proximately augmented the disease [or preexisting condition] to any extent, however slight," then the employer will be liable for the full extent of disability.[98]

As noted in *Rutledge*, once the causation hurdle has been crossed and the claimant has been able to prove the existence of an occupational disease, the plaintiff then has to prove that her last injurious exposure occurred while she was employed by the defendant.[99] The *Rutledge* court defined the term as an exposure that exacerbates the disease to any extent, however minimal.[100] This includes any exposure to hazards that may cause an occupational disease, even though the plaintiff's exposure was so minimal that this exposure alone could not have produced the disease.[101] The policy implications behind the requirement that the employment was the last injurious exposure were also noted in *Rutledge*. The court acknowledged that the statutory language takes into account the fact that occupational diseases sometimes evolve over time after exposure to hazardous materials at successive jobs.[102] Because of the difficulty of determining which place of employment caused the most harm or contributed the most to the resulting disability, only the employer with the last injurious exposure is liable for any disability that develops as a result of the occupational disease.[103]

The North Carolina Court of Appeals did not reach the issue of whether the employer's place of business was the last injurious exposure in *Jarvis*, because it concluded that the claimant had failed to prove that she had a compensable occupational diseases according to section 97-53(13). The court, however, did reach the issue in *Hardin* when it applied the last exposure rule in declining to award compensation to a claimant with carpal tunnel syndrome.[104]

---

97. *Id.* at 102, 301 S.E.2d at 370 (emphasis added).

98. *Id.* at 89, 301 S.E.2d at 362–63 (quoting Haynes v. Feldspar Producing Co., 222 N.C. 163, 168, 22 S.E.2d 275, 278 (1942)).

99. *See Rutledge*, 308 N.C. at 89, 301 S.E.2d at 362.; *see also* N.C. GEN. STAT. § 97-57 (1999) ("In any case where compensation is payable for an occupational disease, the employer in whose employment the employee was last injuriously exposed to the hazards of such disease . . . shall be liable.").

100. *See Rutledge*, 308 N.C. at 89, 301 S.E.2d at 362.

101. *See* Caulder v. Waverly Mills, 314 N.C. 70, 76, 331 S.E.2d 646, 649–50 (1985).

102. *See Rutledge*, 308 N.C. at 89, 301 S.E.2d at 362. (noting that under section 97-57 of the North Carolina General Statutes, the claimant must only show that her last injurious exposure to the conditions or substances that caused her disease occurred while she was employed by the defendant).

103. *See* Jones v. Beaunit Corp., 72 N.C. App. 351, 353–54, 324 S.E.2d 624, 625 (1985).

104. *See* Hardin v. Motor Panels, Inc., 524 S.E.2d 368, 370–71, 373–74, 2000 N.C. App.

Although the Commission had established a causal link between the plaintiff's carpal tunnel syndrome and her employment, her claim was denied because the last injurious exposure to the hazards of the disease did not occur during the course of her employment with the defendant. After her resignation from her employment with the defendant, the plaintiff suffered further injury in subsequent positions.[105] She had a number of other jobs including positions as a clerk at a Belk's department store, a cashier at Burger King, a home health aide, and a clerk at a pet store.[106] In all of these settings, the plaintiff worked with her hands and put pressure on her wrists.[107] The plaintiff did not seek treatment until after she had quit her job with the defendant.[108] She testified that her symptoms had worsened as a result of the places she worked after her employment with defendant.[109] Therefore, the employer was not liable because the plaintiff's last injurious exposure to the disease did not occur while the plaintiff was working for the defendant.

The last injurious exposure rule reflects the General Assembly's recognition that occupational diseases often develop over time—after the plaintiff has been exposed to hazardous conditions in successive places of employment.[110] It further illustrates the difficulty of apportioning responsibility for an occupational disease among various employers,[111] which can lead to excessive litigation[112] and impede the Workers' Compensation Act's goal of providing the aggrieved worker with a "speedy and quick recovery."[113] While casting full accountability on only one of several responsible employers may seem initially unfair, the net result is justified when that employer's industry is viewed as a whole: "each employer consistently exposing employees to the harmful substance

---

LEXIS 5, at **1–7, *11–17 (Jan. 18, 2000).

105. *See id.* at 370, 2000 N.C. App. LEXIS 5, at *2–4.

106. *See id.*

107. *See id.*

108. *See id.*

109. *See id.*

110. *See* Anne Ferrell Team, Note, Caulder v. Waverly Mills*: Expanding the Definition of an Occupational Disease Under the Last Injurious Exposure Rule*, 64 N.C. L. REV. 1566, 1573–74 (1986).

111. *See* Martin, *supra* note 23, at 211.

112. *See id.* Other jurisdictions have, in fact, continued to follow the apportionment rule, requiring a determination of non-work-related factors and work-related factors. *See* LARSON & LARSON, *supra* note 43, § 52.06[4][d], at 52-68 to 52-69. In some cases, courts allow apportionment between successive employers. *See, e.g.*, *id.* § 52.06[4][d], at 52-70 & n.95. For example, in Michigan, successive employers have the burden of proving the extent of injury caused while the claimant was in their employ. *See id.*

113. *See* Martin, *supra* note 23, at 211; Team, *supra* note 110, at 1574.

theoretically will be the last employer at some time and thus shoulder its share of responsibility for the industry's overall hazardous work conditions."[114]

Despite such policy considerations, recent occupational disease cases, particularly *Hardin*, demonstrate the inequities of the last injurious exposure rule.[115] For example, the first employer will often expose the claimant to the most injury. Both the fault-based tort system and general notions of justice require that employers contribute according to their shares of responsibility for the occupational disease.

In light of the inequitable results that often occur under the last injurious exposure rule, the North Carolina General Assembly should adopt a new standard of employer liability for occupational disease cases.[116] The "most injurious exposure rule" would require the employer providing the greatest exposure to the hazards leading to the occupational disease to compensate the complainant to the full extent of the disability. The employer then would be entitled to contribution from other employers to the extent that they exposed the plaintiff to hazardous conditions. Two employers equally at fault would divide the compensation equally. This proposal would provide a more equitable result than the current rule because it is more consistent with the goals of the Workers' Compensation Act—providing quick relief to injured employees[117] and striking a fair balance between employees and employers.

Under the most injurious exposure rule, the employee would first be required to demonstrate by a preponderance of the evidence that her employment with the defendant employer caused her the most significant and damaging exposure to the conditions leading to the disease. While this is a significant burden for the plaintiff, once it has been satisfied, the defendant may seek contribution from other employers by proving that these employers aggravated or otherwise contributed to the disease.

It might be argued that the most injurious exposure rule would be inefficient because, as in the pre-*Rutledge* apportionment era, the rule would require satellite litigation among former employers to determine relative fault,[118] depleting resources from which the

114. Team, *supra* note 110, at 1574.

115. *See supra* notes 81–88 and accompanying text.

116. *See* Martin, *supra* note 23, at 211 (noting that the courts have stated that the unfairness of the last injurious exposure rule should be addressed by the legislature).

117. Martin, *supra* note 23, at 194.

118. *See* Martin, *supra* note 23, at 211.

employee could be compensated. However, like the last injurious exposure rule and unlike the apportionment rule, the most injurious exposure rule would thwart any potential litigation concerning pre-existing, non-work-related factors because these factors would not be taken into account at all. Once an occupational disease is found, employers would be encouraged to settle conflicts outside of the courtroom to avoid being required to compensate the employee to the full extent of their fault and to avoid the cost of litigation.

The availability of insurance for the employer also makes the most injurious exposure rule equitable because employers can pass the costs of insurance on to workers. Employers are in the best position to prevent injuries and occupational diseases that arise from hazardous conditions and substances because they can take precautions to protect employees from exposure to such hazards. Furthermore, the costs of compensation would be spread throughout the industry because each employer would presumably be responsible to some extent for occupational diseases in the industry. Thus, the most injurious exposure rule provides an equitable result when the employer's industry is viewed as a whole.

Another valid concern with the current Act involves the standard of review that appellate courts use in reviewing the Commission's decisions on appeal. Under the current Act, an employer or employee may appeal from a final decision of the full Industrial Commission within thirty days after the decision or after notice of the decision is received.[119] The appellate court's role in such an appeal, however, "is limited to a determination of (1) whether the findings of fact are supported by competent evidence, and (2) whether the conclusions of law are supported by the findings."[120] Findings of fact by the Commission are conclusive on appeal when they are supported by the evidence of record.[121] If any evidence supports the Commission's findings, then the court is bound by those

119. *See* N.C. GEN. STAT. § 97-86 (1999); JERNIGAN, *supra* note 9, § 26-1.

120. Guy v. Burlington Indus., 74 N.C. App. 685, 689, 329 S.E.2d 685, 687 (1985) (quoting Barham v. Food World, 300 N.C. 329, 331, 266 S.E.2d 676, 678 (1980)); JERNIGAN, *supra* note 9, § 26-4 (quoting *Guy*); *see also* Jarvis v. Food Lion, Inc., 134 N.C. App. 363, 367, 517 S.E.2d 388, 391 (noting that the Commission's decisions are conclusive on appeal when there is competent evidence to support the Commission's findings and when those findings justify its legal conclusions), *review denied by* 351 N.C. 356, 1999 N.C. LEXIS 1326, at *1 (Nov. 4, 1999).

121. *See, e.g.*, Rutledge v. Tultex Corp./Kings Yarn, 308 N.C. 85, 90, 301 S.E.2d 359, 363 (1983) (holding that the court of appeals erred in concluding that there was no evidence of record from which the Industrial Commission could find that the claimant's chronic lung disease was an occupational disease).

findings, even though other evidence might have supported a contrary finding.[122] Thus, the court defers to the Commission and does not have the prerogative to weigh the evidence.[123]

The current standard of review provides neither the worker nor the employer with an adequate and meaningful substantive appeal from the full Commission's findings and award. The lack of a meaningful appeal is significant considering that, for employers subject to the Workers' Compensation Act,[124] this procedure is the exclusive remedy for an employee suffering from an occupational disease.[125] The claimant cannot bring a civil action against the employer unless the claim against the employer is unrelated to the employment relationship[126] or the case involves an intentional tort.[127]

The lack of a meaningful appeal for an aggrieved party in North Carolina's current workers' compensation scheme necessitates replacing the current standard of review with a more meaningful standard. The author proposes that appellate courts adopt the substantial evidence of record standard. Substantial evidence has been defined as "evidence that provides 'a substantial basis of fact from which the fact in issue can be reasonably inferred . . . more than a scintilla . . . such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' "[128] The need for such a

122. *See* N.C. GEN. STAT. § 97-86 (1999).

123. *See* Toler v. Black & Decker, 134 N.C. App. 695, 697–700, 518 S.E.2d 547, 549–50 (1999) (citing Morrison v. Burlington Indus., 304 N.C. 1, 6, 283 S.E.2d 458, 463 (1981)).

124. Section 97-13 of the North Carolina General Statutes excepts employers of the following from the scope of the Workers' Compensation Act: (1) railroad employees; (2) fewer than ten full-time farm laborers; (3) casual employees; (4) federal government employees; (5) domestic servants; (6) prisoners; (7) sellers of agricultural products; and (8) fewer than three employees in the same business in the state. *See* N.C. GEN. STAT. § 97-13.

125. *See* N.C. GEN. STAT. § 97-10.1 (1999); Braxton v. Anco Electric, Inc., 330 N.C. 124, 129, 409 S.E.2d 914, 917 (1991) (affirming the appellate court's decision that an employee can file a third-party action against a subcontractor even though the injured employee applied for and received workers' compensation benefits); Gabel, *supra* note 24, at 1084; JERNIGAN, *supra* note 9, § 10-1 (noting that independent contractors and their employees are not covered under the Act and that physicians may also be liable for injuries suffered by employees due to negligent treatment).

126. *See* North Carolina Chiropractic Ass'n v. Aetna Cas. & Sur. Co., 89 N.C. App. 1, 11, 365 S.E.2d 312, 315 (1988).

127. *See* Woodson v. Rowland, 329 N.C. 330, 340–41, 407 S.E.2d 222, 228 (1991) ("[W]hen an employer intentionally engages in misconduct knowing it is substantially certain to cause serious injury or death to employees and an employee is injured or killed by that misconduct, that employee, or [her] personal representative . . . may pursue a civil action against the employer.").

128. Avondale Indus., Inc. v. United States. Dep't of Labor, 977 F.2d 186, 189 (5th Cir. 1992) (quoting Diamond M. Drilling Co. v. Marshall, 577 F.2d 1003, 1005 (5th Cir. 1978)).

standard is strongest in cases where the greater weight of the evidence favors a decision contrary to the Commission's conclusion. Although the North Carolina Supreme Court has stated that the Act " 'should be liberally construed so that the benefits under the Act will not be denied by narrow, technical or strict interpretation,' "[129] the Commission has consistently ruled pro-employer in recent cases.[130] While the substantial evidence of record standard is still deferential, the Commission's findings of fact would have to be supported by more than a mere scintilla of evidence.

In almost all cases, there will be some evidence, however miniscule, from which the Commission could base its conclusion. Consider for example, *Toler v. Black & Decker*,[131] which involved a person seeking compensation for neck injury, post-traumatic stress disorder, and depression that she claimed were occupational in origin. The record revealed overwhelming evidence that the plaintiff had suffered from a number of unpleasant life experiences that had more than likely led to her psychological problems.[132] This evidence greatly outweighed the plaintiff's evidence that her neck injury was the cause of her depression. The court, however, was compelled to affirm the Commission's findings of fact and award because there was competent evidence from which the Commission could have reached its conclusion.[133] The court of appeals stated that "[d]espite the abundance of evidence to the contrary, there is competent evidence of record, however thin, in the form of [a physician's testimony] to indicate that plaintiff's neck injury had a role in exacerbating her pre-existing [post-traumatic stress disorder] and had a role in exacerbating her pre-existing depression."[134]

---

129. Rutledge v. Tultex Corp./Kings Yarn, 308 N.C. 85, 105, 301 S.E.2d 359, 371 (1983) (quoting Stevenson v. City of Durham, 281 N.C. 300, 303, 188 S.E.2d 281, 283 (1972)).

130. *See, e.g.*, Hardin v. Motor Panels, Inc., 524 S.E.2d 368, 374, 2000 N.C. App. LEXIS 5, at *17 (Jan. 18, 2000) (affirming the Commission's denial of benefits because the "plaintiff was last injuriously exposed to carpal tunnel syndrome while working with her subsequent employers"); Jarvis v. Food Lion, Inc., 134 N.C. App. 363, 368, 517 S.E.2d 388, 391–92 (affirming the Commission's denial of benefits because there was evidence from which the Commission could find that the plaintiff failed to demonstrate that her carpal tunnel syndrome was an occupational disease), *review denied by* 351 N.C. 356, 1999 N.C. LEXIS 1326, at *1 (Nov. 4, 1999). This pro-employer trend in North Carolina is due in large part to the difficulty of proving causation in occupational disease cases. This trend follows the national trend in which employers traditionally win two-thirds of all occupational disease cases. *See* Frances H. Miller, *Biological Monitoring: The Employer's Dilemma*, 9 AM. J. L. & MED. 387, 409 n.96 (1984).

131. 134 N.C. App. 695, 518 S.E.2d 547 (1999).

132. *See id.* at 700, 518 S.E.2d at 550.

133. *See id.*

134. *Id.*

Toler illustrates that, currently, the role of the appellate court is very minimal. The substantial evidence of record standard would allow the reviewing court to take a more active role in determining whether the Commission's findings of fact are supported by the greater weight of the evidence. In cases in which substantial evidence of record favors a decision contrary to that reached by the Commission, the court would be able to vacate or overrule the Commission's decision. This standard of review would afford the plaintiff a substantive appeals process because it would be less deferential to the Commission. A workers' compensation system that uses substantial evidence of record review by the appellate court might prevent the inequitable results of cases such as *Toler*.[135]

Support for the use of the substantial evidence of record standard exists at both the federal and state levels. At the federal level, the substantial evidence test is the general standard used in reviewing administrative decisions.[136] Congress has also mandated the use of the substantial evidence standard for review of informal agency decisions.[137] In addition, the substantial evidence of record standard of review has been effectively utilized in occupational disease cases in South Carolina,[138] which has a workers' compensation statute modeled after the North Carolina Workers' Compensation Act.[139] In *McCraw v. Mary Black Hospital*,[140] the Court of Appeals of

135. The substantial evidence of record standard would parallel the standard used in some federal occupational disease cases. Under the Longshore and Harbor Workers' Compensation Act, ch. 509, 44 Stat. 1424 (1929) (codified as amended at 33 U.S.C. § 901–950 (1994 & Supp. IV 1998)), which fixes disability benefits for maritime workers who are injured on the job or develop occupational disease, the deputy commissioner of the Compensation Commission first determines whether a worker should be allowed benefits under the statute. *See* 33 U.S.C. § 919 (1994). If the claimant does not agree with the deputy commissioner's decision, she can appeal to the Benefits Review Board. *See* 33 U.S.C. § 921(b)(3) (1994). The Board must affirm the deputy commissioner's decision unless the deputy commissioner's factual conclusions were not "supported by substantial evidence in the record considered as a whole." *Id.* The Board can send a case to an administrative law judge for further action or make the decision itself. *See* 33 U.S.C. § 921(b)(4) (1994). If the party is not satisfied with the Board's order, she can appeal to the region's circuit court of appeals. *See* 33 U.S.C. § 921(c) (1994). The court of appeals' scope of review is also limited to determining whether the deputy commissioner's decision was supported by substantial evidence of record. *See* Januszewicz v. Sun Shipbuilding & Dry Dock Co. 677 F.2d 286, 290 (3d Cir. 1982).

136. *See* Kelly Kunsch, *Standard of Review (State and Federal): A Primer*, 18 SEATTLE UNIV. L. REV. 11, 42 (1994).

137. *See id.*

138. *See, e.g.*, Tiller v. National Health Care Ctr., 513 S.E.2d 843 (S.C. 1999); Mizell v. Raybestos-Manhattan, Inc., 315 S.E.2d 123 (S.C. 1984); McCraw v. Mary Black Hosp., 527 S.E.2d 113 (S.C. Ct. App. 2000); Grayson v. Gulf Oil Co., 357 S.E.2d 479 (S.C. Ct. App. 1987).

139. *See Mizell*, 315 S.E.2d at 124.

South Carolina noted that in occupational disease cases, "an appellate court may not substitute its judgment for that of [the Industrial Commission] as to the weight of the evidence on questions of fact unless the [Commission's] findings are clearly erroneous in view of the reliable, probative, and substantial evidence of record."[141] Although the standard is not quantifiable, in terms of assigning percentages, South Carolina's standard is more restrictive than North Carolina's because more evidence is required to support the Commission's factual findings than merely *any* evidence of record.[142] The author believes that this standard strikes a healthy balance between deference to the Commission's factual findings and the need to afford employees or employers a meaningful appeal.

Opponents of the substantial evidence of record standard might argue that such a system would require the reviewing court to engage in weighing the evidence to determine whether substantial evidence exists to support the Commission's findings. However, the author does not believe that such balancing would be imperative. In many cases, substantial evidence likely would support either a denial or rewarding of benefits. Provided substantial evidence supported the full Commission's result, the decision would not be disturbed. Perhaps the potential concern that courts would have to weigh the evidence would be obliterated if the General Assembly clearly defined what constitutes substantial evidence.

Opponents might also argue that the substantial evidence of record standard would weaken the integrity of North Carolina's workers' compensation system because appellate courts would be less deferential to the Commission's decisions. The proposed system, however, would strengthen the integrity and the public's perception of the current workers' compensation scheme because the facts of each case would be examined by a higher authority and thus ensure that there is substantial support for the Commission's decision.

The recent *Hardin* and *Jarvis* cases demonstrate a current trend toward abandoning *Rutledge*'s "significant contribution" standard. While not explicitly overruling *Rutledge*, both the Commission and North Carolina courts have limited the case's precedential value by requiring a higher standard of proof.[143] This implicit change in

140. 527 S.E. 2d 113 (S.C. Ct. App. 2000).

141. *Id.* at 116.

142. *See id.*

143. By denying the claimant compensation in *Jarvis*, for example, the Commission stated that there was "insufficient evidence of record from which to prove by its greater weight that plaintiff's carpal tunnel syndrome is an occupational disease which was *due to*

standard threatens to upset the balance between employers and employees in the application of the Act to occupational disease claims. Indeed, cases like *Jarvis* seem to suggest a reversion to the pre-*Rutledge* apportionment scheme requiring assessment of work-related versus non-work-related factors.

Discrepancies in both the Commission's and the appellate courts' articulations of causation standards in occupational disease cases mandates that the General Assembly clarify the appropriate standard. The policy implications of failing to do so are troubling. The Act was designed to provide employees with swift compensation and to limit the liability of employers,[144] but reverting to pre-*Rutledge* apportionment or a sole causation scheme would undoubtedly deplete resources in litigation and delay compensation for injured employees. It is the public which ultimately pays for an inefficient workers' compensation system through increases in consumer costs.[145]

The most injurious exposure rule would present the most effective resolution of occupational disease cases by placing liability for disability from occupational disease on the employer that provided the most exposure to the conditions that caused the disease or aggravation of a preexisting condition. Further, the substantial evidence of record standard would provide a more substantive appeal for employees and employers displeased with the Industrial Commission's decision. Upon revisiting *Rutledge*, it appears that the "significant contribution" standard may soon be a relic of the past.

VERONICA D. HIGGS

---

causes and conditions characteristic of and peculiar to her employment with defendant-employer." Jarvis v. Food Lion, Inc., 134 N.C. App. 363, 366, 517 S.E.2d 388, 390 (emphasis added), *review denied by* 351 N.C. 356, 1999 N.C. LEXIS 1326, at *1 (Nov. 4, 1999). The Commission made this finding despite the fact that the plaintiff had worked as a cashier, a position which involved a substantial amount of repetitive hand motion. *See id.* at 364–65, 517 S.E.2d at 389. Contrary to *Rutledge*, the Commission seemed to require medical testimony that the employment *caused* the condition.

144. *See* Charlotte-Mecklenburg Hosp. Auth. v. North Carolina Indus. Comm'n, 336 N.C. 200, 203, 443 S.E.2d 716, 718–19 (1994) (noting that the North Carolina Workers' Compensation Act was enacted to avoid protracted litigation and to ensure limited liability); JERNIGAN, *supra* note 9, § 1-2.

145. *See* JERNIGAN, *supra* note 9, § 1-2.

When Digital Contacts Equal Minimum Contacts: How Fourth Circuit Courts Should Assess Personal Jurisdiction in Trademark Disputes over Internet Domain Names

Advances in technology alter the ways people and businesses operate and often challenge legal doctrines. The doctrine of personal jurisdiction experienced such a challenge in the early twentieth century as the United States became a more mobile society and corporations expanded their operations throughout the country.[1] Today, the nation's embrace of cyberspace as a new medium for communication has again strained the boundaries of personal jurisdiction doctrine.[2] Faced with disputes over the use of Internet domain names between geographically distant parties, courts must assess whether they can exercise jurisdiction over a party whose sole contacts with a forum are electronic in nature. The traditional, territorial-based due process analysis for personal jurisdiction, however, does not adequately address many of the issues that arise in the context of Internet-related claims. Because no alternative analysis currently exists, courts must apply the traditional doctrine in adjudicating these suits.[3]

The United States Court of Appeals for the Fourth Circuit has not yet addressed the problem of exercising personal jurisdiction over Internet domain name disputes. Presently, only a handful of district courts within the Fourth Circuit have had the opportunity to tackle

---

1. *See, e.g.*, JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE § 3.7, at 108–11 (2d ed. 1993) ("Initially, a corporation was held to be subject to a court's jurisdiction only in the state of its incorporation, beyond which it could have no legal existence," but as corporations began to expand their business outside their particular states of incorporation, "courts were forced to evolve new jurisdictional theories while still abiding by the principles [of established personal jurisdiction doctrine]."); Mathew Oetker, Note, *Personal Jurisdiction and the Internet*, 47 DRAKE L. REV. 613, 616 (1999) (stating that while the traditional personal jurisdiction doctrine "was feasible in an era when most people did not frequently travel between states and conducted business face-to-face, the advent of new technology later forced the Supreme Court to [amend its traditional doctrine]").

2. *See, e.g.*, Veronica M. Sanchez, Comment, *Taking a Byte Out of Minimum Contacts: A Reasonable Exercise of Personal Jurisdiction in Cyberspace Trademark Disputes*, 46 UCLA L. REV. 1671, 1671–72 (1999) ("Because the Internet transcends geographic boundaries, the application to it of territorially based [personal jurisdiction] doctrines is exceedingly difficult.").

3. *See* Howard B. Stravitz, *Personal Jurisdiction in Cyberspace: Something More is Required on the Electronic Stream of Commerce*, 49 S.C. L. REV. 925, 925–27 (1998).

the issue.[4] This situation will likely change as more of these disputes filter through the court system. This Note examines personal jurisdiction in Internet domain name and other Internet-related trademark disputes. First, this Note reviews the different types of domain name and related trademark disputes and analyzes how trademark law applies to them.[5] Second, the Note examines modern personal jurisdiction analysis, with an emphasis on constitutional due process.[6] Third, this Note discusses how other federal circuit and district courts have addressed the issue of the Internet and personal jurisdiction.[7] Finally, the author suggests how the Fourth Circuit courts should assess personal jurisdiction in domain name and other Internet-related trademark disputes.[8]

America's embrace of the Internet as a new medium of communication is unprecedented.[9] The Internet provides the opportunity to shop, invest, conduct business, communicate with friends, and obtain information on nearly any subject all with the use of a personal computer. Consequently, the use of the Internet for business has grown at an astonishingly rapid pace.[10] Many established companies recognized its advantages and developed an Internet presence.[11] Moreover, the utility of the Internet has created a new generation of companies focused exclusively on maximizing the Internet's commercial capacity.[12]

---

4. *See, e.g.*, America Online, Inc. v. Huang, Civ. No. 00-290-A, 2000 U.S. Dist. LEXIS 10232, at *33–34 (E.D. Va. July 13, 2000) (finding jurisdiction in Virginia lacking over a California-based defendant that contracted to register a domain name—which allegedly infringed the plaintiff's trademark—with a Virginia-based domain name registration company); Roche v. Worldwide Media, Inc., 90 F. Supp. 2d 714, 718–19 (E.D. Va. 2000) (finding jurisdiction Virginia lacking over a defendant who had done nothing more than place a passive Web site on the Internet that was accessible to Virginia residents); Rannoch, Inc. v. Rannoch Corp., 52 F. Supp. 2d 681, 686–87 (E.D. Va. 1999) (same); Superguide Corp. v. Kegan, 987 F. Supp. 481, 485–87 (W.D.N.C. 1997) (establishing jurisdiction in North Carolina over a defendant whose principal contacts with the Stater were over the Internet); Telco Communications Group, Inc. v. An Apple A Day, Inc., 977 F. Supp. 404, 405–08 (E.D. Va. 1997) (establishing jurisdiction in Virginia over a defendant based on the its posting of inflammatory press releases on the Internet about a Virginia company).

5. *See infra* notes 9–68 and accompanying text.

6. *See infra* notes 69–92 and accompanying text.

7. *See infra* notes 93–209 and accompanying text.

8. *See infra* notes 210–59 and accompanying text.

9. *See, e.g.*, Stravitz, *supra* note 3, at 925–26 (stating that the Internet reached 50 million users in only four years, while radio and television needed thirty-eight and thirteen years, respectively, to reach the same audience).

10. *See id.* at 926.

11. *See id.*

12. *See id.*

The rapid commercialization of the Internet has led to a race for the acquisition of Internet domain names by companies eager to establish an Internet identity.[13] A domain name is the Internet equivalent of a company's address, telephone number, and trademark all in one.[14] For companies engaged in E-commerce, their domain name is their corporate identity. Securing a domain name that consumers may easily identify is crucial to the success of many E-businesses.[15] Because of the need to make their Web sites memorable and easily accessible to consumers, many businesses choose to use their trademark as their domain name.[16] Thus, Internet users often assume that a company's trademark is also its domain name.[17] When a company does not use its trademark or does not have an easily recognizable domain name, consumers generally resort to Internet search engines or advertisements to discover the company's site.[18] This indirect route may result in a reduction of the number of visits to

13. *See* Sanchez, *supra* note 2, at 1682 (citing Rebecca W. Gole, Note, *Playing the Name Game: A Glimpse at the Future of the Internet Domain Name System*, 51 FED. COMM. L.J. 403, 404 (1999)).

14. *See* Michael B. Landau, *Problems Arising Out of the Use of "www.trademark.com": The Application of Principles of Trademark Law to Internet Domain Name Disputes*, 13 GA. ST. U. L. REV. 455, 461 (1997); Ira S. Nathenson, Comment, *Showdown at the Domain Name Corral: Property Rights and Personal Jurisdiction Over Squatters, Poachers and Other Parasites*, 58 U. PITT. L. REV. 911, 918–19 (1997); Sanchez, *supra note* 2, at 1683; *see also* Greg Miller, *Internet Addresses Fueling Rash of Territorial Disputes*, L.A. TIMES, July 16, 1996, at A8 (referring to domain names as "postal addresses, vanity license plates and billboards, all rolled into one digital enchilada").

Domain names are composed of a combination of words, followed by a period, and a two or three-letter suffix indicating the type of organization that owns the Web site. *See* Stacy B. Sterling, Comment, *New Age Bandits in Cyberspace: Domain Names Held Hostage on the Internet*, 17 LOY. L.A. ENT. L.J. 733, 736 (1997). For commercial organizations, the three-letter suffix is ".com." *See id.* Other domain name suffixes include ".edu" (education organizations), ".gov" (government organizations), ".org" (organizational), ".net" (network), "nc.us" (individual states), and ".mil" (military). *See* Landau, *supra*, at 462; Sterling, *supra*, at 736.

15. *See* Sanchez, *supra* note 2, at 1683.

16. *See* Adam Chase, *A Primer on Recent Domain Name Disputes*, 3 VA. J.L. & TECH. 3, ¶ 3 (Spring 1998) <http://vjolt.student.virginia.edu/graphics/vol3/home_art3.html>; Sanchez, *supra* note 2, at 1683; *see also* Danielle Weinberg Swartz, Comment, *The Limitations of Trademark Law in Addressing Domain Name Disputes*, 45 UCLA L. REV. 1487, 1491–92 (1998) ("Many businesses choose to use their trademarks as domain names because consumers are already familiar with those marks and may favorably associate quality with the trademarks."). Some examples of company trademarks used as domain names include "ibm.com," for International Business Machines (IBM), "nike.com" for Nike, and "sony.com" for Sony.

17. *See* Sanchez, *supra* note 2, at 1683.

18. *See* Swartz, *supra* note 16, at 1492.

a company's site and, consequently, less commercial exposure.[19] One commentator has observed, "[b]ecause there is no effective alternative method of finding a company's Internet location, having a domain name that corresponds to a well-known trademark may be a prerequisite for a company that wants to establish an Internet presence."[20]

Often a company attempting to register its trademark as its domain name discovers that a different company or individual has already registered the name.[21] Until recently, this problem often arose because Network Solutions, Inc. (NSI), the Alexandria, Virginia-based company that handled all domain name registrations, did not research whether a prospective registrant of a particular domain name actually had the right to use that name.[22] NSI simply asked the person if she had such a right, and if the person asserted that she did, NSI issued the name.[23] A trademark owner could object to the registration of the name under NSI's domain name dispute resolution policy by notifying the domain name registrant of its trademark in the name.[24] This policy, however, was of limited use to aggrieved trademark holders, because it was only available if the contestant possessed a registered trademark; those who possessed common law trademarks were left without a remedy.[25] Moreover, the policy was only applicable if the registered trademark and the contested domain name were exactly the same.[26] A trademark owner could not challenge the registration of an alternate spelling or common misspelling of the trademarked name or the registration of the trademarked name in combination with another word.[27] Therefore, many trademark owners seeking to use their trademarks as their domain names were forced to bring trademark infringement

19. *See, e.g.*, Sterling, *supra* note 14, at 735–36 (noting that the fast food chain Carl's Jr. anticipated as much as a 50% percent reduction in Web site visits because it could not use the already-taken domain name "carlsjr.com").

20. Gayle Weiswasser, *Domain Names, the Internet, and Trademarks: Infringement in Cyberspace*, 13 SANTA CLARA COMPUTER & HIGH TECH. L.J. 137, 146 (1997).

21. *See* Sanchez, *supra* note 2, at 1683.

22. *See* Chase, *supra* note 16, at 4–5.

23. *See id.*

24. *See* Susan L. Crane, *Domain Name Disputes: ICANN's New Policy: What it Covers*, E-COMMERCE, Jan. 2000, at 1, *available in* LEXIS, Legal Publications Group File. If NSI received evidence that the trademark owner had a registered trademark in the name and that the domain name registrant did not also own a trademark in the name, then it would place the use of the name "on hold" while the parties resolved their dispute. *See id.*

25. *See id.*

26. *See id.*

27. *See id.*

actions against the parties that obtained the desired names from NSI.[28]

Recent developments in the domain name registration process provide more options for aggrieved trademark holders to prevent third parties from using their trademarks as domain names. First, NSI is no longer the sole company handling domain name registrations.[29] Second, a non-profit corporation, The Internet Corporation for Assigned Names and Numbers (ICANN), was established to oversee the Internet's management functions and has provided uniformity in the area of domain name registration.[30] ICANN recently established the Uniform Domain Name Disputes Resolution Policy (UDRP) which all certified domain name registration companies , such as NSI, must follow when conflicts arise.[31] Under the UDRP, an aggrieved trademark holder must establish each of the following three elements in an arbitration proceeding to prevail in a domain name contest: (1) the domain name is identical to or confusingly similar to a trademark owned by the complainant, (2) the domain name registrant has no legitimate rights in the name, and (3) the domain name was registered in bad faith.[32] If the complainant is successful, the UDRP allows the arbitrator to order the transfer of the domain name to the aggrieved trademark holder or the cancellation of the domain name.[33] Significantly, the UDRP is not limited to those with federally

28. *See* Chase, *supra* note 16, at 5; Swartz, *supra* note 16, at 1492–93.

29. *See* Lisa D. Dame, *Controversy in Cyberspace; ICANN Adopts WIPO Recommendations on Domain Names Conflicts*, THE INTELL. PROP. STRATEGIST, June 1999, at 1. Companies that currently register domain names in addition to NSI include America Online, register.com, NameSecure.com, and Domain Bank, Inc., among others. *See* The Internet Corporation for Assigned Names and Numbers, *List of Accredited and Accreditation-Qualified Registrars* (visited Sept. 1, 2000) <http://www.icann.org/registrars/accredited-list.html>.

30. *See* Dame, *supra* note 29, at 1.

31. *See* Crane, *supra* note 24, at 1. ICANN adopted the UDRP in October 1999 which subsequently became law on January 3, 2000. *See id.* The UDRP governs all .com, .net, and .org domain names, including those registered through NSI before the policy was implemented. *See* Robert D. Gilbert, *Practice Tips Significant Changes in Law Offer Cyberspace Protections for Trademark Owners*, E-COMMERCE, Dec. 1999, at 2, *available in* LEXIS, Legal Publications Group File.

32. *See* Gilbert, *supra* note 31, at 2.

33. *See* Crane, *supra* note 24, at 3. In the first case arbitrated under ICANN's dispute resolution policy, *World Wrestling Federation Entertainment, Inc. v. Bosman*, WIPO Case No. D99-0001 (2000) (Donahey, Arb.), the arbitrator ordered the defendant to transfer the domain name, worldwrestlingfederation.com, to World Wrestling Federation Entertainment, Inc. (WWF), which held a federally registered trademark in the name "World Wrestling Federation." *See WWF Wins Domain Name Transfer in First ICANN Arbitration*, INTELL. PROP. LITIG. REP., March 8, 2000, at 1.

registered trademarks or to situations in which the domain name is identical to the trademark in question.

Although the UDRP provides a more viable and complete resolution process for domain name disputes than did NSI's previous policy, many trademark holders might still choose to pursue trademark infringement claims in federal courts.[34] Aggrieved trademark holders may bring several different types of Internet-related trademark suits. The first type of dispute arises when a person purchases a domain name solely to sell it to a company for profit and the company owning the trademark to the domain name sues the holder of the domain name for trademark violations.[35] People who speculatively purchase domain names in such a manner are commonly referred to as "grabbers" or "cybersquatters."[36] The practice of speculatively purchasing domain names is so extensive that only a small number of Internet domain names are actually in use compared to those that have been registered.[37] Domain names such as "mcdonalds.com," "coke.com," "eddiebauer.com," and "mtv.com," for example, were originally held by individuals who did not own these respective trademarks.[38]

A second kind of dispute arises when a business purchases a domain name that is similar to a competitor's name or trademark for the purpose of taking Internet business away from the competitor.[39] Businesses have engaged in this practice in several ways, including using the competitor's actual trademark in the domain name or using a "commonly mistyped version of a famous name"[40] so that consumers will inadvertently access its Web site, rather than its competitor's Web site.[41]

---

34. For a discussion of the advantages and disadvantages of pursuing a remedy through either the UDRP or the courts, see Gilbert, *supra* note 31.

35. *See* Landau, *supra* note 14, at 485; Nathenson, *supra* note 14, at 925–26; Swartz, *supra* note 16, at 1494–95.

36. Landau, *supra* note 14, at 485.

37. *See* Sterling, *supra* note 14, at 737 (citing Steve G. Steinberg, *Addressing the Internet's Space Problem*, L.A. TIMES, Aug. 26, 1996, at D8).

38. *See* Chase, *supra* note 16, at 12; Sterling, *supra* note 14, at 737.

39. *See* Landau, *supra* note 14, at 490; Nathenson, *supra* note 14, at 927.

40. Nathenson, *supra* note 14, at 927 (noting that in one case, the software company Zero Micro Software registered the domain name "micros0ft.com" which was later put on hold following a complaint Microsoft Corporation).

41. *See* Landau, *supra* note 14, at 492; Nathenson, *supra* note 14, at 927. One of the most-widely publicized cases of squatting involved Stanley Kaplan Education Centers (Kaplan) and Princeton Review, two rival test preparation companies. *See* Sterling, *supra* note 14, at 738. Princeton Review registered the domain name "kaplan.com" after noticing that Kaplan had failed to do so. *See id.* Despite subsequent demands from Kaplan to turn over the domain name, Princeton Review posted advertisements for its

A third category of dispute occurs when two companies have the same or nearly the same name, one of the companies already holds a domain name in the common name, and the other company wants the same domain name.[42] This type of dispute is more complicated because both parties possess a valid claim to the name.[43] Furthermore, both companies may legally own a trademark in the same name[44]—trademark law recognizes concurrent use of a name if the shared use is between multiple parties providing different goods and/or services or between multiple parties in different geographic markets.[45]

A fourth type of Internet trademark dispute arises when a trademark holder discovers that a different business or individual is using its trademark within the content of its Web page.[46] This type of conflict is analogous to other traditional trademark infringement disputes in which the aggrieved trademark holder normally attempts to terminate the other party's use of the trademark and obtain statutory damages. These disputes are different from domain name disputes in that the alleged infringer's use of the trademark does not prevent the trademark holder from simultaneously using the trademark.

To understand fully the nature of the different types of Internet-related trademark disputes, a general understanding of federal trademark law is necessary. Federal trademark law was codified in the 1946 Lanham Trademark Act,[47] which defines a trademark as "any word, name, symbol, or device, or any combination thereof ... used by a person ... to identify and distinguish his or her goods ... from those manufactured or sold by others and to indicate the source of the goods, even if that source is unknown."[48] The two principal purposes of the Lanham Act are to protect consumers from confusion in the marketplace by ensuring that products purchased were those

---

services on a Web page with the name "kaplan.com." *See id.* Kaplan sued Princeton Review and after binding arbitration, Princeton Review agreed to transfer the domain name to Kaplan. *See id.* at 739.

42. *See* Nathenson, *supra* note 14, at 928.

43. *See id.*

44. *See supra* note 24 and accompanying text.

45. *See* Landau, *supra* note 14, at 468–72. For example, United Airlines and United Van Lines both use "United." *See id.*

46. *See* Cybersell, Inc. v. Cybersell, Inc., 130 F.3d 414, 415–16 (9th Cir. 1997); Bensusan Restaurant Corp. v. King, 126 F.3d 25, 26–27 (2d Cir. 1997).

47. Pub. L. No. 79-489, 60 Stat. 427 (1946) (codified as amended at 15 U.S.C. §§ 1051–1127 (1994 & Supp. IV 1998)); *see also* Sterling, *supra* note 14 at 748 (presenting the history of the Lanham Act).

48. 15 U.S.C. § 1127.

that consumers actually intended to purchase[49] and to secure the trademark owner's investment in the mark from use by "pirates and cheats."[50]

The Lanham Act provides several advantages exclusively for federally registered trademarks.[51] First, a federally registered trademark is deemed prima facie evidence of an exclusive right to use the mark.[52] Second, disputes over such trademarks command federal jurisdiction,[53] which is advantageous because federal judges have more experience with trademark infringement cases than do most state court judges.[54] Meanwhile, state unfair competition statutes and trademark statutes afford some protection against infringement, but these statutes add little protection beyond what is already provided under federal trademark law.[55]

Traditionally, federal infringement claims have fallen into one of two categories: (1) a claim of infringement based on a likelihood of confusion or (2) a claim of infringement based on trademark dilution.[56] In a likelihood-of-confusion suit, a trademark owner must prove that the defendant's use of the mark is likely to cause consumer confusion as to the source of the goods or services.[57] In a claim for infringement due to trademark dilution, a trademark holder must demonstrate that a "defendant's conduct will reduce the distinctiveness or goodwill" of the trademark.[58] In trademark

49. *See* Chase, *supra* note 16, at 6; Sterling, *supra* note 14, at 748.

50. S. REP. NO. 79-1333, at 3 (1946), *reprinted in* 1946 U.S.C.C.A.N. 1274.

51. *See* Sterling, *supra* note 14, at 751–52.

52. *See* 15 U.S.C. § 1057(b) (1994 & Supp. IV 1998) (stating that federal registration is "prima facie evidence of the validity [and] the registration of the mark, of the registrant's ownership of the mark, and of the registrant's exclusive right to use the registered mark in commerce on or in connection with the goods or services specified in the certificate"). For a more thorough discussion of the benefits to federal trademark registration, see Sterling, *supra* note 14, at 751–52.

53. *See* 15 U.S.C. § 1121(a) (1994 & Supp. IV 1998).

54. *See* Sterling, *supra* note 14, at 751.

55. *See* Chase, *supra* note 16, at 6 (citing 15 U.S.C. §§ 1051–1127 (1994 & Supp. IV 1998)).

56. *See* Chase, *supra* note 16, at 6–8.

57. *See id.*; Sterling, *supra* note 14, at 753. Courts give different levels of protection to different types of marks depending on the category of the mark. *See* Chase, *supra* note 16, at 6. Trademarks fall into one of five different categories of marks: arbitrary, fanciful, suggestive, descriptive, and generic. *See id.* Arbitrary, fanciful, or suggestive marks generally receive a high level of protection. Marks that fall into the descriptive category, however, will receive less protection unless the registrant demonstrates that the mark has a "secondary meaning." *Id.* Marks that fall into the generic category receive no protection. *See id.*; *see also* Landau, *supra* note 14, at 464 (discussing the likelihood of confusing claims and the different categories of trademarks).

58. Chase, *supra* note 16, at 7. "Blurring" and "tarnishment" are the two principle

disputes over Internet domain names, aggrieved trademark holders pursue both types of claims.[59]

Because of the novelty of the medium, traditional federal trademark law has proved inadequate in addressing issues unique to Internet-related disputes—in particular, the incidence of cybersquatting.[60] Consequently, in November of 1999, Congress amended the Lanham Act with the Anticybersquatting Consumer Protection Act (the "Anticybersquatting Act"),[61] which created a new cause of action for trademark infringement in domain name registration and thus should facilitate the aggrieved trademark holder's ability to obtain its trademarked names.[62]

The Anticybersquatting Act allows trademark holders to bring suits against anyone who, with a *bad faith* intent to profit, registers or uses a domain name that is either "identical or confusingly similar" to a mark that "is distinctive at the time of registration of the domain name"[63] or "identical or confusingly similar" to a mark that is "a famous mark that is famous at the time of registration of the domain name."[64] The Act provides an extensive, although not exclusive, list of factors that a court may consider in determining whether an alleged infringe acted in bad faith.[65] In addition, the Act allows, in specific circumstances, the owner of a federally registered trademark

---

ways in which a trademark can be diluted. *Id.* Blurring occurs when the trademark's selling power is reduced by unauthorized use of the trademark by another on unrelated goods. *See id.* Tarnishment occurs when a trademark becomes associated with "lesser quality goods or with unwholesome or unsavory content." *Id.*

59. *See id.* at 6–8. Congress passed the Federal Trademark Dilution Act of 1995, Pub. L. No. 104-98, 1995 U.S.C.C.A.N. (109 Stat.) 985 (codified as amended at 15 U.S.C. § 1125(c) (1994 & Supp. IV 1998)), partly with the intention of addressing domain name disputes and providing a remedy to trademark holders harmed by cybersquatters. *See* 141 CONG. REC. 38,561 (statement of Sen. Patrick Leahy) ("[I]t is my hope that this antidilution statute can help stem the use of deceptive Internet addresses taken by those who are choosing marks that are associated with the products and reputations of others.").

60. *See, e.g.*, Swartz, *supra* note 16, at 1488.

61. *See* Act of Nov. 29, 1999, Pub. L. No. 106-113, 1995 U.S.C.C.A.N (113 Stat.) 1501A-545 to 552 (codified as amended at 15 U.S.C.A. §§ 1125, 1127 (1998 & Supp. 2000)).

62. *See* 15 U.S.C.A. § 1125(d); *see also* Gilbert, *supra* note 31, at 1 (stating that the Anticybersquating Act should aid trademark holders in their efforts to prevent cybersquatters from infringing their trademarks).

63. 15 U.S.C.A. § 1125(d)(1)(A)(ii)(I).

64. *Id.* § 1125(d)(1)(A)(ii)(II).

65. *See id.* § 1125(d)(1)(B)(i). These factors include whether the alleged infringer intended to divert customers from the trademark owner's Web site under the domain name site, whether the alleged infringer offered to transfer or sell the domain name to the trademark holder, and whether the alleged infringer registered multiple domain names that it knew were identical or similar to trademarks of others. *See id.*

to file an in rem civil action against the domain name for injunctive relief in "the judicial district in which the domain name registrar, domain name registry, or other domain name authority that registered or assigned the domain name is located."[66] Thus, the Act provides trademark holders with an alternative method for invoking federal jurisdiction.[67]

While the Anticybersquatting Act represents a good step towards establishing an adequate legal framework for Internet-related legal disputes, its narrow scope—the Act only applies to bad faith domain name registration—may limit its effectiveness. Moreover, the Act's in rem jurisdiction is not useful for a party seeking more than injunctive relief in a jurisdiction different from that where the domain name registration company is located.[68] As a result, many parties bringing Internet trademark suits must first establish that the courts have personal jurisdiction over the alleged trademark infringers.

For a court's determination in a particular case to be binding, it must have personal jurisdiction over the parties involved in the action.[69] The determination of whether a court has personal jurisdiction over a party is a two-step process.[70] First, the court must determine whether jurisdiction is proper under the particular state's long-arm statute.[71] Second, it must analyze whether exercising jurisdiction over the party would satisfy the Due Process Clause of the Fourteenth Amendment.[72] In many states, the long-arm statute extends to the Constitution's jurisdictional boundaries under the Due Process Clause.[73] For this reason, and because a due process analysis

66. *Id.* § 1125(d)(2)(A).

67. *See, e.g.*, Porsche Cars N. Am., Inc. v. Porsche.com, 51 F. Supp. 2d 707, 713 (E.D. Va. 1999) (holding that prior to the Anticybersquatting Act the Lanham Act did not permit in rem actions against allegedly infringing marks).

68. As discussed in *supra* notes 21–28 and accompanying text, NSI, an Alexandria, Virginia-based company that, until recently, exclusively handled the registration of almost all domain names. Consequently, the Eastern District of Virginia will likely address many domain disputes brought under the new in rem provision in the Anticybersquatting Act.

69. *See* FRIEDENTHAL, *supra* note 1, § 3.1, at 94.

70. *See* Millennium Enters., Inc. v. Millennium Music, LP, 33 F. Supp. 2d 907, 909 (D. Or. 1999); Dale M. Cendali, *Personal Jurisdiction and the Internet, in* THIRD ANNUAL INTERNET LAW INSTITUTE 79, 81 (PLI Patents, Copyrights, Trademarks, and Literary Prop. Course Handbook Series No. G0-0051, June 14-15, 1999); William C. Walter & Deanne M. Mosley, *The Application of Traditional Personal Jurisdiction Jurisprudence to Cyberspace Disputes*, 19 MISS. C. L. REV. 213, 214–15 (1998).

71. *See* Walter & Mosley, *supra* note 70, at 214–15.

72. *See id.*

73. *See* Michael L. Russell, Note, *Back to the Basics: Resisting Novel and Extreme Approaches to the Law of Personal Jurisdiction and the Internet*, 30 U. MEM. L. REV. 157,

must be performed in all cases, this Note focuses on the due process component of personal jurisdiction.

Contemporary due process personal jurisdiction doctrine is premised on one central rule: for a court to have personal jurisdiction over a defendant, that defendant must "have certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' "[74] Depending on the nature and extent of a non-resident defendant's contacts with the forum, a court may exercise either general jurisdiction or specific jurisdiction.[75] If a defendant's contacts with the forum are "systematic and continuous,"[76] the court may exercise general jurisdiction and hear any cause of action involving the defendant, regardless of whether the specific cause of action arose out of the defendant's activities within the forum state.[77] A court with specific jurisdiction over a non-resident defendant may only hear a cause of action that directly arises from the defendant's contacts with the forum state.[78]

---

162 (1999).

74. International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)). In the landmark decision *Pennoyer v. Neff*, 95 U.S. 714 (1878), the Supreme Court held that physical presence within the forum State was necessarily for the State to exercise jurisdiction over a non-resident defendant. *See id.* at 733–34. In *International Shoe*, the Court established this test and expanded the personal jurisdiction doctrine—departing from its "presence" based approach under *Pennoyer*—to accommodate the advent of new technology which mobilized the population and enabled businesses to operate in multiple forums. *See* FRIEDENTHAL, *supra* note 1, § 3.10, at 120 (explaining that after the Court realized that the "*Pennoyer* rule was anachronistic," it adopted a "more flexible standard for the assertion of personal jurisdiction, based upon a jurisdictional theory ... better suited to a progressively more mobile society"); Oetker, *supra* note 1, at 616 (noting that although *Pennoyer* was appropriate when intrastate commerce was the norm, the Court has expanded Pennoyer's holding to reflect the introduction of new technology).

75. *See* Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 415–16 (1984).

76. *Id.* at 416. The Court has provided little help in determining exactly how much contact is necessary for general jurisdiction. *See* Stravitz, *supra* note 3, at 928. However, if "a defendant is domiciled in, incorporated or organized under forum state law, or has its principle place of business in the forum state ... there is little doubt that the constitutionally required substantially 'systematic and continuous' connection is satisfied." *Helicopteros*, 466 U.S. at 416 (citations omitted).

77. *See id.* at 415.

78. *See id.* at 416. In *Helicopteros*, the survivors of four American citizens who died in a helicopter crash in Peru brought suit in Texas against Helicopteros Nacionaleles de Colombia. *See id.* at 410–12. The survivors argued that Texas had general jurisdiction over the company because the company previously engaged in contract negotiations in Texas, purchased helicopters from Texas, and had pilots trained in Texas. *See id.* at 411. Nevertheless, the Supreme Court held that there was no general jurisdiction because the contacts were not continuous and systematic. *See id.* at 418.

The Supreme Court has divided the analysis of whether a court has specific jurisdiction over a defendant into two separate prongs.[79] The first prong, often called the "minimum contacts" or "purposeful availment" prong, focuses on the quantity and quality of the defendant's contacts with the forum state.[80] The second prong, often called the "reasonableness" prong, focuses on the fairness of bringing the defendant into the forum state's courts.[81] Both prongs must be satisfied to establish specific jurisdiction.[82] To satisfy the first prong, the court must find a sufficient number of significant contacts with the forum state that are related to the particular cause of action.[83] Generally, contacts are deemed significant if a court finds that the defendant "purposefully avail[ed]" himself to the forum.[84] For the "purposefully availment" requirement to be satisfied, the defendant's contacts with the forum state must be such "that he should reasonably anticipate being haled into court there."[85]

Although determining whether a defendant purposefully availed himself to suit in a particular jurisdiction is a case-specific, factual inquiry, some generalizations can be made about what contacts satisfy the analysis. First, the purposeful availment prong probably is not satisfied when a defendant does nothing more than place a product into the stream of commerce.[86] Rather, action by the defendant specifically directed towards a jurisdiction is necessary. Second, the purposeful availment prong is likely met when a defendant performs an intentional act with the knowledge that it will adversely affect an individual in a particular forum.[87] In this situation, courts use the

79. *See* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472–78 (1985).

80. *See id.*

81. *See id.*

82. *See id.* at 477–78.

83. *See id.*

84. Hanson v. Denckla, 357 U.S. 235, 253 (1958). In *Hanson*, the Court held that Florida's jurisdiction over a Delaware trustee of a trust established by a settlor who moved to Florida after establishing the trust was not proper, because the trustee had not purposely availed itself of the forum state. *See id.* The Court stated that there must be "some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Id.*

85. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980). In *World-Wide Volkswagen*, the Court held that Oklahoma did not have personal jurisdiction over a New York automobile dealer for a product liability claim arising from an accident that occurred in Oklahoma. *See id.* at 299.

86. *See* Metal Indus. Co. v. Superior Court, 480 U.S. 102, 112 (1987) (plurality opinion).

87. *See, e.g.*, Panavision Int'l, L.P. v. Toeppen, 141 F.3d 1316, 1321–22 (9th Cir. 1998). For a discussion of *Panavision*, see *infra* notes 149–62 and accompanying text.

"forum effects test" to find jurisdiction and reason that, because the defendant knew that the effects of his actions would harm the plaintiff in a specific jurisdiction, the defendant should have anticipated being haled into court in that jurisdiction.[88]

The second prong of the analysis focuses on the fairness of requiring the non-resident defendant to litigate in the forum State's courts. To determine whether the second "reasonableness" prong is satisfied, the court must decide whether allowing jurisdiction over the non-resident defendant would offend "traditional notions of fair play and substantial justice."[89] The Supreme Court established the following five factors that courts should consider when evaluating the reasonableness of jurisdiction: (1) the burden on the defendant, (2) the forum state's interest in adjudicating the matter, (3) the plaintiff's interest in obtaining convenient relief, (4) the interest of the judicial system in obtaining the most efficient resolution of disputes, and (5) the shared interest of the states in furthering substantive social policies.[90] Although jurisdiction cannot be established unless both the purposeful availment and reasonableness prongs are satisfied, the Supreme Court has stated that when a non-resident defendant makes purposeful contacts with the forum state, there is a rebuttable presumption that the exercise of jurisdiction over the defendant is reasonable.[91]

Once a court finds that the requirements of specific or general jurisdiction are met, its exercise of personal jurisdiction over a non-resident defendant is proper. This framework for establishing personal jurisdiction over a non-resident defendant under the Due Process Clause has been used by the federal courts since the mid-twentieth century. The analysis was adopted because of its flexibility and its ability to recognize the mobility of the modern world.[92] Recently, however, the utility of the analysis has been challenged by Internet-related disputes involving types of contacts unforeseen by

88. The "forum effects test" was adopted by the Court in *Calder v. Jones*, 465 U.S. 783, 790 (1984). In *Calder*, the Court held that the defendants, who were residents of Florida, could have reasonably anticipated being haled into court in California when they authored a libelous article about the plaintiff for publication in the *National Enquirer*. *See id.* The Court reasoned that, although the defendants had no other contacts with California, they knew that the plaintiff resided in California and that the plaintiff would suffer maximum harm in California. *See id.* Thus, the defendants should have anticipated being sued in that state. *See id.*

89. International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

90. *See World Wide Volkswagen*, 444 U.S. at 292.

91. *See* Burger King v. Rudzewicz, 471 U.S. 462, 477 (1985).

92. *See supra* note 74.

the courts even just a decade ago.

Although the Internet is still in its infancy and many Internet-related trademark suits are settled outside of court, the body of case law addressing Internet-based personal jurisdiction is rapidly expanding.[93] The federal circuit and district courts that have addressed the issue have struggled to establish a framework for addressing whether an Internet Web site or transmissions over the Internet constitute contacts sufficient to render a defendant subject to a foreign jurisdiction.[94] Much of the difficulty stems from the fact that the traditional personal jurisdiction framework developed at a time when "jurisdictional lines followed state boundaries, and parties more clearly understood the scope of their jurisdiction as well as the location of other parties with whom they were transacting."[95] In contrast, cyberspace is a world without boundaries where businesses and Internet users conduct transactions over the Internet, often without knowledge of each other's physical location.[96]

Applying the traditional, territorial-based minimum contacts analysis to the Internet, which essentially "defies all territorial constraints,"[97] is understandably difficult.[98] Nevertheless, the traditional personal jurisdiction analysis has been and continues to be applied by the courts addressing jurisdiction over Internet domain name disputes.[99]

In examining how the courts have addressed this issue, this Note will first discuss the seminal Internet personal jurisdiction case, *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*[100] This Note will then consider how the various federal circuit courts have addressed the

93. *See, e.g.*, Cendali, *supra* note 70, at 87–98 (outlining 49 federal cases that have addressed the issue of personal jurisdiction and the Internet).

94. *See* Stravitz, *supra* note 3, at 926; Leonard Klingbaum, Note, Bensusan Restaurant Corp. v. King: *An Erroneous Application of Personal Jurisdiction Law to Internet-Based Contacts (Using the Reasonableness Test to Ensure Fair Assertions of Personal Jurisdiction Based on Cyberspace Contacts)*, 19 PACE L. REV. 149, 162 (1998).

95. Sanchez, *supra* note 2, at 1684.

96. *See id.* at 1685.

97. Andrew E. Costa, Comment, *Minimum Contacts in Cyberspace: A Taxonomy of the Case Law*, 35 HOUS. L. REV. 453, 456–57 (1998); *see also* Sanchez, *supra* note 2, at 1671–72 ("Because the Internet transcends geographic boundaries, the application to it of territorially based [personal jurisdiction] doctrines is exceedingly difficult.").

98. *See* Stravitz, *supra* note 3, at 926; Sanchez, *supra* note 2, at 1685.

99. *See, e.g.*, Stravitz, *supra* note 3, at 926 (stating that "[e]ven if flawed and anachronistic, current [personal jurisdiction] doctrine is being applied by courts to resolve Internet jurisdictional disputes").

100. 952 F. Supp. 1119 (W.D. Pa. 1997). For a discussion of *Zippo*, see *infra* notes 103–13 and accompanying text.

issue of personal jurisdiction and the Internet.[101] This Note will then explore how various federal district courts have addressed the issues and how their treatment is less consistent than that of the federal circuit courts.[102]

The most influential case to address the issue of personal jurisdiction over trademark disputes regarding Internet domain names, *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*,[103] involved a trademark suit over the domain name "zippo.com" between Zippo Manufacturing Co., a Pennsylvania-based company, and Zippo Dot Com, a California-based company.[104] In confronting the issue of personal jurisdiction, the United States District Court for the Western District of Pennsylvania summarized the existing law on Internet jurisdiction and provided a useful framework for analyzing Internet jurisdiction cases.[105] The court stated that there is a spectrum, or a "sliding scale," of three principal types of Internet jurisdiction cases.[106] At one end of the spectrum lies the situation in which a business or person clearly conducts business over the Internet and has repeated contacts with the forum state so that exercising jurisdiction over the defendant is proper.[107] This end of the spectrum is often referred to as the "doing business" category of the spectrum.[108] At

101. *See infra* notes 114–71 and accompanying text.

102. *See infra* notes 172–209 and accompanying text.

103. 952 F. Supp. at 1119.

104. *See id.* at 1121. In *Zippo*, Zippo Manufacturing Co., which produces cigarette lighters, claimed that Zippo Dot Com's registration of the domain names "zippo.com," "zippo.net," and "zipponews.com" infringed its trademark in the name "Zippo." *See id.* Zippo Dot Com's Web site contained "information about the company, advertisements and an application for its Internet news service." *Id.* Its contacts with Pennsylvania were exclusively over the Internet and consisted of two percent of its subscribers (3,000 out of 140,000 worldwide) residing in Pennsylvania and existing agreements with seven Internet service providers in Pennsylvania to provide access to Zippo Dot Com's news service. *See id.* The court held that, based on these contacts with Pennsylvania, jurisdiction over Zippo Dot Com was proper. *See id.* at 1128. The court reasoned that because Zippo Dot Com sold passwords to 3,000 Pennsylvania residents and entered into agreements with Internet providers it purposefully availed itself to contact with residents of the forum state and thus could have anticipated being sued in Pennsylvania. *See id.* at 1126–27.

105. *See* Sanchez, *supra* note 2, at 1686–87.

106. *See Zippo*, 952 F. Supp. at 1124; Sanchez, *supra* note 2, at 1686–87; Anindita Dutta, Note, Zippo Manufacturing Co. v. Zippo Dot Com, Inc., 13 BERKELEY TECH. L.J. 289, 291–92 (1998).

107. *See Zippo*, 952 F. Supp. at 1124. The court cited *CompuServe, Inc. v. Patterson*, 89 F.3d 1257 (6th Cir. 1996), as an example of a case on the "doing business" end of the spectrum. For a discussion of *CompuServe*, see *infra* notes 114–30 and accompanying text.

108. For cases in which courts have found jurisdiction over defendants whose activities fell into the "doing business" category, see *CompuServe, Inc. v. Patterson*, 89 F.3d 1257, 1264–65 (6th Cir. 1996); *International Star Registry v. Bowman Haight Ventures, Inc.*, No. 98 C 6823, 1999 U.S. Dist. LEXIS 7009, at *22–23 (N.D. Ill. May 6, 1999); Thompson v.

the other end of the spectrum, the defendant has done nothing more than post information on a Web site that is accessible to users in other jurisdictions.[109] At this end of the spectrum, often referred to as the "passive Web site" category, jurisdiction is not proper.[110] The court then stated that the middle ground between the two ends "is occupied by interactive [w]eb sites where a user can exchange information with the host computer" and that here, "the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the [w]eb site."[111] This section of the spectrum is often referred to as the "interactive" category of the spectrum.[112] Although the court's description of the three types of cases is fairly broad, it has served as a useful starting point for other courts to use in analyzing personal jurisdiction over Internet-related disputes.[113]

Handa-Lopez, Inc., 998 F. Supp. 738, 743 (W.D. Tex. 1998); Superguide Corp. v. Kegan, 987 F. Supp. 481, 486–87 (W.D.N.C. 1997); Gary Scott Int'l, Inc. v. Baroudi, 981 F. Supp. 714, 715–16 (D. Mass. 1997).

109. *See Zippo*, 952 F. Supp. at 1124.

110. *See id.* at 1124. The court cited *Bensusan Restaurant Corp. v. King*, 937 F.Supp. 295 (S.D.N.Y. 1996), as an example of a case on this end of the spectrum. For a discussion of *Bensusan*, see *infra* notes 131–41 and accompanying text. On several occasions, courts have denied personal jurisdiction over a defendant whose activities fell into the "passive Web site" category. *See* Mink v. AAAA Dev., L.L.C, 190 F.3d 333, 337 (5th Cir. 1999); Cybersell, Inc. v. Cybersell, Inc., 130 F.3d 414, 416–20 (9th Cir. 1997); Bensusan Restaurant Corp. v. King, 126 F.3d 25, 29 (2d Cir. 1997); Desktop Techs., Inc. v. Colorworks Reprod. & Design, Inc., No. CIV. A. 98-5029, 1999 WL 98572, at *8–10 (E.D. Pa. Feb. 25, 1999); Patriot Sys., Inc. v. C-Cubed Corp., 21 F. Supp. 2d 1318, 1324 (D. Utah 1998); No Mayo-San Francisco v. Memminger, No. C-98-1392PJH, 1998 WL 544974, at *4 (N.D. Cal. Aug. 20, 1998); CFOs 2 Go, Inc. v. CFO 2 GO, Inc., No. C97-4676SI, 1998 WL 320821, at *3 (N.D. Cal. June 5, 1998); SF Hotel Co., L.P. v. Energy Invs., Inc., 985 F. Supp. 1032, 1035–36 (D. Kan. 1997); Weber v. Jolly Hotels, 977 F. Supp. 327, 333 (D.N.J. 1997); Smith v. Hobby Lobby Stores, Inc., 968 F. Supp. 1356, 1356–66 (W.D. Ark. 1997); IDS Life Ins. Co. v. SunAmerica, Inc., 958 F. Supp. 1258, 1268 (N.D. Ill. 1997), *vacated in part on other grounds*, 126 F.3d 537 543 (7th Cir. 1998); Graphic Controls Corp. v. Utah Med. Prod., No. 96-CV-0459E(F), 1997 WL 276232, at *3–4 (W.D.N.Y. May 21, 1997), *aff'd*, 149 F.3d 1382 (Fed. Cir. 1998); Hearst Corp. v. Goldberger, No. 96 CIV. 3620 (PKL) (AJP), 1997 WL 97097, at *12–13 (S.D.N.Y. Feb. 26, 1997).

111. *Zippo*, 952 F. Supp. at 1124.

112. Numerous courts have addressed cases that fall into the middle, "interactive" category. The determination of whether personal jurisdiction is proper depends on the facts of each case. *See* Millennium Enters., Inc. v. Millennium Music, L.P., 33 F. Supp. 2d 907, 923–24 (D. Or. 1999) (declining to find jurisdiction); GTE New Media Sers. Inc. v. Ameritech Corp., 21 F. Supp. 2d 27, 38–39 (D.D.C. 1998) (finding jurisdiction); Scherr v. Abrahams, No. 97C5453, 1998 WL 299678, at *4–5 (N.D. Ill. May 29, 1998) (declining to find jurisdiction); Vitullo v. Velocity Powerboats, Inc., No. 97 C 8745, 1998 WL 246152, at *6 (N.D. Ill. Apr. 27, 1998) (finding jurisdiction); E-Data Corp. v. Micropatent Corp., 989 F. Supp. 173, 176–78 (D. Conn. 1997) (declining to find jurisdiction); Maritz, Inc. v. Cybergold, Inc. 947 F. Supp. 1328, 1333 (E.D. Mo. 1996) (finding jurisdiction).

113. *See, e.g.*, *Millennium*, 33 F. Supp. 2d at 915–16 (discussing the *Zippo* framework

The federal circuit courts that have addressed the issue of personal jurisdiction in trademark disputes over Internet domain names have been relatively consistent with the framework established by the District Court for the Western District of Pennsylvania in *Zippo*. One year earlier, *CompuServe, Inc. v. Patterson*[114] presented the United States Court of Appeals for the Sixth Circuit with a fact pattern akin to the "doing business" end of the *Zippo* spectrum. In *CompuServe*, the court overruled a decision by the United States District Court for the Southern District of Ohio and held that the defendant's Internet contacts with Ohio satisfied the due process requirements.[115] Patterson, a Texas resident, entered into a Shareware Registration Agreement (SRA) with CompuServe, an Ohio-based computer information service company.[116] Under the agreement Patterson sold software he created on CompuServe's system to CompuServe subscribers, and in exchange, CompuServe retained fifteen percent of the sales.[117] The SRA incorporated by reference an agreement that Ohio law was to govern all disputes.[118] From 1991 to 1994, Patterson electronically transmitted thirty-two software files to CompuServe which were stored in CompuServe's system in Ohio.[119] In 1993, when CompuServe began marketing an application similar to the one that Patterson had created, Patterson notified CompuServe by e-mail that it was infringing his common law trademark to the software.[120] After Patterson demanded at least $100,000 to settle his claims, CompuServe brought a declaratory judgment action in the United States District Court for the Southern District of Ohio to determine whether it had infringed upon Patterson's trademarks.[121] Patterson contested the Court's personal jurisdiction over him and the District Court dismissed the suit for lack of personal jurisdiction.[122]

Upon appeal the Sixth Circuit concluded that Patterson had

---

and stating that "[m]ost courts follow the reasoning set forth in ... *Zippo*"). *But see* Sanchez, *supra* note 2, at 1687 (stating that the *Zippo* court's "categorization is not always helpful, especially because the [middle ground] scenario and the [passive Web site] scenario are not as clear as the court makes them out to be").

114. 89 F.3d 1257 (6th Cir. 1996).

115. *See CompuServe*, 89 F.3d at 1268–69.

116. *See* CompuServe, Inc. v. Patterson, No. C2-94-91, 1994 U.S. Dist. LEXIS 20352, *2–3, (S.D. Ohio Aug. 11, 1994).

117. *See id.*

118. *See id.* at *2.

119. *See id.* at *3–5.

120. *See id.* at *3–4.

121. *See* CompuServe, Inc. v. Patterson, 89 F.3d 1257, 1261 (6th Cir. 1996).

122. *See CompuServe*, 1994 U.S. Dist. LEXIS 20352, at *2.

purposefully availed himself of the privilege of doing business in Ohio and that the district court had specific jurisdiction over Patterson.[123] In finding that the purposeful availment prong of the due process analysis was satisfied, the court emphasized that Patterson had entered into an agreement with an Ohio company, had repeatedly sent his software electronically to Ohio, and had signed an agreement stating that Ohio law would govern the contract.[124] Further, the court stressed that Patterson initiated the contacts with CompuServe, benefited from their agreement, and sent numerous e-mails to CompuServe regarding his trademark claim.[125]

After finding that Patterson's contacts with Ohio were substantial enough to satisfy the first prong of the due process analysis, the court held that the cause of action arose out of Patterson's activities in Ohio.[126] The court reasoned that because he only submitted his software to the Ohio-based CompuServe, the principle place where any trademark infringement would have occurred is Ohio.[127] The court then held that the reasonableness prong of the due process analysis was satisfied and that it was not unduly burdensome for Patterson to be haled into an Ohio court.[128] It stated that because Patterson was an entrepreneur who knew that he was entering into a contract agreement with an Ohio-based company and because Ohio had a strong interest in the suit, jurisdiction over Patterson was reasonable.[129] Thus, the Sixth Circuit Court of Appeals was consistent with the *Zippo* framework and found specific jurisdiction in a case where there were continuous and multiple contacts with the forum state and where the "defendant clearly [engaged in] business over the Internet."[130]

In *Bensusan Restaurant Corp. v. King*,[131] the United States Court

123. *See CompuServe*, 89 F.3d at 1267.

124. *See id.* at 1264.

125. *See id.* at 1265–66 ("The record demonstrates that Patterson not only purposefully availed himself of CompuServe's Ohio-based services to market his software, but that he also 'originated and maintained' contacts with Ohio when he believed that CompuServe's competing product unlawfully infringed on his own software.").

126. *See id.* at 1267.

127. *See id.*

128. *See id.* at 1268.

129. *See id.* The court determined that the State of Ohio had a strong interest in the suit because it involved an Ohio company, its law of common law trademarks would be used, and because possibly more than $10 million could have been at stake for CompuServe because the suit would affect how they operate their shareware business. *See id.*

130. Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1124 (W.D. Pa. 1997).

131. 126 F.3d 25 (2d Cir. 1997).

of Appeals for the Second Circuit confronted a fact pattern that fits the opposite end of the *Zippo* spectrum in which the defendant operates a "passive Web site" and maintains no other contacts with the forum state, thus making jurisdiction almost always improper.[132] In *Bensusan*, the defendant, Richard King, operated a Web site promoting his small jazz club, "The Blue Note," located in Columbia, Missouri, which contained the club's logo.[133] The plaintiff, Bensusan Restaurant Corp., which operated the famous New York City jazz club, "The Blue Note," and held a federally registered trademark on the club's name,[134] sued King in the Southern District Court of New York for trademark infringement, trademark dilution, and unfair competition.[135] The district court held that neither the New York long-arm statute nor the Due Process Clause permitted jurisdiction over King, and the Second Circuit affirmed.[136] The district court focused on the passive nature of King's Web site[137] in noting that King did nothing to purposefully avail himself of the benefits of New York law by posting a Web page on the Internet.[138] It stated that King's site was directed towards residents of Missouri and that King did not encourage New Yorkers to access his site. Moreover, the court emphasized that King had no other contacts with New York.[139] The court also explained that "[c]reating a site, like placing a product into the stream of commerce, may be felt nationwide—or even worldwide—but, without more, it is not an act purposefully directed toward [New York]."[140] The court distinguished the Sixth Circuit's holding in *CompuServe* by stating that, in *CompuServe*, the defendant specifically targeted the forum state and had multiple contacts with the state.[141] By affirming the district court's decision, the Second Circuit implicitly agreed, consistent with the *Zippo* framework, that something more than merely placing a passive Web page on the Internet is necessary to exercise personal jurisdiction in Internet trademark disputes.

---

132. *See Zippo*, 952 F. Supp. at 1124 (citing *Bensusan* as an example of a case where personal jurisdiction is not proper because the defendant had a "passive Web site that does little more than make information available to those who are interested in it").

133. *See Bensusan*, 126 F.3d at 26–27.

134. *See id.*

135. *See* Bensusan Restaurant Corp. v. King, 937 F. Supp. 295, 297–98 (S.D.N.Y. 1996).

136. *See Bensusan*, 126 F.3d at 29.

137. *See Bensusan Restaurant*, 937 F. Supp. at 299–300.

138. *See id.* at 300–01.

139. *See id.*

140. *Id.* (citing Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 112 (1992) (plurality opinion)).

141. *See id.* at 301.

The Ninth Circuit adopted a similar position with respect to passive Web sites in *Cybersell, Inc. v. Cybersell, Inc.*[142] In *Cybersell*, an Arizona corporation, Cybersell, Inc. (Cybersell AZ), which provided Internet advertising and marketing services, brought a trademark infringement suit in the District of Arizona against a Florida corporation, Cybersell, Inc. (Cybersell FL), which provided consulting services for marketing on the Web.[143] Cybersell AZ, which had registered the name "Cybersell" as a service mark, alleged that Cybersell FL's use of the word "Cybersell" and the phrase "Welcome to Cybersell!" at the top of its Web page constituted trademark infringement.[144] Cybersell FL moved to dismiss the suit for lack of personal jurisdiction. The district court granted the motion, and the Ninth Circuit affirmed.[145]

The Ninth Circuit applied the traditional minimum contacts analysis, examined other cases—including *Bensusan* and *CompuServe*—in which courts have addressed personal jurisdiction in cyberspace, and concluded that Cybersell FL had not purposefully availed itself of the benefits and protections of Arizona.[146] The court's conclusion rested on the fact that Cybersell FL had not conducted any commercial activity in Arizona and had posted only a passive Web site on the Internet.[147] The court further stated that, if it were to find jurisdiction, then "every complaint arising out of alleged trademark infringement on the Internet would automatically result in personal jurisdiction wherever the plaintiff's principal place of business is located," and that such a result would "not comport with traditional notions of what qualifies as purposeful activity invoking the benefits and protections of the forum state."[148] Thus, the Ninth Circuit, as did the Second Circuit in *Bensusan*, acted consistently with the *Zippo* framework and established that something more than the mere placement of a Web page on the Internet is necessary to establish personal jurisdiction over a defendant in a foreign state.

The following year the Ninth Circuit encountered a similar issue in *Panavision International, LP v. Toeppen*,[149] but appeared to depart somewhat from *Cybersell* and the *Zippo* framework. In *Panavision*,

142. 130 F.3d 414 (9th Cir. 1997).
143. *See Cybersell*, 130 F.3d at 415.
144. *Id.* at 415–16.
145. *See id.* at 420.
146. *See id.* at 416–20.
147. *See id.* at 419–20.
148. *Id.* at 420 (citing Peterson v. Kennedy, 771 F.2d 1244, 1262 (9th Cir. 1985)).
149. 141 F.3d 1316 (9th Cir. 1998).

Dennis Toeppen, an Illinois resident and notorious "cybersquatter,"[150] registered the domain name "panavision.com" with NSI and created a Web site with that domain name which displayed photographs of Pana, Illinois.[151] Panavision, a California company which held a federally registered trademark to the name "Panavision," sued Toeppen in the United States District Court for the Central District of California for trademark dilution under the Federal Trademark Dilution Act of 1995[152] after Toeppen attempted to sell the domain name to Panavision for $13,000.[153] The court denied Toeppen's motion for dismissal for lack of personal jurisdiction and entered summary judgment in favor of Panavision.[154]

On appeal, the Ninth Circuit rejected Toeppen's argument that "any contact he had with California was insignificant, emanating solely from his registration of domain names on the Internet, which he did in Illinois," and concluded that the purposeful availment prong of the due process analysis was satisfied under the "forum effects test."[155] Applying this test, the court reasoned that although Toeppen had little contact with California, his scheme of registering a California company's trademark as a domain name for the purpose of extorting money from the company was akin to an intentional tort.[156] Thus, the court concluded that because Toeppen knew he would harm Panavision and that Panavision's principle place of business was in California, he should have anticipated being haled into court in California when he registered the domain name and established the Web page.[157]

The court then stated that Panavision's claim arose out of

150. The court stated that "Toeppen has registered domain names for various ... companies including Delta Airlines, Neiman Marcus, Eddie Bauer, Lufthansa, and over 100 other marks. Toeppen has attempted to 'sell' domain names for other trademarks such as intermatic.com to Intermatic, Inc. for $10,000 and americanstandard.com to American Standard, Inc. for $15,000." *Id.* at 1319.

151. *See id.*

152. Pub. L. No. 104-98, 109 Stat. 985 (codified as amended at 15 U.S.C. § 1125(c) (1994 & Supp. IV 1998)). For a discussion of the claim of trademark dilution and the Federal Trademark Dilution Act of 1995, see *supra* notes 56–58 and accompanying text.

153. *See* Panavision Int'l, L.P. v. Toeppen, 938 F. Supp. 616, 619 (C.D. Cal 1996).

154. *See id.* at 623.

155. *Id.* at 1322. Under the "effects test" first developed in *Calder v. Jones*, 465 U.S. 783 (1984), personal jurisdiction can be established upon: "(1) intentional actions (2) expressly aimed at the forum state (3) causing harm, the brunt of which is suffered—and which the defendant knows is likely to be suffered—in the forum state." *Panavision*, 141 F.3d at 1321 (quoting Core-Vent Corp. v. Nobel Indus. AB, 11 F.3d 1482, 1486 (9th Cir. 1993)). For a discussion of *Calder*, see *supra* note 88.

156. *See id.* at 1321–22.

157. *See id.* at 1322.

Toeppen's California-related activities.[158] Finally, the court concluded that the second, reasonableness prong of the due process analysis was satisfied and that California's exercise of personal jurisdiction over Toeppen was not unduly burdensome.[159] The court reasoned that because California had a strong interest in having the suit adjudicated in the state and because Toeppen purposefully subjected himself to a foreseeable suit in California, jurisdiction was reasonable.[160] In finding specific personal jurisdiction over Toeppen, the *Panavision* court undercut the *Zippo* framework, which provided that the mere establishment of a passive Web site without any other contacts is not enough to justify jurisdiction.[161] Nevertheless, the Ninth Circuit contended that the nature of "cybersquatting" is sufficiently directed toward the state where the infringed party resides to justify jurisdiction there and to distinguish it from cases such as *Cybersell* and *Bensusan*.[162]

In contrast to the Ninth Circuits' opinion in *Panavision*, the Fifth Circuit recently adopted the position that a passive Web site will not alone support a finding of personal jurisdiction over non-resident defendants. In *Mink v. AAAA Development, L.L.C.*,[163] David Mink, a Texas resident, brought a complaint in the United States District Court for the Southern District of Texas, against AAAA Development, a Vermont corporation, and David Middlebrook, a Vermont resident, alleging infringement of his federal copyright and patent pending rights.[164] After initially having his suit dismissed for lack of personal jurisdiction, Mink filed an unsuccessful motion for reconsideration contending that the court had personal jurisdiction over AAAA Development because AAAA's Web site was accessible to Texas residents.[165]

On appeal the Fifth Circuit first held that specific jurisdiction was improper because none of the alleged contacts were related to the cause of action.[166] The court then considered whether AAAA's

158. *See id.*

159. *See id.* at 1324.

160. *See id.* at 1322–24.

161. *See* Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1124 (W.D. Pa. 1997).

162. *See Panavision*, 141 F.3d at 1322. The court stated, "As we said in *Cybersell*, there must be 'something more' to demonstrate that the defendant directed his activity toward the forum state ... Here, that has been shown." *Id.* (referring to Cybersell, Inc. v. Cybersell, Inc., 130 F.3d 414, 418 (9th Cir. 1997)).

163. 190 F.3d 333 (5th Cir. 1999).

164. *See id.* at 335.

165. *See id.*

166. *See id.* at 336. The court stated that Mink was "silent concerning where his

advertisements on its Web site were substantial enough contacts to justify the exercise of general jurisdiction over AAAA.[167] In doing so, the court expressly adopted the *Zippo* framework for the Fifth Circuit.[168] Consequently, the court determined that the Web site was passive in nature because it only provided information about AAAA's services, a printable mail-in order form, a telephone number, a mailing address, and an e-mail address.[169] The defendant neither conducted business over the Internet nor interacted over the Internet with any of the forum residents.[170] Thus, the court stated that the site fell into the side of the *Zippo* spectrum where personal jurisdiction is not appropriate.[171] By finding personal jurisdiction over AAAA lacking, the Fifth Circuit held consistent with the *Zippo* framework and, like the Second Circuit Court in *Bensusan* and the Ninth Circuit in *Cybersell*, required more than just the placement of a Web page on the Internet for a finding of personal jurisdiction.

In contrast to the federal circuit courts' adherence to and application of the *Zippo* framework, the federal district courts' assessments of personal jurisdiction in Internet-related trademark disputes exhibit greater variances and inconsistencies. For example, in *Inset Systems, Inc. v. Instruction Set, Inc.*,[172] the United States District Court for the District of Connecticut strayed from the *Zippo* spectrum established and exercised personal jurisdiction over defendants who had rather limited contacts with the forum state. Inset Systems, a Connecticut-based software development company, brought a trademark infringement suit in Connecticut against Instruction Set, Inc., a Massachusetts based computer technology company, over Instruction Set's registration and use of the domain name "inset.com."[173] Inset Systems held a registered trademark in the name "Inset" and wanted to prevent Instruction Set from using it as

---

contacts with the defendants occurred," but that it inferred that the contact was not in Texas because of an affidavit which stated that AAAA had no sales in Texas and had never had any employees travel to Texas for business purposes. *Id.* at 335.

167. *See id.* at 336.

168. *See id.* (citing Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1124 (W.D. Pa. 1997)).

169. *See id.* at 337.

170. *See id.* The court stressed the fact that "AAAA's web site does not allow consumers to order or purchase products and services on-line," and that "potential customers are instructed by the web site to remit any completed order forms by regular mail or fax." *Id.*

171. *See id.*

172. 937 F. Supp. 161 (D. Conn. 1996).

173. *See id.* at 162–63.

their domain name.[174] The court applied a minimum contacts analysis to the suit and held that specific jurisdiction was proper.[175] The court ruled that although Instruction Set performed no business or transactions in Connecticut, its placement of a Web page on the Internet with an advertisement for its services and a toll-free phone number was activity directed toward the state of Connecticut and sufficient to satisfy the purposeful availment requirement.[176] The court then concluded that Instruction Set's close proximity to Connecticut and Connecticut's interest in adjudicating the suit satisfied the reasonableness prong of the due process analysis.[177]

Similarly, in *Maritz, Inc. v. Cybergold, Inc.*,[178] the United States District Court for the Eastern District of Missouri found jurisdiction over a defendant who operated an essentially passive Web site.[179] Maritz, a Missouri-based company, provided an e-mail service under its trademark name "Goldmail" and alleged that advertisements by Cybergold, a California-based company, about Cybergold's future e-mail service on its Web site, "www.cybergold.com," infringed upon Maritz's trademark and justified exercising jurisdiction over Cybergold in Missouri.[180] In finding jurisdiction over CyberGold, the court held that CyberGold's contacts with Missouri satisfied the due process analysis.[181]

In contesting personal jurisdiction, Cybergold argued that because it had only posted information about its new e-mail service on its site, the site was passive.[182] Nevertheless, the court reasoned that because CyberGold was advertising on its Web page with the

174. *See id.*

175. *See id.* at 165.

176. *See id.* The court further suggested that Instruction Set had availed itself to the jurisdiction of all of the states. *See id.* The court's minimum contacts analysis consisted of essentially four sentences:

> Instruction [Set] has directed its advertising activities via the Internet and its toll-free number toward not only the state of Connecticut, but to all states. The Internet as well as toll-free numbers is designed to communicate with people and their businesses in every state. Advertisements on the Internet can reach as many as 10,000 Internet users within Connecticut alone. Further, once posted on the Internet, unlike television and radio advertising, the advertisement is available continuously to any Internet user. [Instruction Set] has therefore, purposefully availed itself of the privilege of doing business within Connecticut.

Id.

177. *See id.*

178. 947 F. Supp. 1328, 1334 (E.D. Mo. 1996).

179. *See id.*

180. *See id.* at 1329–30.

181. *See id.* at 1331–34.

182. *See id.* at 1333.

intent of obtaining customers from other jurisdictions and because approximately 131 Missouri residents had visited CyberGold's site, the purposeful availment prong was satisfied.[183] The reasonableness prong was satisfied because Missouri had an interest in having the suit adjudicated in Missouri and because CyberGold did not demonstrate that litigating in Missouri would be overly burdensome.[184] Thus, as the United States District Court for the District of Connecticut did in *Inset*, the United States District Court for the Eastern District of Missouri in *Maritz* found personal jurisdiction over a defendant with a passive Web site and rather limited contacts with the forum state. Both decisions are contrary to the spectrum established in *Zippo*.[185]

In contrast to *Inset* and *Maritz*, in *Millennium Enterprises, Inc. v. Millennium Music, L.P.*,[186] the United States District Court for the District of Oregon found personal jurisdiction lacking in a case with facts more supportive of jurisdiction. In *Millennium*, Millennium Enterprises, Inc., an Oregon-based music store, sued Millennium Music, L.P., a South Carolina-based music store that sold music through retail outlets and through a Web site for trademark infringement.[187] The plaintiff asserted that personal jurisdiction was proper because of the defendant's Web site, its sale of compact disks (CDs) to residents of Oregon, and its purchases of small amounts of CDs from an Oregon supplier.[188] The court quickly dismissed the plaintiff's arguments that the defendant's sale of CDs to Oregon residents and the purchase of CDs from an Oregon supplier were sufficient to warrant jurisdiction.[189] The court then dismissed the

183. *See id.* at 1333–34.

184. *See id.* at 1334.

185. *See supra* notes 104–13 and accompanying text.

186. 33 F. Supp. 2d 907 (D. Or. 1999).

187. *See id.* at 908–09.

188. *See id.* at 909–11.

189. *See id.* at 911–12. The court dismissed the plaintiff's claim that jurisdiction was proper because the only Web-based customer the defendant had in Oregon was an acquaintance of the plaintiff's council, who had been asked by the attorney to purchase a CD from the defendant, apparently to establish contacts. *See id.* The court explained that the defendant "cannot be said to have 'purposely' availed [itself] of the protections of this forum when it was an act of someone associated with plaintiff, rather than defendant's Web site advertising, that brought defendant's product into this forum." *Id.* at 911. It continued, "[t]he court is dismayed by plaintiff's counsel's lack of candor ... Such questionable and unprofessional tactics cannot subject defendants to jurisdiction in this forum." *Id.* With regard to the purchases from an Oregon supplier, the court dismissed the plaintiff's argument that these purchases justified personal jurisdiction because the court stated that the minimal purchases were not related to the suit. It indicated that plaintiffs "assert no ascertainable loss caused by defendant's purchase of inventory from [an Oregon supplier]." *Id.* at 912.

plaintiff's claim that the defendant's interactive Web site supported the exercise of personal jurisdiction.[190] Initially, the court stated that the case fell into the middle of the *Zippo* spectrum.[191] It then stated that because there was no evidence that the defendant had directed its activities toward Oregon or transacted business in Oregon and because the defendant could not have foreseen being sued in Oregon, there was no purposeful availment.[192] Although the court did not need to address the reasonableness prong after finding a lack of purposeful availment, it indicated that special consideration should be given to Internet cases because small businesses might be discouraged from operating on the Internet out of fear of being subject to the jurisdiction of all fifty states.[193] The District Court for the District of Oregon's decision in *Millennium* was consistent with the *Zippo* framework by not finding jurisdiction where the defendant had an interactive Web site, but did not direct its activity towards the forum state.

In *International Star Registry v. Bowman-Haight Ventures, Inc.*,[194] the United States District Court for the Northern District of Illinois, Eastern Division addressed a case with a factual scenario that falls into *Zippo*'s "doing business" category. In *International Star Registry*, the plaintiff, International Star Registry of Illinois (ISRI), an Illinois corporation, sued Bowman-Haught Ventures, Inc. (BHV), a Virginia corporation, alleging, among other things, trademark infringement and unfair competition.[195] BHV argued that Illinois lacked personal

190. *See id.* at 913–23. The court characterized the *Inset* decision as "inauspicious" and stated that "the trend has shifted away from finding jurisdiction based solely on the existence of Web site advertising." *Id.* at 915.

191. *See id.* at 920. As the court stated that "[a]rguably, the capability of selling compact discs through the Web site could constitute 'doing business' over the Internet and confer personal jurisdiction almost as a matter of course." *Id.* The court reasoned, however, that because the defendant's sales of CDs over the Internet had not been directed to Oregon at all, the defendant's acts amounted to less than "doing business" in the Zippo spectrum. *See id.*

192. *See id.* at 920–23. The court further distanced itself from the *Inset* and *Maritz* courts when it stated:

> Not surprisingly, plaintiff relies on *Inset* and *Maritz* for the proposition that jurisdiction over the operator of a Web site is proper if the site is interactive.... However, the court finds lacking in *Inset* and *Maritz* the principle that a defendant must "purposefully direct" its activities at or take "deliberate action" in or create "substantial connection" with the forum state so as to provide "fair warning" that such activities may subject defendant to jurisdiction in a distant forum.

Id. at 922 (citing Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 (1985)).

193. *See Millennium*, 33 F. Supp. 2d at 923.

194. No. 98 C 6823, 1999 WL 300285 (N.D. Ill. May 6, 1999).

195. *See id.* at *1.

jurisdiction over it despite the fact that BHV had interacted with Illinois residents over the Internet and had sold twenty-two star registrations to Illinois residents through its Web site using an "Electronic Secure Order Form" for credit card sales.[196]

The court found that BHV's activities fell into the "doing business" category of the *Zippo* framework.[197] Although BHV did not "target or tailor" its business to Illinois, it did benefit economically from Internet users in Illinois who purchased goods from BHV over the Internet.[198] Further, the court stated that because BHV allegedly infringed an Illinois company's trademark while contracting with Illinois residents, BHV's conduct in Illinois was related to the controversy in question.[199] Thus, the court concluded that the purposeful availment prong was satisfied.[200] Then, without actually assessing the reasonableness of requiring the defendant to litigate in Illinois, the court stated that an exercise of personal jurisdiction was consistent with the Due Process Clause.[201] The District Court for the Northern District of Illinois, thus, held relatively consistent with the *Zippo* framework and found jurisdiction over a defendant who did business over the Internet with residents of the forum state. Its failure to perform an actual analysis under the reasonableness prong, however, is suspect.

In *Desktop Technologies, Inc. v. Colorworks Reproduction & Design, Inc.*,[202] the United States District Court for the Eastern District of Pennsylvania acted in accord with *Zippo* framework when it refused to exercise personal jurisdiction over a defendant whose Internet activities were essentially passive. Desktop Technologies, Inc., a Pennsylvania company, brought a trademark infringement suit against Colorworks Reproduction & Design, Inc., a company based out of Vancouver, British Columbia, Canada.[203] Desktop alleged that Colorworks' use of the domain name "colorworks.com" infringed Desktop's federally registered trademark in "COLORWORKS" and allowed Colorworks to compete unfairly with Desktop in the United States.[204] While Desktop contended that Colorwork's Web site

196. *See id.* at *1–2.
197. *See id.* at *6.
198. *Id.*
199. *See id.* at *7.
200. *See id.* at *8.
201. *See id.*
202. No. CIV. A. 98-5029, 1999 WL 98572 (E.D. Pa. Feb. 25, 1999).
203. *See id.* at *1.
204. *See id.* Colorworks, had a trademark in "ColorWorks," which was registered in Canada. *See id.*

supported jurisdiction in Pennsylvania,[205] the court agreed with Colorworks and dismissed Desktop's suit.[206] Although Colorwork's Web site was equipped to receive e-mails from customers, it did not allow customers to place orders online and had nothing more than information and advertisements about its services.[207] Thus the court classified the Web site as passive and held that because Colorworks had no other contacts with Pennsylvania, neither general nor specific jurisdiction could be exercised over Colorworks.[208] Relying on *Panavision* and *Cybersell* to support its holding that specific jurisdiction was not proper, the court stated that "something more" than registering another's trademark as a domain name and placing it on the Internet was necessary for the purposeful availment prong to be satisfied.[209] The District Court for the Eastern District of Pennsylvania, thus, ruled consistently with the *Zippo* framework and did not find jurisdiction where the defendant's Web site was passive in nature and the defendant had taken no other action toward the forum state.

Although a few district courts within the Fourth Circuit have addressed the issue of personal jurisdiction in Internet trademark disputes,[210] the Fourth Circuit Court of Appeals has yet to address such a case and the body of law within the Fourth Circuit is predictably incipient. This Note will now discuss how the courts of the Fourth Circuit, including the Fourth Circuit Court of Appeals, should address these disputes. In addressing the issue of personal jurisdiction in trademark disputes over Internet domain names, the courts of the Fourth Circuit should take the following measures. First, the courts should adopt an approach consistent with the spectrum established in *Zippo*. Second, they should refrain from finding personal jurisdiction in cases similar to those in which the courts did find jurisdiction in *Inset*, *Maritz*, and *Panavision*. Third,

205. *See id.*

206. *See id.* at *6.

207. *See id.* at *3–4. The court emphasized the fact that Colorwork's site specifically directed its customers to fax their orders, and that it stated that it would not begin working on the order until it was verified by telephone. *See id.*

208. *See id.* at *4–6.

209. *See id.* at *5. Of course, in *Panavision*, the Ninth Circuit Court of Appeals found jurisdiction over a cybersquatter who registered someone else's trademark as a domain name and posted a Web site on the Internet. *See* Panavision Int'l, L.P. v. Toeppen, 141 F.3d 1316, 1327 (9th Cir. 1998). In that case, however, the court emphasized that because the defendant intentionally harmed the plaintiff and knew the plaintiff was located in California, there was "something more," and California's exercise of jurisdiction over him was within the bounds of due process. *See id.* at 1322.

210. *See, e.g.*, *supra* note 4.

they should follow *CompuServe*, *Bensusan*, *Cybersell*, *Millennium*, and *Desktop* and require more than just the placement of a passive Web page on the Internet for a finding of personal jurisdiction. Fourth, they should place more emphasis on the reasonableness prong of the due process analysis when considering whether exercising personal jurisdiction is proper in Internet-related cases.

Taking an extreme approach, such as concluding that jurisdiction is everywhere or nowhere, does not resolve the issue of personal jurisdiction over Internet domain name disputes.[211] Rather, a middle ground is necessary, in which a factual determination establishes whether jurisdiction is proper. For this reason, the spectrum of Internet cases discussed in *Zippo* is a useful starting point for a court assessing whether personal jurisdiction over a defendant is proper.[212] The courts of the Fourth Circuit should recognize this benefit and adopt the *Zippo* framework as a starting point to its jurisdictional analysis.[213]

Of course, the framework established in *Zippo* is only a starting point. The courts must conduct a factual inquiry and determine in which of the three categories the defendant's activity falls. Then, in the likely event that it falls into the middle, or "interactive" category,[214] the court must examine "the level of interactivity and commercial nature of the exchange of information that occurs on the Web site" and between the parties.[215] Nevertheless, as did many of

---

211. *See, e.g.*, Stravitz, *supra* note 3, at 939 ("[D]isputes over personal jurisdiction arising from Internet contact cannot be resolved by equally objectionable extremes—jurisdiction everywhere or jurisdiction nowhere. Some reasonably predictable middle position is desirable.").

212. *See, e.g.*, Richard Philip Rollo, Note, *The Morass of Internet Personal Jurisdiction: It is Time for a Paradigm Shift*, 51 FLA. L. REV. 667, 692 (1999) ("The largest benefit of the *Zippo* test is that it is very flexible."); Russell, *supra* note 73 at 181 (stating that the *Zippo* framework "is well-reasoned and thoughtful").

213. Numerous courts have used the *Zippo* framework to assess personal jurisdiction in Internet related disputes. *See* Mink v. AAAA Devs., L.L.C., 190 F.3d 333, 336 (5th Cir. 1999); Cybersell, Inc. v. Cybersell, Inc., 130 F.3d 414, 419 (9th Cir. 1997); International Star Registry v. Bowman-Haight Ventures, Inc., No. 98C 6823, 1999 WL 300285, at *4–6 (N.D. Ill. May 6, 1999); Resnick v. Marfredy, 52 F. Supp. 2d 462, 467 (E.D. Pa. 1999); Desktop Techs., Inc. v. Colorworks Reprod. & Design, Inc., No. CIV. A. 98 5029, 1999 WL 98572, at *4 (E.D. Pa. Feb. 25, 1999); Millennium Enters., Inc. v. Millennium Music, LP., 33 F. Supp. 2d 907, 916 (D. Or. 1999).

214. Future Internet personal jurisdiction cases likely will fall into the interactive category because as business on the Internet grows, interactive Web sites are likely to be developed by companies seeking to obtain an Internet presence. *See* Sanchez, *supra* note 2, at 1704 ("as the Internet and the Web become more popular, most contacts will fall into this nebulous middle category and will involve activities occurring only in cyberspace").

215. Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1124 (W.D. Pa. 1997). The court further stated that "our review of the available cases and materials reveals that

the courts that have addressed this issue, the courts of the Fourth Circuit should start with the assumptions grounded in the *Zippo* analysis—something more than Web site advertising is necessary to establish jurisdiction and that at a certain point Internet contacts with residents of the forum state become sufficient to warrant being haled into court.[216]

The decisions in *Inset* and *Maritz* conflict with the assumption in the *Zippo* analysis that something more than a passive Web site is necessary to satisfy the purposeful availment prong of the due process analysis.[217] In both cases, the courts found specific personal jurisdiction over defendants who had limited contacts with the forum states and who had little to no interaction with residents of the forum states.[218] In *Inset*, the United States District Court for the District of Connecticut found jurisdiction over the defendant although the defendant had an essentially passive Web site, had not performed any business transactions in Connecticut, and had no proof that any of the defendant's advertisements on the Internet were accessed by any Connecticut residents.[219] Similarly, in *Maritz*, the United States District Court for the Eastern District of Missouri found jurisdiction over a defendant who had a primarily passive Web site, had not performed any business transactions in Missouri (nor anywhere else for that matter, as the Web site was solely an advertisement for future services), and whose site had been accessed by only 131 Missouri residents.[220]

---

the likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet." *Id.*

The framework established in *Zippo* has been criticized by some as being too broad in its approach to be useful. *See, e.g.*, Sanchez, *supra* note 2, at 1704 (contending that the *Zippo* court "never defines the middle category nor does it provide a suggestion as to how cases falling under the category should be treated" and that the analysis "fails to recognize that, as the Internet and the web become more popular, most Internet contacts will fall into this nebulous middle category and will involve activities occurring only in cyberspace").

216. *See Zippo*, 952 F. Supp. at 1124.

217. *See, e.g.*, Millennium Enters., Inc., v Millennium Music, L.P., 33 F. Supp. 2d 907, 922 (D. Or. 1999) (stating that "the court finds lacking in *Inset* and *Maritz* the principle that a defendant must purposefully direct its activities at or take deliberate action in or create substantial connection with the forum state so as to provide fair warning that such activities may subject defendant to jurisdiction in a distant forum" (internal quotations omitted)); Sanchez, *supra* note 2, at 1706 (stating that the courts in *Inset* and *Maritz* "incorrectly applied the purposeful availment requirement").

218. *See supra* notes 172–85 and accompanying text (discussing *Inset* and *Maritz*).

219. *See* Inset Sys., Inc. v. Instruction Set, Inc., 937 F. Supp. 161, 165 (D. Conn. 1996).

220. *See* Maritz, Inc. v. Cybergold, Inc., 947 F. Supp. 1328, 1334 (E.D. Mo. 1996).

The decisions in *Inset* and *Maritz* are further problematic because in those cases, the courts indicated that the mere act of placing a Web site on the Internet may be enough to subject the defendant to personal jurisdiction in all fifty states, because it is foreseeable that one's Web site could be accessed everywhere.[221] These courts seem to have adopted a stream-of-commerce theory to support their finding of jurisdiction. That is, both courts appear to have suggested that the defendants purposefully availed themselves to the forum states by placing products (Web sites) into the stream of commerce (the Internet) with the awareness that the products may end up in the forum states. By adopting an approach to Internet jurisdiction analogous to the stream-of-commerce theory, the two courts used a theory that a plurality of the Supreme Court rejected in *Asahi Metal Industry Company v. Superior Court of California.*[222] In *Asahi*, Justice O'Connor addressed the principal problem of the stream of commerce theory when she stated that "a defendant's awareness that the stream of commerce may or will sweep the product into the forum State does not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum State."[223] Another problem with the stream-of-commerce approach is that it essentially robs potential defendants of their ability "to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit."[224] The stream of commerce approach, thus, leaves potential defendants open to suits in states in which they have little or no contacts, and without the ability to predict where they will be subject to jurisdiction.[225]

For all of these reasons, the courts of the Fourth Circuit should avoid exercising jurisdiction in cases with factual similarity to either *Inset* or *Maritz*. By doing so, the courts will maintain consistency with the *Zippo* framework and thus will avoid finding jurisdiction over

221. In *Inset*, the United States District Court for the District of Connecticut suggested that the defendant "directed its advertising activities via the Internet . . . toward not only the state of Connecticut, but to all states." *Inset*, 937 F. Supp. at 165. In *Maritz*, the District Court for the Eastern District of Missouri was less blunt. It stated that by having its advertisements on the Internet accessed by Missouri residents, the defendant purposefully availed itself to privilege of conducting business in Missouri. *See Maritz*, 947 F. Supp. at 1333. This reasoning leads to the conclusion that the defendant purposefully availed itself of the benefits to any state whose residents have accessed the defendant's site.

222. 480 U.S. 102, 112 (1987) (plurality opinion).

223. *Id.*

224. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980).

225. *See* Sanchez, *supra* note 2, at 1706.

defendants who solely place passive Web sites on the Internet. Further, the courts of the Fourth Circuit will avoid adopting an approach similar to the stream-of-commerce theory rejected by a plurality of the Supreme Court in *Asahi*.

For similar reasons, the courts of the Fourth Circuit should be cautious in using *Panavision* as precedent for justifying a finding of jurisdiction when a defendant has done nothing more than register a domain name that is also a company's registered trademark. In this situation, purposeful availment is likely lacking.[226] In *Panavision*, the Ninth Circuit Court of Appeals used the "forum effects test"[227] to find jurisdiction over the defendant, Toeppen, whose sole contact with California was the registration and use of a California company's trademark as a domain name.[228] The court took the "forum effects test" to its limits and ignored *Cybersell*, which the court decided several months earlier.[229] In *Cybersell*, the Ninth Circuit Court of Appeals rejected the use of the "forum effects test" in an Internet trademark dispute, stating that "the 'effects' test [does not] apply with the same force to [a corporation] as it would to an individual, because a corporation 'does not suffer harm in a particular geographic location in the same sense that an individual does.' "[230] The unique nature of Panavision's business possibly justifies the use of the "effects test" in the specific case.[231] Panavision is a California-based company involved in the movie and television industry that conducts almost all of its business in California. Consequently, Toeppen likely knew that his actions would affect Panavision specifically in California.[232] Nevertheless, it is hard to imagine another situation in

226. In *Panavision*, although the court found jurisdiction in a very similar situation, it stated, "We agree that simply registering someone else's trademark as a domain name and posting a web site on the Internet is not sufficient to subject a party domiciled in one state to jurisdiction in another." Panavision Int'l, L.P. v. Toeppen, 141 F.3d 1316, 1322 (9th Cir. 1998).

227. *See supra* notes 87–88 and accompanying text.

228. *See Panavision*, 141 F.3d at 1322.

229. *See* Scott D. Sanford, Note, *Nowhere to Run ... Nowhere to Hide: Trademark Holders Reign Supreme In* Panavision Int'l, L.P. v. Toeppen, 29 GOLDEN GATE U. L. REV. 1, 33–34 (1999) (stating that in *Panavision*, "the Ninth Circuit's application of the *Calder* effects test, to establish personal jurisdiction, is in direct conflict with its previous decision in *Cybersell*").

230. Cybersell, Inc. v. Cybersell, Inc., 130 F.3d 414, 420 (9th Cir. 1997) (quoting Core-Vent Corp. v. Nobel Indus., 11 F.3d 1482, 1486 (9th Cir. 1993)).

231. In using the *Calder* "effects test," the court stressed the fact that "[Toeppen's] conduct, as he knew it likely would, had the effect of injuring Panavision in California where Panavision has its principal place of business *and where the movie and television industry is centered.*" *Panavision*, 141 F.3d at 1321–22 (emphasis added).

232. *See id.*

which a court could find that harm against a corporation from trademark infringement, without other contacts, is sufficient to justify a finding of personal jurisdiction in the corporation's principal place of business. For this reason, the courts of the Fourth Circuit should require more than the act of registering another's trademark as a domain name and posting a Web site on the Internet for them to find the purposeful availment prong satisfied, regardless of the intentions of the infringing party.

Further, one of the Ninth Circuit Court of Appeals' principal justifications for finding personal jurisdiction in *Panavision* was the bad faith intent of Toeppen to profit from his registration of Panavision's trademark.[233] The court was justifiably unsympathetic to Toeppen and, although it didn't specifically say so, was more likely to allow Panavision to adjudicate its suit in its forum of choice and find that California's exercise of jurisdiction over Toeppen was reasonable because of Toeppen's bad faith. The court's concern for not burdening Panavision's ability to find jurisdiction over cybersquatters would likely have been diminished, however, had the Anticybersquatting Act[234] passed by Congress in late 1999 been available to Panavision. As mentioned previously, the Anticybersquatting Act was passed specifically to protect the trademark holder whose trademark was registered as a domain name by a person with bad faith intent to profit from the registration.[235] The Act allows for trademark owners to obtain in rem jurisdiction over the domain name in the judicial district of the domain name registration company where the domain name was registered.[236] Thus, the Anticybersquatting Act provides trademark holders with jurisdictional alternatives unavailable at the time the Ninth Circuit addressed *Panavision.*

The courts of the Fourth Circuit should recognize this difference and avoid exercising personal jurisdiction over even bad faith infringers if the exercise would be overly burdensome on the defendant and perhaps unreasonable under the second prong of the due process analysis. Under the Anticybersquating Act, the trademark holder would still have the option of bringing an in rem action in the jurisdiction of the domain name registration company.[237]

---

233. *See id.* at 1322.

234. Act of Nov. 29, 1999, Pub. L. No. 106-113, 113 Stat. 1501A-545 to 552 (codified as amended at 15 U.S.C.A. § 1125(d) (1998 & Supp. 2000)).

235. *See supra* notes 61–68 and accompanying text.

236. *See* 15 U.S.C.A. § 1125(d)(2)(A).

237. *See id.* § 1125(d)(2)(A).

Further, two of the largest domain name registration companies, Network Solutions, Inc. (NSI) and America Online, are located within the Fourth Circuit (both are Virginia-based companies). Thus, if the domain name in question was registered with either of these companies, the trademark holder will likely have an option of bringing an in rem suit within a nearby jurisdiction, if not the jurisdiction in which it desired to bring the suit in the first place.

After examining precedent that the courts of the Fourth Circuit should avoid, it is clear that the courts of the Fourth Circuit should adopt an approach similar to that taken by the courts in *Zippo*, *CompuServe*, *Bensusan*, *Cybersell*, *Mink*, *Millennium*, and *Desktop* and remain cautious in their purposeful availment analysis. When the defendant's activity falls into *Zippo*'s "doing business" category,[238] the purposeful availment prong is likely satisfied and the courts should find jurisdiction.[239] The facts in *CompuServe*, such as the defendant repeatedly sending electronic files to CompuServe's computers in Ohio and signing an agreement to adjudicate all suits in Ohio,[240] clearly indicate that the defendant knew he was dealing with an Ohio corporation and purposefully availed himself of Ohio's laws.[241] Should a court in the Fourth Circuit address a case with factual similarity to *CompuServe* the court should likely find jurisdiction over the defendant.

Nevertheless, the courts should not end their due process analysis after finding that the contacts fall into "doing business" category. They still must consider whether exercising jurisdiction over the defendant satisfies the reasonableness prong. In *International Star Registry v. Bowman-Haight Ventures, Inc.*,[242] the District Court for the Northern District of Illinois, Eastern Division, found personal jurisdiction over a defendant whose contacts fell into the "doing business" category but failed to consider the reasonableness of jurisdiction over the defendant.[243] Although the

238. *See supra* note 107–08 and accompanying text (asserting that a court may exercise jurisdiction over a party that frequently engages in business interactions with residents of the forum state).

239. *See, e.g.*, Millennium Enters., Inc. v. Millennium Music, L.P., 33 F. Supp. 2d 907, 916 (D. Or. 1999) (stating that "courts generally have exercised jurisdiction in cases ... where the defendant 'conducted business' over the Internet").

240. *See* CompuServe, Inc. v. Patterson, 89 F.3d 1257, 1260–61 (6th Cir. 1996).

241. *See id.* at 1266.

242. No. 98L6823, 1999 WL 300285 (N.D. Ill. May 6, 1999).

243. *See id.* at *7. Rather than actually perform an analysis of whether exercising jurisdiction over the defendant satisfied the reasonableness prong of the due process analysis, the court simply stated that "the facts as presented establish that defendant has sufficient minimum contacts with Illinois such that exercise of personal jurisdiction meets

court probably would have held that jurisdiction was reasonable after performing *World-Wide Volkswagen*'s five reasonableness factor analysis,[244] the court's omission of this analysis was an error. The courts of the Fourth Circuit should not make the same mistake.[245]

In cases that fall into the "passive" category under the *Zippo* framework, the purposeful availment prong is usually not satisfied.[246] Consequently, in these situations, the courts of the Fourth Circuit should restrain from finding personal jurisdiction. In *Bensusan*, *Cybersell*, and *Desktop*, the courts correctly held that because the defendants in each case had only placed Web sites on the Internet containing trademarks of the companies in the forum states and had done nothing else to contact the forum states, the defendants had not purposefully availed themselves of the laws of those states.[247] These holdings are consistent with the traditional personal jurisdiction notion that something more than just the mere placement of a product in the stream of commerce is necessary for a finding of purposeful availment of a particular forum.[248] For this reason, when the courts of the Fourth Circuit encounter cases involving passive Web sites, they should adopt a similar position.

In trademark disputes with interactive Web sites that fall into the middle *Zippo* category, the courts of the Fourth Circuit should perform a factual analysis to determine if the level of interactivity and the commercial nature of the Web site is such that the purposeful availment prong is satisfied. In performing this analysis, the courts of the Fourth Circuit should follow the example of the District Court for the District of Oregon in *Millennium*, and only find jurisdiction if the defendant actually interacts with residents of the forum state. A court should not only examine the Web site's interactive capacity, but also whether residents of the forum state actually interacted with the

---

traditional standards of fair play and substantial justice. Exercise of personal jurisdiction [under these facts] does not violate the Due Process Clause of the Fourteenth Amendment...." *Id.*

244. *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980); *see also supra* notes 89–90 and accompanying text (discussing the reasonableness prong and the five factors established by the Supreme Court in *World-Wide Volkswagen*).

245. For a further discussion of how the courts of the Fourth Circuit should use the reasonableness prong in its due process analysis for personal jurisdiction and the Internet, see *infra* notes 253–59 and accompanying text.

246. *See, e.g.*, Millennium Enters., Inc. v. Millennium Music, L.P., 33 F. Supp. 2d 907, 916 (stating that "[m]ost courts ... decline to assert jurisdiction based solely on Web site advertising").

247. *See* Cybersell, Inc. v. Cybersell, Inc., 130 F.3d 414, 420 (9th Cir. 1997); Bensusan Restaurant Corp. v. King, 937 F. Supp. 295, 301 (S.D. N.Y. 1996).

248. *See, e.g.*, *World-Wide Volkswagen*, 444 U.S. at 297 (1980).

site. In *Millennium*, the court reasoned that although the defendant's Web site was interactive and users could order products through it, the defendant did not purposely avail itself of the forum state because no residents in the forum state had accessed the service.[249] Thus, despite the *Zippo* framework allowing jurisdiction in similar situations involving interactive Web sites, the court reasoned that jurisdiction was not proper because the defendant did not direct his actions to the specific forum state.[250] This reasoning is consistent with the traditional personal jurisdiction notion that exercising personal jurisdiction over a defendant who purposefully avails himself to suit in a forum state is justified when the defendant receives "the benefits and protections of [the forum state's] laws."[251] The courts of the Fourth Circuit should take a similar approach and require something more than just an interactive Web site to establish jurisdiction. They should require activity by the defendant directed toward the forum state and actual interaction with organizations or residents of the forum state for the purposeful availment prong to be satisfied.

If the courts of the Fourth Circuit determine that the purposeful availment prong is satisfied, they should avoid the mistake made in *International Star Registry* and consider whether the reasonableness prong is satisfied.[252] After a court determines that the minimum contacts-purposeful availment prong is satisfied, the typical court performs a cursory analysis under the reasonableness prong and usually enters a finding of jurisdiction.[253] The failure to consider fully

---

249. *See Millennium*, 33 F. Supp. 2d at 920–23. Of course, as mentioned, *see supra* note 189, an acquaintance of the plaintiff's attorneys purchased a compact disk through the Web site. *See id.* at 911. Nevertheless, the court did not consider this contact in its analysis since the plaintiff manufactured it. *See id.*

250. *See id.* at 921. The court stated:

> On its face, the site would appear to suffice for personal jurisdiction under the middle category in *Zippo*; the level of potential interactivity, while not necessarily high, is not insubstantial. Further, the potential exchange of information can be commercial in nature. However, the court finds that the middle interactive category of Internet contacts as described in *Zippo* needs further refinement to include the fundamental requirement of personal jurisdiction: "deliberate action" within the forum state in the form of transactions between the defendant and residents of the forum or conduct of the defendant purposefully directed at residents of the forum state.

Id. (citing Calder v. Jones, 465 U.S. 783, 788–90 (1984)).

251. Hanson v. Denckla, 357 U.S. 235, 253 (1958).

252. *See supra* notes 242–45 and accompanying text.

253. *See, e.g.*, Stravitz, *supra* note 3, at 940 ("Although most courts deciding Internet jurisdictional disputes engage in two-branch due process analysis, many of their opinions seem primarily grounded on conventional views of minimum contacts. The fair play and substantial justice branch either gets short shift or is added as an afterthought to buttress a decision already made."); Sanchez, *supra* note 2, at 1709 ("There is a troubling trend

whether or not a finding of jurisdiction would comport with "traditional notions of fair play and substantial justice"[254] is a grave mistake. In trademark disputes over Internet domain names, courts should place even more emphasis on the reasonableness prong of the due process analysis than they do in non-Internet-related suits.[255]

A great advantage of the Internet is that it allows for businesses to reach a wide audience without incurring significant start-up costs and time investment.[256] As a result, small businesses with little capital are able to function on the Internet but at the same time probably cannot afford the costs of litigating matters throughout the country. Small businesses may be discouraged from obtaining an Internet presence to expand their business, if doing so would subject them to jurisdiction in every state. The District Court for the District of Oregon expressed this concern in *Millennium*, when it remarked that "[b]usinesses offering products through the Internet, particularly small businesses, might forego this efficient and accessible avenue of commerce if faced with the 'litigious nightmare of being subject to suit' in every jurisdiction in this country."[257] The courts of the Fourth Circuit should recognize this reality and not impose unreasonable standards that might discourage businesses from utilizing the Internet out of fear of being subjected to costly litigation in foreign jurisdictions.[258] Rather, in their reasonableness prong analysis, the courts should carefully consider the circumstances of each defendant and whether forcing the defendant to defend itself in a given forum is reasonable. Even if a Fourth Circuit court finds that a defendant has purposefully availed itself of the laws of the forum state, the court should not exercise jurisdiction over the defendant if doing so would

---

among some courts that have addressed the issue of personal jurisdiction in cyberspace to disregard the predictability aspect of due process" and to set aside concerns of inconvenience of the forum for the defendant.).

254. International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

255. *See* Stravitz, *supra* note 3, at 940 (advocating the shifting of emphasis to the second branch of the due process analysis for Internet-related jurisdictional questions).

256. *See* Dutta, *supra* note 106, at 302.

257. Millennium Enters., Inc. v. Millennium Music, L.P., 33 F. Supp. 2d 907, 923 (D. Or. 1999) (quoting Donnie L. Kidd, Jr., *Casting the Net: Another Confusing Analysis of Personal Jurisdiction and Internet Contacts in* Telco Communications v. An Apple a Day, 32 U. RICH. L. REV. 505, 541 (1998)).

258. Some commentators have gone so far as to suggest that courts should not concern themselves with the minimum contacts test in Internet jurisdiction cases and instead focus solely on whether exercising jurisdiction over the defendant would satisfy the reasonableness prong. *See* Stravitz, *supra* note 3, at 940 ("Focusing the crucial due process analysis on the second branch may not substantially improve predictability. But at least the inquiry will focus on fair play and substantial justice, which are the objectives that the Due Process Clause is intended to promote.").

cause unreasonable harm to the defendant.[259]

The traditional, territorial-based due process analysis for personal jurisdiction was developed almost a half-century before the Internet drastically changed the means by which people and businesses operate. Consequently, the traditional personal jurisdiction analysis does not address many of the problems posed by the issue of how to assess personal jurisdiction over a defendant whose sole contacts with a forum state are over the Internet. Some have suggested that a new, unique analysis for assessing personal jurisdiction over the Internet should be implemented because of the inadequacy of the traditional analysis.[260] Others have argued that the traditional framework can adequately address the issue and that the Internet is no different from other increases in technology in the twentieth century that led the Supreme Court to its decision in *International Shoe*.[261] Until the Supreme Court addresses this issue or some other federal action is taken, courts must apply the traditional due process analysis in domain name disputes and other suits involving Internet contacts. Because of the unique nature of these suits, the courts of the Fourth Circuit must be prudent in assessing personal jurisdiction. They must avoid taking extreme measures in either direction and only find jurisdiction when the Internet contacts clearly demonstrate purposeful availment and the exercise of jurisdiction in the forum state would not unduly burden the particular defendant.

CHRISTOPHER M. KINDEL

259. As one commentator stated, "It would be unfair to subject a business ... which existed solely on the Internet, to the same standards as a franchise corporation like McDonald's, whose Web page is insignificant in comparison to all of its other commercial activities." Dutta, *supra* note 106, at 302.

260. *See* Costa, *supra* note 97, at 494 ("Because a number of conceptual and practical problems arise due to the differences between cyberspace and real space, the only resolution is to carve out a distinct legal paradigm for cyberspace. Cyberspace must be treated as a place unto itself where entry subjects the entrant to its laws."); Rollo, *supra* note 212, at 694 (advocating the adoption of a separate "cyberspace" jurisdiction); Russell, *supra* note 73, at 177 ("Some commentators have thrown in the towel. They have concluded that the law of personal jurisdiction is simply not compatible with new means of electronic communications.").

261. *See* Alan R. Stein, *The Unexceptional Problem of Jurisdiction in Cyberspace*, 32 INT'L LAW. 1167, 1179–91 (1998); Russell, *supra* note 73, at 176–79.