



UNC
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NORTH CAROLINA LAW REVIEW

Volume 65 | Number 1

Article 8

11-1-1986

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Recommended Citation

David M. Lawrence, *Fines, Penalties, and Forfeitures: An Historical and Comparative Analysis*, 65 N.C. L. REV. 49 (1986).

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FINES, PENALTIES, AND FORFEITURES: AN HISTORICAL AND COMPARATIVE ANALYSIS

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Article IX, section 7 of the North Carolina Constitution directs that the State use fines, penalties, and forfeitures collected for any breach of state penal laws to maintain the public schools. This constitutional provision recently has been the subject of a great deal of judicial and legislative attention. This attention has raised fundamental questions about the interpretation and application of article IX, section 7. Professor Lawrence suggests that the North Carolina courts and general assembly should resolve these questions of interpretation and application by viewing the provision in the manner of a statute, with a careful regard for the intent of the drafters. He thereby analyzes the provision in light of the historical circumstances surrounding its insertion into the North Carolina Constitution and in light of court cases interpreting the provision soon after its adoption. Professor Lawrence concludes that an interpretation of article IX, section 7 in its historical context will increase significantly the moneys going to local schools.

Article IX, section 7 of the North Carolina Constitution directs that "the clear proceeds of all penalties and forfeitures and of all fines collected in the several counties for any breach of the penal laws of the State . . . be . . . used exclusively for maintaining free public schools."¹ This constitutional appropriation of fines, penalties, and forfeitures has been part of the Constitution in general form since 1868² and has been the subject of the State supreme court's attention on many occasions.³ Despite that attention, fundamental questions continue to arise concerning the meaning and application of the provision.⁴ Indeed, the provision has been the focus of both judicial and legislative attention during the past year.

For example, in 1985 in *Cauble v. City of Asheville*, the North Carolina Supreme Court finally settled litigation against the city of Asheville that had

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1. N.C. CONST. art. IX, § 7.

2. N.C. CONST. of 1868, art. IX, § 5.

3. The court first addressed this constitutional provision in *Katzenstein v. Raleigh & G.R.R.*, 84 N.C. 688 (1881) and most recently in *Cauble v. City of Asheville*, 314 N.C. 598, 336 S.E.2d 59 (1985). Since *Katzenstein* the provision has been the subject of at least 20 court decisions.

4. The most significant unsettled issue under § 7 is the proper disposition of civil penalties that the State collects for violation of state statutes. See *infra* text accompanying notes 128-39, 186-201. The litigation in *Cauble* concerned only local government ordinance penalties and did not settle the law with respect to state-imposed penalties.

begun eight years earlier.⁵ In 1977 a taxpayer sued the city of Asheville, claiming on behalf of the two school systems of Buncombe County the clear proceeds of all moneys Asheville collected for violations of overtime parking ordinances.⁶ The North Carolina Supreme Court in 1980 held that Asheville's parking penalties were subject to section 7.⁷ The court remanded the case to the trial court for a determination of the "clear proceeds" of the parking penalties.⁸ In a 1985 appeal of the subsequent lower court proceedings on the question of "clear proceeds," the supreme court asked for reargument on the question it had decided in 1980 and then reaffirmed the 1980 result.⁹

Numerous North Carolina statutes enforced by state agencies or officers impose civil penalties for their violation. Examples include the environmental statutes,¹⁰ the unfair competition law,¹¹ the moral nuisance statute,¹² and the revenue laws.¹³ These statutes either direct the application of the penalty proceeds to a noneducational use or are silent about their use, in which case the proceeds have gone into the State's general fund. In 1985 budget leaders of the State house introduced legislation to require that the State treasurer distribute all such state-imposed penalties to counties for use by local school systems.¹⁴ As

5. 314 N.C. 598, 336 S.E.2d 59 (1985), *aff'g* 66 N.C. App. 537, 311 S.E.2d 889 (1984), *on later appeal from* 301 N.C. 340, 271 S.E.2d 258, *aff'g in part and rev'g in part* 45 N.C. App. 152, 263 S.E.2d 8 (1980).

6. *Cauble*, 45 N.C. App. at 156-57, 263 S.E.2d at 10-11.

7. *Cauble*, 301 N.C. at 344-45, 271 S.E.2d at 260-61. The court held that because the city brought misdemeanor charges against those offenders who did not voluntarily pay their parking tickets and because state law made violation of city ordinances a misdemeanor, the parking ordinances were "penal laws of the State," and the penalties were therefore subject to article IX, § 7. *Id.* For a detailed discussion of the question addressed in *Cauble*, see *infra* notes 202-228 and accompanying text.

Although the *Cauble* litigation involved parking ordinances, the rationale of the decision extends to any city or county ordinance enforced by both civil penalties and criminal prosecution. Until very recently parking ordinances were the only ordinances so enforced in most local governments in North Carolina.

8. *Cauble*, 301 N.C. at 345, 271 S.E.2d at 261.

9. *Cauble*, 314 N.C. at 598, 336 S.E.2d at 59.

10. *E.g.*, N.C. GEN. STAT. § 143-215.6(a) (1983) (water quality); *id.* § 143-215.17(b) (water use); *id.* § 143-215.36(b) (dam safety); *id.* § 143.215.91(a) (discharges of oil or other hazardous substances). None of these statutes makes any special appropriation of the proceeds of the penalties. However, all of the proceeds apparently are placed into the State's General Fund. Telephone interview with Barry K. Sanders, North Carolina Office of the State Budget (Oct. 7, 1986).

11. N.C. GEN. STAT. § 75-15.2 (1985). The amount of the penalty is to be paid to the State's General Fund.

12. *Id.* § 19-6 (1983). Cities and counties in which the illegal activity occurred share equally the moneys forfeited under this section. See *State ex rel. Gilchrist v. Cogdill*, 74 N.C. App. 133, 327 S.E.2d 647 (1985) (judgment against defendant providing that the forfeited money was to be shared equally by the city and the county).

13. N.C. GEN. STAT. § 105-236 (1985) (setting out a series of penalties for violation of the laws that raise revenues for state government).

14. H.B. 1079, N.C. Gen. Assembly, 1985 Session (draft of May 16, 1985, available at U.N.C. Inst. of Gov't). The two main sponsors were Representatives Watkins and Etheridge, who chaired the two principal house appropriation committees. The bill would have amended N.C. GEN. STAT. § 147-77 (1983 & Supp. 1985), which requires that a report be made to the State treasurer whenever a state agency deposits funds into an official depository, by adding the following language:

The report to the State Treasurer shall identify each civil fine or penalty collected by the State and the county in which the acts for which the fine or penalty was levied occurred. Notwithstanding any other provision of law, the State Treasurer shall pay these funds to the county school fund in the county in which the acts for which the fine or

introduced, the legislation passed only the house, but its sponsors were successful in requiring state agencies to report to the 1986 legislature on the magnitude of such penalties imposed and expended.¹⁵

Another bill introduced in the State house in 1985 illustrates the continuing legislative pressure to divert to noneducational purposes moneys that arguably are subject to the constitutional provision. In June 1986 the North Carolina General Assembly created a state level Racketeer Influenced and Corrupt Organizations Act that requires that property involved in racketeering forfeit to the State.¹⁶ If the bill had been enacted as originally proposed in 1985, the major portion of the proceeds from this property was to be given to law enforcement agencies for their operating expenses.¹⁷

Furthermore, in 1985 the general assembly defined one phrase in article IX, section 7. Chapter 779, ratified the day before adjournment, defines "clear proceeds" as the full amount of fines, penalties, and forfeitures collected, "diminished only by the actual costs of collections, not to exceed ten percent of the amount collected."¹⁸ This new legislation directly affected the continuing litigation against the city of Asheville, because the definition of clear proceeds was one of the enduring issues in that case.¹⁹

This judicial and legislative attention to the fines, penalties, and forfeitures provision of the North Carolina Constitution promises to continue and therefore makes a review and analysis of the provision timely. The approach taken in this Article is historical and comparative. At least seventeen other states have or have had comparable constitutional provisions, most of them products of the mid to late nineteenth century.²⁰ These fines, penalties, and forfeitures provi-

penalty was levied occurred. If the acts occurred in more than one county, the State Treasurer shall divide the funds equally among the counties in which the acts occurred. The counties shall use these funds for the purpose set out in article IX, Section 7 of the Constitution.

Under current practice moneys subject to § 7 are first turned over to the finance officer of the appropriate county. The finance officer then distributes the moneys to the finance officer or officers of each of the school administrative units in that county. *E.g.*, N.C. GEN. STAT. § 115C-452 (1983) (clerk of superior court to turn moneys over to county finance officer).

15. Act of July 18, 1985, ch. 791, § 54, 1985 N.C. Sess. Laws 1321, 1335.

16. North Carolina Racketeer Influenced and Corrupt Organizations Act (RICO), H.B. 829, N.C. Gen. Assembly, 1985 Session (to be codified at N.C. GEN. STAT. § 75D).

17. *See* H.B. 829, N.C. Gen. Assembly, 1985 Session (draft of May 3, 1985, available at U.N.C. Inst. of Gov't). The enacted version requires that the proceeds be given to the State treasury. *See* North Carolina Racketeer Influenced and Corrupt Organizations Act (RICO), H.B. 829, N.C. Gen. Assembly, 1985 Session (to be codified at N.C. GEN. STAT. § 75D-5(j)(2), (4), (5), (7)).

18. Act of July 17, 1985, ch. 779, 1985 N.C. Sess. Laws 1308 (codified at N.C. GEN. STAT. § 115C-437 (1983 & Supp. 1985)).

19. In its most recent *Cable* opinion, the supreme court permitted cities to deduct only costs of collection, and not costs of enforcement, from gross proceeds. *Cable*, 314 N.C. at 606, 336 S.E.2d at 64; *see infra* text accompanying notes 170-79. The new legislation imposes a 10% maximum on the amount of collection costs that cities may deduct. This maximum, however, applies only prospectively, from July 17, 1985. *See* N.C. GEN. STAT. § 115C-437 (1983 & Supp. 1985). A city still may claim a larger deduction for collection costs on penalties collected before that date, and the *Cable* litigation itself was remanded to the superior court for a final determination of allowable collection costs related to those earlier proceeds. *Cable*, 314 N.C. at 601, 606, 336 S.E.2d at 61, 64.

20. Twelve other states currently have comparable provisions in their constitutions. *See* IND. CONST. art. 8, § 2; MICH. CONST. art. VIII, § 9; MO. CONST. art. IX, § 7; NEB. CONST. art. VII, § 5; NEV. CONST. art. 11, § 3; N.M. CONST. art. XII, § 4; N.D. CONST. art. IX, § 2; S.D. CONST. art.

sions are in reality statutes that are given constitutional status. These provisions do not embody broad notions of civil liberties such as due process clauses or basic allocations of governmental power such as separation of power clauses. Rather, they represent specific decisions on narrow issues of public concern that their proponents were able to insert into the state constitutions rather than the statute books. For this reason, these constitutional provisions are more appropriately interpreted as statutes, with careful regard for their drafters' legislative intent, rather than as provisions embodying broad notions of policy, which appropriately are responsive to developing concepts of liberty, equality, and fairness. John Marshall's reminder that "it is a *constitution* we are expounding"²¹ therefore really does not apply to provisions such as section 7.

Thus, this Article argues that the intentions of the 1868 and 1875 drafters of section 7 are very relevant to a determination of the current meaning of the section. This Article seeks those intentions in the historical context in which section 7 and comparable provisions became part of state constitutions; in whatever fragmentary accounts there are that describe the proceedings of the 1868 and 1875 North Carolina conventions, and in the judicial decisions in the years just before and just after the provision entered the North Carolina Constitution. Those courts spoke the same legal language as the drafters of these provisions in state constitutions and were aware of the conditions motivating the placement of such provisions in state constitutions. Therefore, those early court decisions should accurately mirror the intentions underlying section 7.

I. THE HISTORICAL BACKGROUND OF SECTION 7

A. *The Literary Fund*

North Carolina's original State Constitution, adopted in 1776, expressly recognized the importance of government support of education. Section XLI directed "[t]hat a school or schools shall be established by the Legislature for the convenient Instruction of Youth, with such Salaries to the Masters paid by the Public, as may enable them to instruct at low Prices; and all useful Learning shall be duly encouraged and promoted in one or more Universities."²² The general assembly acted quickly to establish a university, chartering the University of North Carolina in 1789.²³ The establishment of a publicly-supported school system, however, took much longer. The general assembly did not establish such a system until 1839.²⁴

VIII, § 3; VA. CONST. art. VIII, § 8; W. VA. CONST. art. XII, § 5; Wis. CONST. art. 10, § 2 (amended 1982); WYO. CONST. art. 7, § 5. In addition, five states at one time, but no longer, included a comparable provision in their constitutions. See ARK. CONST. of 1868, art. IX, § 4; FLA. CONST. of 1868, art. VIII, § 4; FLA. CONST. of 1885, art. 12, § 9 (amended 1926); IOWA CONST. of 1846, art. IX, § 4; IOWA CONST. art. IX, 2nd, § 4 (1857, repealed 1974); KAN. CONST. art. VI, § 6 (1859, amended 1966); MISS. CONST. of 1869, art. VIII, § 6. Three states allocate to education the proceeds of "escheats and forfeitures." See OR. CONST. art. VIII, § 2; UTAH CONST. art. X, § 3; WASH. CONST. art. 9, § 3.

21. *McCullough v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819).

22. N.C. CONST. of 1776, § XLI.

23. Act of Dec. 22, 1789, ch. 20, 1715-1804 N.C. Laws 472.

24. Act of Jan. 8, 1839, ch. 8, 1838-39 N.C. Laws 12.

The delay in establishing a school system arose from the rejection of two principles that are firmly established in modern public policy.

The first of these is the democratic principle that education is the function of the state rather than a family or parental obligation and that the responsibility of providing the means of education rests primarily with the state. The other principle is that the state has the right and the power to raise by taxation . . . sufficient funds for adequate school support.²⁵

The rejection was not unique to North Carolina; indeed, antagonism to public education and to tax-based support of such education was widespread in the nineteenth century.²⁶ Consequently, states commonly sought to finance education through permanent endowment funds, funded with revenues other than taxes.²⁷ These states would use the income from such a fund to establish and support public schools.

In 1825 North Carolina followed this route and became the twelfth state to establish a permanent endowment fund—the Literary Fund.²⁸ The major source of money for North Carolina's new Literary Fund was dividends from bank stock held by the State. Other sources included dividends from stock in navigation companies, certain license taxes, and proceeds from the sale of swamp lands. The income from the Fund was to provide "for the support of common and convenient Schools for the instruction of youth . . ."²⁹

The Fund, however, was initially inadequate to meet this legislative goal, and its administration aggravated the problem. The growth of principal was painfully slow, and in 1831 it totaled less than 75,000 dollars.³⁰ In addition, both the Fund trustees and the general assembly believed that it was appropriate to use Fund principal and income to support internal improvements and even to lend money to the State treasury.³¹ As a result, no money remained for public education.

Finally, in 1838 a change in state political leadership and a windfall from the federal government led to a significant increase in Literary Fund assets.³²

25. E. KNIGHT, *PUBLIC EDUCATION IN THE SOUTH* 161 (1922).

26. F. SWIFT, *A HISTORY OF PUBLIC PERMANENT COMMON SCHOOL FUNDS IN THE UNITED STATES, 1795-1905* 3-5 (1911).

27. *Id.* at 5.

28. Act of Jan. 4, 1826, ch. 1268, § 1, 1821-25 N.C. Laws 167, 167 (J. Taylor rev. 1827). The first state to establish a permanent fund was Connecticut in 1795. The other states that established permanent funds before 1825 were Delaware (1796), New York (1805), Tennessee (1806), Virginia (1810), Maryland (1813), Indiana (1816), New Jersey (1817), Georgia (1817), New Hampshire (1821), and Kentucky (1821). See F. SWIFT, *supra* note 26, at 207-436 (summarizing the origin and present condition and administration of permanent funds in these states).

29. Act of Jan. 4, 1826, ch. 1268, § 1, 1821-25 N.C. Laws 167, 167 (J. Taylor rev. 1827).

30. E. KNIGHT, *supra* note 25, at 90.

31. Boyd, *The Finances of the North Carolina Literary Fund*, 13 S. ATL. Q. 270, 275-76 (1914).

32. State constitutional changes in 1835 shifted political power from the east towards the west of North Carolina, and consequently, the Whig party came to power in 1836. The Whigs were committed to internal improvements and public education as tools to increase the economic well-being of the State. At approximately the same time the Whigs came to power in North Carolina, the federal government's budget was in surplus, with revenues continuing to outstrip expenditures. Congress decided to distribute the surplus among the several states, and North Carolina's share was \$1,433,757.39. H. LEFLAR & A. NEWSOME, *NORTH CAROLINA* 359-62 (3d ed. 1973).

When the federal government distributed its surplus revenues to the states, North Carolina used 300,000 dollars of its share to increase the Literary Fund's principal.³³ In addition, the general assembly added 600,000 dollars of state-owned railroad stock, 700,000 dollars of state-owned bank stock, and sufficient other moneys to increase Fund assets by over 1,700,000 dollars. By 1840 Fund principal was valued at almost 2,250,000 dollars.³⁴

In 1839 the general assembly finally acted to establish a state-supported system of common schools.³⁵ As amended two years later,³⁶ the plan distributed Literary Fund income among the counties on a per capita basis. Under the plan each county was obliged to raise locally an amount equal to at least one-half its Literary Fund allocation.³⁷ Although the State continued to borrow money from the Literary Fund for general government purposes,³⁸ much of the money did find its way to local school systems. By the late 1850s North Carolina had a relatively respectable system of schools. By the eve of the Civil War, the average school term in North Carolina was four months, a level that was soon lost to the strains of the War and that, because of the economic destruction of the war and reconstruction, was not regained until 1900.³⁹

The Civil War proved disastrous to public education in North Carolina. Although state and local taxation had become an accepted method of financing schools, many counties diverted tax moneys from education to war-related expenditures.⁴⁰ In addition, the Literary Fund was essentially destroyed. Much of the Fund's principal was invested in state and Confederate bonds issued to fund the war effort. When the war was lost, the state bonds were repudiated and the Confederate bonds were worthless.⁴¹ Most of the remaining Fund assets had been invested with banks that had themselves purchased large amounts of Confederate bonds. When these bonds failed, the banks failed, and Fund assets were lost.⁴² In 1866 the total income of the Literary Fund was only 766 dollars.⁴³

Against this background, the Reconstruction Constitution of 1868 replaced the statutorily based Literary Fund with a constitutionally based "irreducible educational fund," the annual income of which could be used only "for establishing and perfecting . . . a system of free public schools."⁴⁴ The Constitution placed in this new fund not only the remaining assets of the Literary Fund but

33. E. KNIGHT, *supra* note 25, at 95. The State used another \$200,000 of its share to drain swamp lands and appropriated the income from sales of the drained land to the Literary Fund. *Id.*

34. E. KNIGHT, *supra* note 25, at 95.

35. Act of Jan. 8, 1839, ch. 8, 1838-39 N.C. Laws 12.

36. Act of Jan. 11, 1841, ch. 7, 1840-43 N.C. Laws 11.

37. The original act called for a local tax levy in each school district sufficient to raise \$20; the Literary Fund then matched that with \$40 more. *See* Act of Jan. 8, 1839, ch. 8, 1838-39 N.C. Laws 12. The amended version required a comparable match of state to local funds, but did not limit the state share to \$40 per district. *See* Act of Jan. 11, 1841, ch. 7, 1840-43 N.C. Laws 11.

38. Boyd, *supra* note 31, at 362-63.

39. E. KNIGHT, *supra* note 25, at 175; H. LEFLAR & A. NEWSOME, *supra* note 32, at 530-39.

40. Boyd, *supra* note 31, at 368.

41. Boyd, *supra* note 31, at 370.

42. Boyd, *supra* note 31, at 369-70.

43. Boyd, *supra* note 31, at 369-70.

44. N.C. CONST. of 1868, art. IX, § 4. The entire section read as follows:

also the proceeds of several recurring revenues, including "the net proceeds that may accrue to the State . . . from fines, penalties and forfeitures."⁴⁵

B. *The Background of the 1868 Constitutional Provision*

The irreducible educational fund established in the 1868 Constitution both continued and changed existing state policy. The new educational fund was in one sense an expanded version of the 1825 Literary Fund. However, a statute had established the Literary Fund;⁴⁶ the Constitution established the new educational fund. In addition, the Literary Fund had derived most of its principal from extraordinary revenues, while the new fund relied, in part, on the recurring revenue source of fines, penalties, and forfeitures. The revenues from fines, penalties, and forfeitures were a source that had not heretofore been earmarked for education. Why, it must be asked, were the changes made? ·

At one level that question is impossible to answer. The only recorded debate on education in the 1868 Constitutional Convention focused on whether the Constitution should require that public schools be segregated.⁴⁷ The sources of and policies behind the rest of the Constitution's provision for education, including the new endowment fund, are lost in the unrecorded committee deliberations.⁴⁸ On a more general level, however, reasons for the changes can be suggested.

The constitutionalization of the endowment fund probably was an attempt to insulate the fund's principal and income from diversion to noneducational purposes. As noted above, the forty year history of the Literary Fund was dotted with instances of diversion. Given the Republicans' general enthusiasm

The proceeds of all lands that have been, or hereafter may be granted by the United States to this State and not otherwise specially appropriated by the United States or heretofore by this State; also, all moneys, stocks, bonds, and other property now belonging to any fund for purposes of education; also, the net proceeds that may accrue to the State from sales of estrays, or from fines, penalties and forfeitures; also, the proceeds of all sales of the swamp lands belonging to the State; also, all money that shall be paid as an equivalent for exemption from military duty; also, all grants, gifts or devises that may hereafter be made to this State, and not otherwise appropriated by the grant, gift or devise, shall be securely invested, and sacredly preserved as an irreducible educational fund, the annual income of which, together with so much of the ordinary revenue of the State as may be necessary, shall be faithfully appropriated for establishing and perfecting in this State a system of Free Public Schools, and for no other purposes or uses whatsoever.

Id.

45. *Id.*

46. Act of Jan. 4, 1826, ch. 1868, § 1, 1821-25 N.C. Laws 167, 167 (J. Taylor rev. 1827); see *supra* note 28 and accompanying text.

47. Unsuccessful efforts were made in the convention to include in the new Constitution a requirement that public schools be segregated by race. N.C. JOURNAL OF THE CONSTITUTIONAL CONVENTION OF 1868, at 342-43. Comparable efforts succeeded in the 1875 Convention, which added the following language to the North Carolina Constitution: "And the children of the white race and the children of the colored race shall be taught in separate public schools; but there shall be no discrimination in favor of, or to the prejudice, of either race." N.C. CONST. OF 1868, art. IX, § 2 (amended 1875). This language remained in the Constitution until the adoption of the present Constitution in 1970. See N.C. CONST. art. IX, § 7.

48. The published journal of the 1868 Convention contains no record of actual debate. However, two Raleigh newspapers published daily accounts of the debates. See North Carolina Standard (Raleigh, N.C.), Jan. 29, 1868, at 2; Daily Sentinel (Raleigh, N.C.), Feb. 21, 1868, at 2, col. 1.

for publicly supported education⁴⁹ and the depleted status of the Fund, it is not surprising that the convention sought to protect, as much as possible, the new endowment fund from the same history of diversion. Other states had given their common school funds constitutional protection for the same reasons.⁵⁰

The meager resources of the Literary Fund, which were the core of the new educational fund, may also explain the constitutional allocation of fines, penalties, and forfeitures to the fund. The new educational fund needed to build its assets because only its income was available for expenditure. Further, the experiences of other states may have suggested that fines, penalties, and forfeitures were good sources of assets.⁵¹

In 1868 the allocation of fines and, less often, of penalties and forfeitures to education had a history almost as long as that of common school funds. The earliest allocation of these revenues seems to have been in Virginia in 1810. In that year Virginia established by statute a Literary Fund and included among its funding sources "any fine, penalty or forfeiture which has been or may be imposed, or which may accrue . . ." ⁵² Over the next half-century other states turned to the same source to fund education. Indiana was the first to constitutionalize the allocation. Its 1816 Constitution provided that "all fines assessed for any breach of the penal laws" be used to support county seminaries.⁵³ In 1851 Indiana amended this provision, perhaps in response to an 1848 court decision, to add to the common school fund "all forfeitures which may accrue."⁵⁴ In 1835 the provision for education in the Michigan Constitution set aside "the clear proceeds of all fines assessed in the several counties for any breach of the penal laws" for local libraries;⁵⁵ Iowa, in 1846, and Wisconsin, in 1848, used language almost identical to Michigan's to help fund common schools.⁵⁶ Thus, by the Civil War there was a limited precedent in the neighboring state of Vir-

49. H. LEFLAR & A. NEWSOME, *supra* note 32, at 531-32. The Republicans dominated the convention and controlled State government for the next few years.

50. Several states that constitutionalized their common school funds about the same time as North Carolina—Arkansas, Missouri, and Mississippi—had comparable histories of mismanagement and loss. F. SWIFT, *supra* note 26, at 217, 322-23, & 326-27.

51. For example, "[t]he proceeds from fines and forfeitures have added more to the principal of the Common School Fund in Indiana than the proceeds from the seven other sources provided by law." F. SWIFT, *supra* note 26, at 87-88.

52. Act of Feb. 2, 1810, ch. 44, § 1, 1808 Rev. Code of Va. Acts 48, 49 (Supp. 1812); see W. MADDOX, *THE FREE SCHOOL IDEA IN VIRGINIA BEFORE THE CIVIL WAR* 48 (1918).

53. IND. CONST. of 1816, art. IX, § 3. The moneys were not placed in an endowment fund, but were used to support current operations.

54. IND. CONST. art. 8, § 2.

The case was *Common Council v. Fairchild*, 1 Ind. 315 (1848). The court in *Fairchild* held that the 1816 constitutional provision applied only to criminal actions, because only the word "fines" was used: "It is probable, that if the proceeds arising from civil suits . . . had been intended to be embraced by the constitution, the words fines and penalties, or fines and forfeitures, instead of the word 'fines,' would have been used." *Id.* at 318. If the purpose of the 1851 change was to extend the reach of the provision to civil suits, it was unsuccessful. In 1892 the Indiana Supreme Court held that the constitutional provision still extended only to criminal actions. *State v. Indiana & I.S.R.R.*, 133 Ind. 69, 32 N.E. 817 (1892). Perhaps only bail bond forfeitures were added by the 1851 amendment. See *State v. Elliott*, 171 Ind. App. 389, 357 N.E.2d 276 (1977).

55. MICH. CONST. of 1835, art. X, § 4.

56. IOWA CONST. of 1846, art. IX, § 4; WIS. CONST. art. 10, § 2. Wisconsin's Constitution was the first to place these moneys in an endowment fund.

ginia and in several states of the Midwest for allocating fines, and sometimes penalties and forfeitures, to education.

The specific model for North Carolina's provision, however, appears to have come from Missouri. Missouri adopted a new Constitution in 1865, and the common school provision in that document is remarkably similar to the provision included in North Carolina's 1868 Constitution.⁵⁷ There appears to be no common model for the two states' provisions, and thus it is likely that the North Carolina Convention used the Missouri provision as a model. Republicans dominated both conventions,⁵⁸ and perhaps an informal network linked Republican party members in different states.⁵⁹ Whatever the relation, in 1868 North Carolina joined those states that constitutionally allocated fines, penalties, and forfeitures to support the public schools.

C. From 1868 to 1875

The irreducible educational fund established in the 1868 Constitution lasted only seven years. In 1875 the Conservatives,⁶⁰ who had gained control of state government and politics, forced a constitutional convention, primarily to repeal

57. Compare N.C. CONST. of 1868, art. IX, § 4, with MO. CONST. of 1865, art. IX, § V. North Carolina's Constitution provided as follows:

The proceeds of all lands that have been or hereafter may be granted by the United States to this State, and not otherwise appropriated by this State or the United States; also, all moneys, stocks, bonds, and other property now belonging to any State fund for purposes of education; also the net proceeds of all sales of the swamp lands belonging to the State, and all other grants, gifts or devises, that have been or hereafter may be made to this State and not otherwise appropriated by the State or by the term of the grant, gift or devise, shall be paid into the State treasury; and, together with so much of the ordinary revenue of the State as may be by law set apart for that purpose, shall be faithfully appropriated for establishing and maintaining in this State a system of free public schools, and for no other uses or purposes whatsoever.

In comparison, Missouri's Constitution provided as follows:

The proceeds of all lands that have been, or hereafter may be granted by the United States to this state, and not otherwise appropriated by this state or the United States; also, all moneys, stocks, bonds, lands and other property now belonging to any fund for purposes of education; also, the net proceeds of all sales of lands, and other property and effects that may accrue to the state by escheat, or from sales of estrays, or from unclaimed dividends, or distributive shares of the estates of deceased persons, or from fines, penalties, and forfeitures; also, any proceeds of the sales of the public lands which may have been or hereafter may be paid over to this state, (if congress will consent to such appropriation); also, all other grants, gifts, or devises that have been or hereafter may be made to this state, and not otherwise appropriated by the terms of the grant, gift, or devise, shall be securely invested and sacredly preserved as a public school fund, the annual income of which fund, together with so much of the ordinary revenue of the state as may be necessary, shall be faithfully appropriated for establishing and maintaining the free schools and the university in this article provided for, and for no other uses or purposes whatsoever.

58. W. PARRISH, C. JONES & L. CHRISTENSEN, *MISSOURI, THE HEART OF THE NATION* 190 (1980).

59. The Arkansas Constitution of 1868, also authored by a Republican-dominated convention, see H. ASHMORE, *ARKANSAS 91-92* (1978), also contained a provision apparently modeled on the Missouri document. ARK. CONST. of 1868, art. IX, § 4.

60. The Reconstruction opponents of the Republicans called themselves Conservatives. In 1876 the national resurgence of the Democratic party caused the North Carolina Conservatives to rename their party the North Carolina Democratic party. H. LEFLAR & A. NEWSOME, *supra* note 32, at 488, 500.

some of the most objectionable provisions of the 1868 document.⁶¹ However, the 1875 Convention also proposed other changes unrelated to partisan preferences, one of which was a revision of the education funding provisions.⁶² The 1875 Convention abolished the permanent endowment fund and earmarked most of its resources, except fines, penalties, and forfeitures, as current *state* revenues for public education.⁶³ In addition, for the first time the convention constitutionally allocated certain moneys for public education directly to *local* government; these moneys did not have to pass through the State treasury. Among the moneys were "the clear proceeds of all penalties and forfeitures, and of all fines collected in the several counties for any breach of the penal or military laws of the State."⁶⁴

As was true of the 1868 change, no accurate record exists explaining the 1875 changes.⁶⁵ However, events in the years between 1868 and 1875 suggest several reasons that are helpful in understanding the meaning of the 1875 language, which is essentially the language in the State's present Constitution.⁶⁶

The drafters of the constitutional endowment fund apparently had intended the fund to supplement local funding for education, much as the Literary Fund

61. The most important changes were to return control of county government from county voters to the general assembly, thus assuring white and Conservative control of county government, H. LEFLAR & NEWSOME, *supra* note 32, at 500, and to require, by constitutional mandate, segregated schools, *see supra* note 47.

62. N.C. CONST. of 1868, art. IX, § 5 (amended 1875). The section read as follows:

All moneys, stocks, bonds, and other property, belonging to a county school fund; also, the net proceeds from the sale of estrays; also, the clear proceeds of all penalties and forfeitures, and of all fines collected in the several counties for any breach of the penal or military laws of the State; and all moneys which shall be paid by persons as an equivalent for exemption from military duty, shall belong to and remain in the several counties, and shall be faithfully appropriated for establishing and maintaining free public schools in the several counties of this State: *Provided*, that the amount collected in each county shall be annually reported to the Superintendent of Public Instruction.

When the Constitution was rewritten in 1970, the reference to "military laws" was dropped. The term probably encompassed those laws regulating the state militia, which provided for fines and other sanctions upon conviction in a court martial.

63. *See id.* § 4. With only minor changes, this provision was brought forward in the 1970 Constitution. N.C. CONST. art. IX, § 6.

64. N.C. CONST. of 1868, art. IX, § 5 (amended 1875).

65. Oddly, the Missouri connection continued. Missouri also had a political reaction, and the conservatives in that state also forced an 1875 Constitutional Convention. That convention shifted fines, penalties, and forfeitures to the counties, and the language used was, again, very much like North Carolina's:

Section 8. *County School funds, whence derived.*

All moneys, stocks, bonds, lands, and other property belonging to a county school fund; also, the net proceeds from the sale of estrays; also, the clear proceeds of all penalties and forfeitures, and of all fines collected in the several counties for any breach of the penal or military laws of the State and all moneys which shall be paid by persons as an equivalent for exemption from military duty, shall belong to, and be securely invested, and sacredly preserved in the several counties, as a county public school fund; the income of which fund shall be faithfully appropriated for establishing and maintaining free public schools in the several counties of this State.

MO. CONST. of 1875, art. XI, § 8. When the Missouri Constitution was revised again in 1945, the language relating to fines, penalties, and forfeitures was modified. MO. CONST. art. IX, § 7.

66. The 1970 Constitution deleted the reference to "military laws" and deleted a comma after the word forfeitures. *Compare* N.C. CONST. art. IX, § 7 with N.C. CONST. of 1868, art. IX, § 5 (amended 1875).

had done before the Civil War.⁶⁷ The North Carolina General Assembly gave this responsibility to the endowment fund in comprehensive school legislation enacted in 1869.⁶⁸ However, despite the constitutional command that counties support local school systems, the supreme court held in 1871 that counties could not levy township school taxes without voter approval.⁶⁹ Given the general antagonism towards levying taxes for education, this decision made it practically impossible for counties to meet their obligations under the 1869 statute and later statutes.⁷⁰ By 1874 the average school term was estimated at only ten weeks.⁷¹ Thus, one likely purpose of the 1875 change was to shift a steady source of income—fines, penalties, and forfeitures—to the counties to assist them in supporting public schools.

Moreover, during the period from 1868 to 1875 State government remained unable to keep its hands off the endowment fund. Despite the constitutional command that the fund's assets were to be used for public schools "and for no other uses or purposes whatsoever,"⁷² the State continued to divert moneys, at least temporarily, from the Fund to other purposes.⁷³ Because of this diversion and because the fund began with very few assets, the income of the fund was quite small during the 1868-1875 period. As a result, little State money was reaching the local schools.

Statutory changes made in the early 1870s that presaged the constitutional changes of 1875 reflected these difficulties. In 1869 the general assembly provided that seventy-five percent of the state and county poll tax was to be paid into the State treasury to increase the principal of the educational fund.⁷⁴ In 1870 the general assembly levied a statewide property tax of one-twelfth of one percent to fund an 1869 appropriation for schools of 100,000 dollars.⁷⁵ In 1871 the general assembly amended the 1869 poll tax legislation to keep the proceeds in the county of collection, rather than returning them to the State for redistribution.⁷⁶ Further, in 1872 the general assembly again levied a statewide property tax and this time retained its proceeds in the county of collection.⁷⁷

Newspaper accounts of the debate accompanying the 1871 changes are illuminating. The comments of various senators in the debate indicate two points. First, because some banks refused to lend to the State, the State relied on the

67. See *supra* text accompanying notes 37-39.

68. Act of Apr. 12, 1869, ch. 184, 1868-69 N.C. Pub. Laws 458.

69. *Lane v. Stanly*, 65 N.C. 153 (1871). In 1871 the Constitution permitted the levy of taxes without voter approval only for "necessary expenses." N.C. CONST. of 1868, art. VII, § 7. In *Lane* the court held that schools were not a necessary expense. *Lane*, 65 N.C. at 154.

70. E. KNIGHT, PUBLIC SCHOOL EDUCATION IN NORTH CAROLINA 248-49 (1916); M. NOBLE, A HISTORY OF THE PUBLIC SCHOOLS OF NORTH CAROLINA 327-28 (1930).

71. E. KNIGHT, *supra* note 70, at 260.

72. N.C. CONST. of 1868, art. IX, § 4 (amended 1875).

73. *E.g.*, Auditor's Statement for 1870, Statement B, 1870-71 N.C. Pub. Laws 517, 543 (showing loans from this fund to the University of North Carolina and to the Institution for the Deaf and Dumb and Blind).

74. Act of Apr. 10, 1869, ch. 184, § 52, 1868-69 N.C. Pub. Laws 458, 471.

75. Act of Mar. 28, 1870, ch. 229, class 1, § 2, 1869-70 N.C. Pub. Laws 297, 299.

76. Act of Apr. 5, 1871, ch. 237, § 5, 1870-71 N.C. Pub. Laws 387, 387-88.

77. Act of Feb. 10, 1872, ch. 189, § 38, 1871-72 N.C. Pub. Laws 308, 318.

moneys in the educational fund as a source of short-term borrowed funds.⁷⁸ Second, because of this use of the educational fund and for other unspecified technical reasons,⁷⁹ local schools were not receiving income from the fund. As a result, some counties had no public schools.⁸⁰ Several senators argued for the shift from state control to local retention as a means of getting at least some money to local schools.⁸¹

Thus, the 1875 Convention met in a context of declining confidence in the statewide educational fund and several years' experience of shifting school-related revenue sources from central state collection to retention in the county of collection. The two major 1875 changes continued the statutory pattern: the concept of a permanent educational fund was eliminated from the Constitution, and the county of collection rather than the State retained the proceeds of fines, penalties, and forfeitures.

II. ANALYSIS OF SECTION 7

Article IX, section 7 of the North Carolina Constitution currently states, in relevant part, that "the clear proceeds of all penalties and forfeitures and of all fines collected in the several counties for any breach of the penal laws of the State" shall be used for public school purposes.⁸² The remainder of this Article discusses the following elements of this language: (1) "penal laws"; (2) "penalties," "forfeitures," and "fines"; (3) "clear proceeds"; and (4) "collected in the several counties." The discussion focuses on the meaning of these words and phrases that was prevalent in the late nineteenth century when "fines, penalties, and forfeitures" provisions entered several state constitutions in a brief span of years. The remainder of the Article also discusses the applicability of section 7 to violations of local ordinances and infractions.

A. "Penal Laws"

The county school fund consists of fines, penalties, and forfeitures collected for breaches of the "penal laws of the State."⁸³ This section discusses the meaning of "penal laws" and whether that term refers only to criminal laws or has a broader meaning.

78. Raleigh Daily Telegram, Mar. 22, 1871, at 2, col. 2.

79. Senator Gilmer, floor manager of the bill, reportedly stated that money was held by the State treasurer for schools, but "[could not] be had [by counties] unless under certain technicalities, difficult to comply with." *Id.* at 2, col. 3. Gilmer did not disclose the nature of the technicalities.

80. Senator Cowles, who lived in Yadkin County and represented Yadkin and Surry Counties in the Senate, *see* 1870-71 N.C. Pub. Laws viii (list of senators by county), was reported as saying that the schools in his county had been closed. Raleigh Daily Telegram, Mar. 22, 1871, at 2, col. 3. The Daily Telegram reported Senator Gilmer as responding to Cowles' remarks by stating that the "state of affairs mentioned by Mr. Cowles, prevails generally over the State." *Id.*

81. Raleigh Daily Telegram, Mar. 22, 1871, at 2, col. 3. These changes from state to local control also probably changed the distribution pattern of the moneys. Counties that contributed heavily to the statewide fund because of high property values or large numbers of taxable males may not have had comparably large numbers of school age children, the basis on which statewide moneys were distributed.

82. N.C. CONST. art. IX, § 7.

83. *Id.*

The Constitution itself does not define "penal laws," nor has any reported case involving section 7 turned on the meaning of those words. Therefore, one must look to the meaning given the term in other contexts and to the policy of the provision to determine its meaning in section 7. Although courts have had to define the term "penal laws" in several contexts, the following two contexts have most frequently demanded definition: First, determining the reach of John Marshall's maxim that "[t]he Courts of no country execute the penal laws of another";⁸⁴ and second, executing the interpretative principle that penal laws are strictly construed.⁸⁵

There are, not surprisingly, common elements of meaning in both contexts. Generally, "penal laws" in both contexts are laws that impose a monetary payment for their violation.⁸⁶ This payment is punitive rather than remedial; it is intended to punish the wrongdoer rather than compensate the victim of the violation.⁸⁷ Because a single law can contain both punitive and remedial elements,⁸⁸ lines between penal and remedial laws can be difficult to draw, but the underlying distinction is well established and remains reasonable.

Recently, however, the differing policies underlying the two contexts have led toward differences in the meaning accorded "penal laws." Because the modern policy is to open the courts of one state to claims based on the laws of another state,⁸⁹ the meaning of "penal laws" in the first context has tended to

84. Marshall's comment was made in *The Antelope*, 23 U.S. (10 Wheat.) 66, 123 (1825). The doctrine summarized by the maxim is discussed in *Huntington v. Attrill*, 146 U.S. 657 (1892). Although Marshall made the comment in the context of international law, it also applies to enforcement of the laws of one American state by another. *Id.*

85. See generally 3 C. SANDS, *SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION* § 59.03 (4th ed. 1974) (discussing the strict construction of penal laws).

Two other contexts that have necessitated definition of "penal laws" are (1) the doctrine that equity will not ordinarily restrain violation of a penal law, e.g., *International Ass'n of Cleaning & Dye House Workers v. Landowitz*, 20 Cal. 2d 418, 126 P.2d 609 (1942); and (2) special statutes of limitations for claims based on penal laws, e.g., *Cruickshanks v. Eak*, 33 N.J. Super. 285, 110 A.2d 61 (N.J. Super. Ct. Law Div. 1954).

86. E.g., *Adams v. Fitchburg R.R.*, 67 Vt. 76, 30 A. 687 (1894) (penalty for wrongful death, with amount of penalty varying with culpability of defendant, is imposed as punishment; therefore statute is penal and will not be enforced by court of another state); *Hall v. Norfolk & W.R.R.*, 44 W. Va. 36, 28 S.E. 754 (1897) (fixed penalty for overcharges in freight by railroad imposed as punishment; therefore, statute is penal and must be strictly construed).

87. See *Newman v. George A. Fuller Co.*, 72 R.I. 113, 48 A.2d 345 (1946) (Fair Labor Standards Act compensates victims and is therefore remedial rather than penal).

88. Examples include antitrust statutes that permit a range of enforcement and remedial actions, e.g., N.C. GEN. STAT. §§ 75-13 to -16 (1985), and contempt actions, in which fines may have both remedial and punitive purposes, e.g., *Holloway v. People's Water Co.*, 100 Kan. 414, 167 P. 265 (1917).

89. The rule prohibiting a state from adjudicating a claim based on the laws of another state was subjected to academic criticism over a half-century ago. See Leflar, *Extrastate Enforcement of Penal and Governmental Claims*, 46 HARV. L. REV. 193 (1932), in which the author urged that the rule was not rationally supportable in its broad application and urged that it be limited to criminal laws. By 1977 Leflar was able to report a general acceptance of his views:

Actually, most American states have broken away from the old rule which excluded local enforcement of extrastate penal and governmental claims. A principal means by which they did so is by redefinition of the word "penal," so as to confine it more strictly to the criminal law as such Though the penalty rule is not dead, it has only a fraction of the strength that it possessed at the turn of the century.

R. LEFLAR, *AMERICAN CONFLICTS LAW* § 49, at 92 (3d ed. 1977).

narrow in recent years. In many jurisdictions the "penal laws" have become identical to the criminal laws.⁹⁰ However, nineteenth century courts remained likely to extend this nonenforcement doctrine beyond the criminal law,⁹¹ and it is the nineteenth century meaning that was familiar to the drafters of section 7.

The policies underlying the context of statutory construction have tended to pull the other way, broadening the meaning given "penal laws." The courts have been solicitous towards those whom the law seeks to punish, concerned that the offense involved be clearly defined and that those charged be protected against arbitrary enforcement.⁹² Thus, the term "penal laws" in this second context extends far beyond the criminal laws. The courts characterize a law as penal if the law imposes a monetary payment on anyone violating its terms and if the purpose of that payment is punishment.⁹³ Indeed, the courts have extended the principle to laws that impose various forms of economic losses on violators beyond simple payment of money.⁹⁴

An expansive rather than a restrictive understanding of the term "penal laws" better furthers the probable policy behind section 7—to assist in supplying a stable and sufficient source of funds for local school systems. For this reason and because the restrictive trend of definition in the enforcement context has been largely a twentieth century phenomenon, it is likely that section 7's drafters intended "penal laws" to include much more than the criminal laws. For section 7 purposes, the better understanding is that any law imposing a monetary payment for punishment on a violator of that law is a penal law.

Case law roughly contemporary with the adoption of the 1875 language supports this understanding. Although the North Carolina Supreme Court has not had direct occasion to define "penal laws" in a section 7 case, the court's early cases addressing section 7 indicate an expansive understanding. Both *Katzenstein v. Raleigh & Gaston Railroad*⁹⁵ and *State ex rel. Hodge v. Marietta & North Georgia Railroad*⁹⁶ involved statutory penalties recoverable by civil, rather than criminal actions. In both cases the court apparently assumed that

90. R. LEFLAR, *supra* note 89, § 49, at 92-95.

91. See R. MINOR, *CONFLICT OF LAWS* § 10 (1901).

So far as private international law is concerned, it matters not whether that punishment is inflicted through the instrumentality of an ordinary prosecution by the state's officers for a fine, or through the medium of a civil action by the party injured for penal damages. In substance it is an act of punishment; it is punitive in either case.

Id. at 24.

92. 3 C. SANDS, *supra* note 85, § 59.03, at 7-8.

93. 3 C. SANDS, *supra* note 85, § 59.01, at 1.

94. 3 C. SANDS, *supra* note 85, § 59.02, at 4-5, which includes the following examples of penal laws: professional licensing statutes, the violation of which is punished by revocation of the violator's license, *Texas State Bd. of Medical Examiners v. McClellan*, 307 S.W.2d 317 (Tex. Ct. App. 1957); a statute that denied access to the state courts by any foreign corporation that did not register with the state, *Clymer v. Zane*, 128 Ohio St. 359, 191 N.E. 123 (1934); and divorce statutes that permitted entry of judicial orders in divorce proceedings prohibiting one or both partners from remarrying within a specified period of time, *Olsen v. Olsen*, 27 Misc. 2d 555, 209 N.Y.S.2d 503 (N.Y. Sup. Ct. 1960).

95. 84 N.C. 688 (1881). *Katzenstein* was the first § 7 case the North Carolina Supreme Court decided.

96. 108 N.C. 24, 12 S.E. 1041 (1891).

the penalties in question were potentially subject to section 7. This assumption necessarily meant that the court also assumed that the laws imposing the penalties were penal.⁹⁷

Moreover, courts of other states with comparable constitutional provisions, with one exception, reached the same expansive interpretation of "penal laws." The Missouri Supreme Court in 1878⁹⁸ and the Kansas Supreme Court in 1879⁹⁹ expressly defined "penal laws" to include laws enforced by civil remedies. In each case the crucial characteristic was the law's imposition of a monetary penalty to punish the violator.¹⁰⁰ In addition, the courts of Mississippi in 1875 and Wisconsin in 1870 assumed that such laws were penal in interpreting the constitutional provisions of those states.¹⁰¹ The exception was Indiana, which in 1848 decided that its constitutional provision extended only to criminal laws.¹⁰² The peculiar phraseology and context of that provision, however, weighed heavily in the Indiana court's decision.¹⁰³

One other distinction—that between "penal laws" and "revenue laws"—might be relevant to the meaning of "penal laws" under section 7. There was formerly a rule of international law that one state did not enforce the revenue laws of another.¹⁰⁴ Because the courts have set aside this rule in recent years and now enforce foreign revenue laws, the courts must now distinguish revenue laws from penal laws.¹⁰⁵ If penal laws do not include revenue laws, it could be

97. In *Branch v. Wilmington & W.R.R.*, 77 N.C. 347 (1877), the supreme court upheld the statute involved in *Katzenstein* against constitutional attack and, in passing, characterized the statute as a "penal statute." *Id.* at 353. The meaning of "penal statute" seems to have been a statute for the violation of which a court imposed a penalty.

98. *Barnett v. Atlantic & P.R.R.*, 68 Mo. 56 (1878).

99. *Atchison, T. & S.F.R.R. v. State ex rel. Sanders*, 22 Kan. 1 (1879).

100. The *Barnett* court held that a statute requiring railroads to fence their tracks and providing for double damages for stock killed as a result of violations was a penal law under the Missouri fines, penalties, and forfeitures provision. Because *double* damages exceeded the amount necessary to compensate the victim, the statute was penal. *Barnett*, 68 Mo. at 62-64. In *Atchison* a statute requiring railroads to ring a bell or sound a whistle at crossings and providing a \$20 civil penalty for each violation was held to be a penal law under the Kansas fines, penalties, and forfeitures provision. *Atchison*, 22 Kan. at 12-16.

101. *Mobile & O.R.R. v. State*, 51 Miss. 137 (1875) (statute requiring railroad to maintain warning sign at each crossing enforced by \$50 civil penalty), *overruled on other grounds* by *McLendon v. Pass*, 66 Miss. 110, 5 So. 234 (1888); *Lynch v. The Steamer "Economy"*, 27 Wis. 69 (1870) (statute requiring steamship companies to maintain devices to prevent the escape of sparks or burning cinders enforced by \$200 civil penalty).

102. *Common Council v. Fairchild*, 1 Ind. 315 (1848).

103. The court noted that another section of the State Constitution required the legislature to formulate a "penal code." In that context "penal" was interpreted to mean "criminal." Therefore, the court reasoned, the word must mean "criminal" in the school fund provision as well. *Id.* at 318-19. Furthermore, the court noted that the Constitution earmarked only "fines" for the school fund. "Fines" were commonly understood to be imposed only for violations of criminal laws. *Id.* at 318.

The Virginia Supreme Court has limited the reach of that state's provision to criminal laws. *Southern Express Co. v. Commonwealth ex rel. Walker*, 92 Va. 59, 22 S.E. 809 (1895), *aff'd per curiam*, 168 U.S. 705 (1897). However, the Virginia provision reads quite differently from the North Carolina provision: "all fines collected for offenses committed against the Commonwealth . . ." VA. CONST. art. VIII, § 8.

104. See *Robertson, Extraterritorial Enforcement of Tax Obligations*, 7 ARIZ. L. REV. 219, 219 (1966).

105. *E.g.*, *State ex rel. Oklahoma Tax Comm'n v. Rodgers*, 238 Mo. App. 1115, 193 S.W.2d 919 (1946); *Buckely v. Huston*, 60 N.J. 472, 291 A.2d 129 (1972).

argued that penalties imposed for nonpayment of taxes or for other violations of revenue statutes are not subject to section 7. However, even as the rule of non-enforcement of revenue laws has eroded, courts and commentators have distinguished between the revenue-raising provisions of revenue laws and the penal provisions of those laws.¹⁰⁶ The courts continue to deny interstate enforcement to the penal provisions of revenue laws on the ground that those provisions remain penal laws.¹⁰⁷ This distinction makes good sense in the section 7 context. No one would deny that a criminal fine that is imposed as punishment for a criminal violation of the tax laws is subject to section 7. The appropriate sections of the tax laws are clearly penal. Using the alternative enforcement mechanism of imposing a penalty in civil suit does not change the character of the payment; it is still punishment, and for that reason the courts should consider these laws penal.

B. "Fines, Penalties, and Forfeitures"

Historically, neither courts nor legislatures have carefully distinguished between fines, penalties, and forfeitures. Rather, they have used the terms, especially fines and penalties, interchangeably to denote monetary payments imposed as punishment for violations of law. This pattern of synonym, as opposed to differentiation, is reflected in most of the state constitutions that earmark such monetary payments for schools or other limited purposes. Of the nineteenth century constitutional provisions, only those in North Carolina, Missouri, and Arkansas used all three words—fines, penalties, and forfeitures.¹⁰⁸ It was much more common for constitutions to mention only "fines."¹⁰⁹ The courts, recognizing the traditional looseness of usage, refused to differentiate between fines and other payments. Instead, they extended the reach of the constitutional provisions to all monetary payments imposed as punishment, regardless of how the legislature labeled the payment and regardless of whether the proceeding was criminal or civil.¹¹⁰

106. *Nelson v. Minnesota Income Tax Div.*, 429 P.2d 324 (Wyo. 1967); Robertson, *supra* note 104.

107. *Nelson*, 429 P.2d at 324 (Wyoming court allowed Minnesota to sue in Wyoming for unpaid Minnesota income tax but not for statutory penalty imposed for late payment).

108. ARK. CONST. of 1868, art. IX, § 4; MO. CONST. of 1865, art. IX, § V; N.C. CONST. of 1868, art. IX, § 5 (amended 1875).

109. *E.g.*, IOWA CONST. art. IX, 2nd, § 4 (1857, repealed 1974) ("the clear proceeds of all fines collected . . . for any breach of the penal laws"); KAN. CONST. art. VI, § 6 (1859, amended 1966) ("the proceeds of fines for any breach of the penal laws"); WIS. CONST. art. X, § 2 ("the clear proceeds of all fines collected . . . for any breach of the penal laws").

110. The looseness of usage is well illustrated by *Lynch v. The Steamer "Economy"*, 27 Wis. 69 (1870). The Wisconsin Constitution gave the "clear proceeds of all fines" to a permanent school fund. WIS. CONST. art. 10, § 2. The court held that the provision applied to a civil penalty awarded in a *qui tam* action and in the course of the opinion equated penalties and forfeitures: "It is a general rule, that a common informer cannot sue for a *penalty* unless authorized so to do so by statute; but many cases hold, where the statute gives the *forfeiture*, or a part of it . . ." *Id.* at 71 (emphasis added).

Other cases demonstrating this point include *Atchison, T. & S.F.R.R. v. State ex rel. Sanders*, 22 Kan. 1, 25-26 (1879) ("fines" includes civil penalties); *Mobile & O.R.R. v. State*, 51 Miss. 137, 138 (1875) ("fines" includes civil penalties), *overruled on other grounds by* *McLendon v. Pass*, 66

The North Carolina courts followed this common practice in the first years after the constitutional provision was adopted.¹¹¹ However, in a 1900 case, the supreme court, ignoring earlier legislative and judicial practice, introduced a distinction between fines and penalties:

To our minds there is a clear distinction between a "fine" and a "penalty." A "fine" is the sentence pronounced by the court for a violation of the criminal law of the state; while a "penalty" is the amount recovered—the penalty prescribed for a violation of the statute law of the state or the ordinance of a town. This penalty is recovered in a civil action of debt.¹¹²

This distinction, not rooted in the reality of legal practice, is mostly harmless, because section 7 extends to both fines and penalties so defined. But the distinction has created some confusion in the meaning of "clear proceeds,"¹¹³ and it would be better to reject the distinction and return to the usages contemporaneous with the adoption of the constitutional provision.

Distinctions between fines and penalties, on the one hand, and other sorts of payments, on the other, have been more important than distinctions between fines and penalties. Because a "penal law" imposes a monetary payment as punishment for its violation, fines, penalties, and forfeitures as a group are distinguished as payments imposed as *punishment*. If a payment, however labelled, is imposed for some other purpose—usually as compensation to a person or entity who has been harmed because of the violation—then the constitutional provision does not apply. Questions of classification arise with actual damages, multiple and punitive damages, restitution, and tax penalties and interest.

1. Actual damages

The prototypical nonpunitive payment is compensation to a person harmed by violation of a law. The amount of compensation paid to the victim is based on the actual harm the victim suffered. Unquestionably, such payments are

Miss. 110, 5 So. 234 (1888). *Contra* Common Council v. Fairchild, 1 Ind. 315, 318 (1848) ("fines" include only "pecuniary punishments for breaches of the criminal law").

111. In *Commissioners of Wake v. City of Raleigh*, 88 N.C. 120, 123 (1883), the court mentioned "fines" imposed by cities for violation of city ordinances. The court characterized these same payments as "penalties" in *Board of Educ. v. Town of Henderson*, 126 N.C. 689, 36 S.E. 158 (1904).

The general assembly also used the three terms interchangeably. For example, one 1877 statute read as follows:

Every person who shall practice any trade or profession, or use any franchise taxed by laws of North Carolina without having first paid the tax and obtained a license as herein required, shall be deemed guilty of a misdemeanor, and shall *forfeit* and pay to the state a *penalty* not to exceed twenty dollars, at the discretion of the court, and in default of the payment of such *fines* he may be imprisoned for not more than thirty days, at the discretion of the court, for every day on which he shall practice such trade or profession, or use such franchise except in such cases where the *penalty* is specially provided in this act; which *penalty* the sheriff of the county in which it has occurred shall cause to be recovered before any justice of the peace of the county.

Act of Mar. 10, 1877, ch. 156, § 31, 1876-77 N.C. Laws 282, 296 (emphasis added).

112. *Board of Educ. v. Town of Henderson*, 126 N.C. 689, 691, 36 S.E. 158, 159 (1900).

113. In *Henderson* the supreme court distinguished fines from penalties and argued that the words "clear proceeds" modified only penalties. *Id.* at 691, 36 S.E. at 159. For a discussion of correctness of this decision, see *infra* notes 143-69 and accompanying text.

neither fines nor penalties in the constitutional sense.¹¹⁴ When legislatures began to create statutory rights to compensation in situations in which the common law gave no remedy at all, such as wrongful death statutes¹¹⁵ and workers' compensation systems,¹¹⁶ the courts had little trouble in analogizing the statutory payment schedules to compensatory damages.¹¹⁷

2. Multiple and punitive damages

The courts have had greater difficulty with double or treble damages and with punitive damages. Indeed, the Nebraska courts have held that Nebraska's version of section 7 prohibits the award to a private plaintiff of either treble damages or punitive damages, holding that such damages are in fact penalties and therefore earmarked for the schools.¹¹⁸ The Nebraska courts arguably are correct in their characterization, except possibly for some forms of multiple damages, but their conclusion has quite properly not been accepted in this or any other state.

Punitive damages present the easier case. The express purpose of punitive damages is to punish. Although actual loss is a necessary condition to the imposition of punitive damages, actual damages fully compensate that loss. Multiple damages present a somewhat more complicated case. If the amount of actual damages is small, multiple damages may be necessary to the economic feasibility of any private suit for damages.¹¹⁹ In such a case, multiple damages are at least partly compensatory in nature. However, it becomes less obvious that the multiple damages are partly compensatory in nature if the basic award of damages is

114. *E.g.*, *Livick v. Piqua State Bank*, 96 Kan. 5, 149 P. 676 (1915); *see Shore v. Edmisten*, 290 N.C. 628, 227 S.E.2d 553 (1976) (restitution is payment to party harmed by criminal action as compensation and therefore is not subject to § 7).

115. The prototype for wrongful death statutes was Lord Campbell's Act, enacted by the British Parliament in 1846. 9 & 10 Vict., ch. 93. The North Carolina wrongful death statute is found in N.C. GEN. STAT. § 28A-18-2 (1984).

116. The first comprehensive workers' compensation statute was enacted in New York in the early twentieth century. 1 A. LARSON, *THE LAW OF WORKMEN'S COMPENSATION* § 5.10 (1985). North Carolina's workers' compensation statute is codified at N.C. GEN. STAT. §§ 97-1 to -122 (1985).

117. *E.g.*, *Shaffer v. Rock Island R.R.*, 300 Mo. 477, 254 S.W. 257, *aff'd*, 263 U.S. 687 (1923) (wrongful death); *University of Neb. v. Paustian*, 190 Neb. 840, 212 N.W.2d 704 (1973) (workers' compensation).

118. *Abel v. Conover*, 170 Neb. 926, 104 N.W.2d 634 (1960).

119. *See Marshall v. Miller*, 302 N.C. 539, 549, 276 S.E.2d 397, 404 (1981). The North Carolina Unfair Trade Practices Act provides for treble damages in civil suits against violators of the Act. N.C. GEN. STAT. § 75-16 (1985). In *Marshall* the court noted that plaintiffs suing under the Act often had suffered only insignificant actual damages. Therefore, the provision for treble damages "makes more economically feasible the bringing of an action where the possible money damages are limited, and thus encourages private enforcement." *Marshall*, 302 N.C. at 549, 276 S.E.2d at 403-04.

In *Newman v. George A. Fuller Co.*, 72 R.I. 113, 48 A.2d 345 (1946), the Rhode Island Supreme Court construed a Fair Labor Standards Act provision for double damages as compensatory rather than penal. The court found a statutory "intent to assure to the injured worker substantial compensation not only for the deprivation of his rightful wages by the employer but also for the consequent expense, inconvenience and delay incidental to his being compelled to resort to litigation to obtain those wages." *Id.* at 117, 48 A.2d at 348.

large. In such a case, double or treble damages, like punitive damages, begin to look penal in nature.

If multiple and punitive damages are penal, the laws that impose them are penal laws, and the payments are therefore penalties in the constitutional sense. But this recognition does not mean that punitive and multiple damages are unconstitutional. As the next section on "clear proceeds" demonstrates, because these penalties do not "accrue to the state," they are not subject to the constitutional appropriation.¹²⁰ However, it does legal doctrine little good to strive for that same end by distorting reality and refusing to recognize multiple and punitive damages for what they are.¹²¹

3. Restitution

The distinction between compensatory and penal payments is well established. A potential difficulty arises, however, when the state or some other government claims that it has been harmed by the violations of law. Is the payment made to the state in such a case compensatory, or is it punitive?

The recent North Carolina case of *Shore v. Edmisten*¹²² addressed these issues, and the court resolved them in a manner that respected both the purposes of section 7 and the distinction between compensation and punishment. North Carolina law permits trial courts to condition probation on payment of fines and payment of "restitution or reparation to an aggrieved party."¹²³ In *Shore* the Guilford County Clerk of Superior Court held sums of money paid as a result of thirty-four criminal judgments entered pursuant to this statute. Some of the judgments directed that the amounts be paid to local police departments or educational institutions for their normal operating programs. Other judgments directed that the moneys be paid to police agencies as direct repayment of moneys paid to convicted defendants in drug buys.¹²⁴ The clerk brought a declaratory judgment action against the North Carolina Attorney General and others to determine the proper disposition, under section 7, of these moneys.

The supreme court held the first group of payments to be improper under section 7, but the second to be permissible.¹²⁵ Restitution to a governmental agency is proper "where the offense charged results in particular damage or loss to it over and above its normal operating costs."¹²⁶ The entire purpose of the constitutional provision is to divert fines, penalties, and forfeitures from support

120. See *infra* text accompanying notes 140-69.

121. Compare *Barnett v. Atlantic & P.R.R.*, 68 Mo. 56, 62 (1878) (statute imposing double damages upon violator is penal law) with *Mackie v. Central R.R.*, 54 Iowa 540, 542, 6 N.W. 723, 724-25 (1880) (statute imposing double damages upon violator is simply a statutory measure of damages).

122. 290 N.C. 628, 227 S.E.2d 553 (1976).

123. N.C. GEN. STAT. § 15A-1343(d) (1983 & Supp. 1985). At the time *Shore* was decided the relevant statute was N.C. GEN. STAT. § 15-199 (originally enacted as Act of Mar. 13, 1937, ch. 132, § 3, 1937 N.C. Pub. Laws 351, 351-52, repealed by Act of June 23, 1977, ch. 711, § 33, 1977 N.C. Sess. Laws 853, 899).

124. *Shore*, 290 N.C. at 636-39, 227 S.E.2d at 560-62.

125. *Id.* at 630-31, 227 S.E.2d at 557.

126. *Id.* at 633-34, 227 S.E.2d at 559.

of the general operations of government, including the operating costs of locating and prosecuting those who violate the law. Therefore, only extraordinary governmental costs can be imposed on a violator; only the payment of extraordinary charges can be characterized as compensating the State.¹²⁷

4. Tax penalties and interest

North Carolina statutes impose a variety of monetary payments for failure to comply with different requirements of the revenue laws. Some statutes characterize these payments as "interest,"¹²⁸ others as a "penalty,"¹²⁹ and still others as an additional "tax."¹³⁰ Further, some payments are characterized as both penalty and additional tax.¹³¹ All three kinds of payments are often calculated as a percentage of the amount of tax due.¹³²

The drafters of section 7 probably gave little consideration to the status of such payments at the time the provision was adopted. Cooley published his treatise on taxation in 1876, and in that work he noted that tax penalties were used infrequently at the state level.¹³³ Cooley himself considered both interest and penalties to be penal in nature because they are imposed as punishment for failure to comply with tax statutes, and contemporaneous case law generally follows his lead.¹³⁴ However, context was very important in the early cases. Because interest was held to be penal in another context does not necessarily mean it should be penal in the context of section 7.¹³⁵ It is likely that there simply was no settled understanding of tax penalties and interest at the time of section 7's adoption.

Although the state revenue laws do not consistently differentiate between penalties and interest, the Machinery Act,¹³⁶ the local property tax law, is care-

127. Costs present an interesting problem. In civil lawsuits costs are recovered by the successful litigant along with his or her damages and are considered indemnification for the expense of asserting his or her rights in court. In criminal cases, however, generally only the defendant pays costs and then only if convicted. N.C. GEN. STAT. § 7A-304 (1981). That only a convicted defendant pays costs suggests that criminal costs are at least partially penal in character. Possibly some criminal court costs, such as the court facility fee and the fee supporting the General Court of Justice, can be characterized as user charges. The law enforcement retirement fee, on the other hand, is used to subsidize the general operations of government and, under the reasoning of the *Shore* decision, would seem to violate the requirements of § 7.

128. *E.g.*, N.C. GEN. STAT. § 105-360(a) (1985) (late payment of property taxes).

129. *E.g.*, *id.* § 105-236(3) (failure to file state tax return).

130. *E.g.*, *id.* § 105-236(1) (paying taxes with a bad check).

131. *E.g.*, *id.* § 105-236(5) (negligent failure to comply with tax laws).

132. *E.g.*, *id.* § 105-360 ("interest" of 2%); *id.* § 105-236(3) ("penalty" of 5%); *id.* § 105-236(2) ("additional tax" of 5%).

133. T. COOLEY, LAW OF TAXATION 310-11 (1876).

134. *Id.* at 309-15. A representative case is *People ex rel. Johnson v. Peacock*, 98 Ill. 172 (1881). See also J. GRAY, LIMITATIONS OF THE TAXING POWER §§ 1215, 1403 (1906) (characterizing interest as the "ordinary penalty" imposed for nonpayment of taxes). *But see* *High v. Shoemaker*, 22 Cal. 363, 370 (1863) (characterizing a 5% charge imposed for late payment of taxes as an inducement to pay, rather than as a penalty).

135. For example, in *People ex rel. Johnson v. Peacock*, 98 Ill. 172, 177 (1881), defendant argued that the 1% monthly interest charged on unpaid taxes was a special law regulating the rate of interest and was forbidden by the Illinois Constitution. The court responded by declaring the payment a penalty rather than interest. *Id.*

136. N.C. GEN. STAT. §§ 105-271 to -395 (1985).

ful to treat the two words as denoting different concepts. "Interest" is imposed when a tax payment is late as a charge for the late payment.¹³⁷ A "penalty" is imposed for tax law violations other than late payment, such as for failure to list property or for payment with a bad check.¹³⁸ The interest payment is compensatory. The taxpayer has withheld money belonging by law to the government and has possibly imposed costs on the government in the form of interest paid for funds borrowed because taxes were late, or interest not earned because tax payments were not available for investment. The penalty, however, is simply punishment, and it is explicitly recognized as such.¹³⁹ Therefore, if the tax-related payment is for the wrongful withholding of taxes due the government, it can be characterized as interest and thereby as compensatory in nature. However, if the tax-related payment is imposed for some other failure to comply with the tax laws, it is penal, and it is subject to section 7.

C. "Clear Proceeds"

Section 7 appropriates to education "the clear proceeds of all penalties and forfeitures and of all fines . . ."¹⁴⁰ Repeated confusion has attended the interpretation of the phrase "clear proceeds." The North Carolina Supreme Court has taken alternative approaches to the phrase's meaning and, indeed, in one important case simply ignored the constitutional language.¹⁴¹ The lack of any constitutional definition of the term "clear proceeds" and the peculiar phrasing of the entire clause in which it appears¹⁴² has hampered the court's efforts in this area.

Three questions arise under this section. First, does the term "clear proceeds" modify "fines" as well as "penalties and forfeitures?" Second, which of the following may be deducted from gross proceeds to arrive at clear proceeds: costs of collection, cost of prosecution and enforcement, or any amount the general assembly may permit? Last, what role does the general assembly have in the definition of clear proceeds?

The first question requires an answer because of a series of cases decided in the twenty-five years after the present constitutional language was adopted, culminating in the 1900 case of *Board of Education v. Town of Henderson*.¹⁴³ To

137. *Id.* § 105-360(a) (Machinery Act) (originally enacted as Act of Apr. 5, 1947, ch. 888, 1947 N.C. Sess. Laws 1227).

138. *Id.* § 105-312(h) (failure to list); *id.* § 105-357(b)(2) (payment with bad check).

139. W. CAMPBELL, PROPERTY TAX COLLECTION IN NORTH CAROLINA § 704A (2d ed. 1974).

140. N.C. CONST. art. IX, § 7. Although most of the constitutional provisions appropriating fines, penalties, and forfeitures appropriate only the "clear" or "net proceeds" of those moneys, a few lack the modifier. *E.g.*, MICH. CONST. art. VIII, § 9; VA. CONST. art. VIII, § 8. Despite the missing modifier, the Virginia court interpreted that State's provision to mean *clear* proceeds. *Southern Express Co. v. Commonwealth ex rel. Walker*, 92 Va. 59, 64-65, 22 S.E. 809, 810, *aff'd*, 168 U.S. 705 (1895). The courts of Kansas and Michigan, on the other hand, required that proceeds, with no deductions, go to schools and libraries respectively. *Atchison, T. & S.F.R.R. v. State ex rel. Sanders*, 22 Kan. 1, 14 (1879); *People v. Treasurer of Wayne County*, 8 Mich. 392, 393 (1860).

141. *See Board of Educ. v. Town of Henderson*, 126 N.C. 689, 36 S.E. 158 (1900).

142. "[T]he clear proceeds of all penalties and forfeitures and of all fines . . ." N.C. CONST. art. IX, § 7.

143. 126 N.C. 689, 36 S.E. 158 (1900).

understand these cases it is necessary to discuss the once-common *qui tam* action.¹⁴⁴

The *qui tam* action and the closely-related popular action are mechanisms for private enforcement of penal statutes. Instead of the State bringing a criminal action against the violator, in a *qui tam* action a private citizen brings the violator to task in a civil action.¹⁴⁵ If the private citizen proves the violation, the punishment is a monetary penalty. The plaintiff keeps some or all of the penalty, while the remainder, if any, goes to the state.¹⁴⁶ The *qui tam* action was a creation of the common law, and because of part-time prosecutors and few state administrative agencies, it was a popular tool of nineteenth century economic regulation.¹⁴⁷ Although the plaintiff in such a suit was frequently the person damaged by the statutory violation, there was no requirement that the plaintiff be injured; any citizen could, and sometimes did, sue.¹⁴⁸ Therefore, the monetary payment imposed on the violator was a penalty, not a form of liquidated damages.

The first cases decided under section 7, beginning in 1881, involved *qui tam* actions. In the first such case, the court unanimously held the constitutional provision was not intended to inhibit the general assembly's authority to establish *qui tam* actions and, in fact, did not apply to that portion of the penalty awarded to the plaintiff.¹⁴⁹ The court maintained this position for the remainder of the nineteenth century, although individual members of the court began occasionally to dissent from it.¹⁵⁰ Then, in 1900, the court decided the *Henderson* case.

In *Henderson* the school board sought an order directing the town to turn over the full amount of proceeds it held from fines collected in criminal prosecutions for violation of town ordinances.¹⁵¹ The general assembly had expressly permitted the town to keep those proceeds, and the town argued that the *qui*

144. A nineteenth century description of the *qui tam* action is found in 1 McCLAIN ON CRIMINAL LAW § 7 (1897).

145. *Id.*; see *Middleton v. Wilmington & W.R.R.*, 95 N.C. 167 (1886) (action may be brought in name of private plaintiff, without joinder of state).

146. Strictly speaking, if the plaintiff kept the entire amount of the penalty, the action was a "popular action," while if he or she shared it with the state, it was a "*qui tam* action." *Turner v. McKee*, 137 N.C. 251, 259-60, 49 S.E. 330, 333 (1904) (Walker, J., dissenting). The North Carolina Supreme Court has not always spoken strictly, however. For example, in *Sutton v. Phillips*, 116 N.C. 502, 507, 21 S.E. 968, 969 (1895), both actions were labelled *qui tam* actions.

147. For example, railroads were subject to popular actions for such offenses as refusing to accept freight, see Code of N.C. vol. 1, ch. 49, § 1964 (1888); discriminating in rates, see *id.* § 1966; and not shipping freight received within five days of receipt, see *id.* § 1967. In *Sutton v. Phillips*, 116 N.C. 502, 507, 21 S.E. 968, 969 (1895), the court characterized the *qui tam* action as "an indispensable means of enforcing the law in many cases."

148. See *Turner v. McKee*, 137 N.C. 251, 259-60, 49 S.E. 330, 333 (1904) (Walker, J., dissenting).

149. See *Katzenstein v. Raleigh & G.R.R.*, 84 N.C. 688 (1881).

150. See *Carter v. Wilmington & W.R.R.*, 126 N.C. 437, 36 S.E. 14 (1900) (violation of requirement that railroad accept freight); *State ex rel. Godwin v. Caraleigh Phosphate & Fertilizer Works*, 119 N.C. 120, 25 S.E. 795 (1896) (violation of requirement that fertilizer bags be tagged); *Sutton v. Phillips*, 116 N.C. 502, 21 S.E. 968 (1895) (one judge dissented) (violation of weights and measures law); *State ex rel. Hodge v. Marietta & N.G.R.R.*, 108 N.C. 24, 27, 12 S.E. 1041, 1042 (1891) (Avery, J., concurring) (violation of requirement that railroad annually report to governor).

151. *Henderson*, 126 N.C. 689, 36 S.E. 158 (1900).

tam cases supported the general assembly's right to do so.¹⁵² The court disagreed. Although the court's result arguably was correct, its reasoning was absurd:

[T]hat line of cases [upholding the *qui tam* actions] . . . does not materially affect the case at bar. Those cases were actions for penalties where the "clear proceeds" are given to the school fund, and this is an action for *finis collected*. Mark the difference in the language of the Constitution: with regard to penalties, it says, the "clear proceeds"; while it says "all fines collected in any county" shall belong to the common school fund, and there is no ground for deducting anything from it.¹⁵³

This rationale, as Chief Justice Faircloth pointed out in a concurrence, is nonsense.¹⁵⁴ The court's quotation disingenuously left out the "of" before "all fines." When that word is returned to the clause, it is manifest that "clear proceeds" must modify fines as much as it does penalties if the language is to make sense.

Justice Furches, the author of the *Henderson* opinion, misinterpreted the reason for not subjecting *qui tam* penalties to the school fund and ignored the consistent interpretation of the preceding twenty years—an interpretation that the court returned to just a few years later.¹⁵⁵ The 1868 Constitution appropriated to the irreducible education fund "the net proceeds *that may accrue to the State* . . . from fines, penalties, and forfeitures."¹⁵⁶ This provision did not require that such moneys accrue to the State; it simply required that those that did accrue be allocated to education. Although the 1875 amendment changed the language, it does not appear to have been intended to affect the moneys subject to the allocation. There is no evidence to suggest that the 1875 Convention intended any change as to *which* fines, penalties, or forfeitures were subject to the provision. Indeed, evidence from newspaper accounts of that Convention suggests that the only intention was to shift *allocation* of the resource—unchanged—from State to local control. A newspaper summary of the change described it as follows: "Leaves fund raised from fines, penalties and forfeitures in counties instead of forwarding to Treasurer State Board of Education."¹⁵⁷ The newspaper reported that one opponent to the change disliked "the proposition that the money collected from fines, forfeitures, etc., should be applied in the particular counties in which they were collected. He looked upon common schools as a public charity, and all the funds for their support should be rateably distributed throughout the whole state."¹⁵⁸ The major floor amendment pro-

152. *Id.* at 693-95, 36 S.E. at 159.

153. *Id.* at 695-96, 36 S.E. at 160.

154. *Id.* at 696, 36 S.E. at 161 (Faircloth, C. J., concurring).

155. *See State v. Maulsby*, 139 N.C. 583, 51 S.E. 956 (1905); *infra* text accompanying notes 166-69.

156. N.C. CONST. of 1868, art. IX, § 4 (amended 1875) (emphasis added).

157. The [Carolina] Era (Raleigh, N.C.), Sept. 30, 1875, at 2, col. 6; The Daily Constitution (Raleigh, N.C.), Sept. 27, 1875, at 3, col. 3.

158. Daily Sentinel (Raleigh, N.C.), Sept. 27, 1875, at 1, col. 4. The delegate was Jacob Bowman from Mitchell County. Bowman was answered by Thomas Jarvis, from Pitt County, who later

posed to the committee's draft, which was unsuccessful, would have provided "that the moneys obtained from the fines in the different counties be used as a distributive instead of an irreducible fund."¹⁵⁹ The amendment would have returned the moneys to the State government, but distributed the whole amount each year rather than the income only. Throughout these newspaper accounts there is absolutely no indication of any change in the fines, penalties, or forfeitures to which the provision applied. Indeed, the accounts make complete sense only if the drafters intended no change in the moneys at issue.

The case law during the remainder of the nineteenth century reflects this understanding. In *Katzenstein v. Raleigh & Gaston Railroad*,¹⁶⁰ the first case decided under section 7, the court distinguished between those penalties "that accrue to the State"—using the 1868 language in 1881—and those that are given to the plaintiff in a *qui tam* action.¹⁶¹ Only "penalties that accrued to the State" belonged to the school fund. The court reaffirmed this interpretation fourteen years later in *Sutton v. Phillips*.¹⁶² Citing *Katzenstein* and the cases decided under Missouri's comparable constitutional provision,¹⁶³ the court suggested that "the object of the Constitutional provision was not to prohibit *qui tam* actions in [the] future, but simply to provide that all penalties inuring to the state should go to the school fund."¹⁶⁴

Thus, the consistent understanding before *Henderson* was that the Constitution required only that the clear proceeds of all fines, penalties, and forfeitures that came to the State be given to the school fund. The Constitution did not require that all such moneys come to the State in the first instance. Therefore, *qui tam* penalties did not violate the Constitution because they never accrued to the State.¹⁶⁵ The court in *Henderson* misread the rationale of these earlier cases.

served as Governor from 1879-1885. Although Bowman was a Republican and Jarvis a Conservative, the issue does not seem to have been joined on partisan lines. Bowman's motion to table the proposal, which lost 83-23, received the support of 10 Conservatives and 13 Republicans. It seems more likely that the issue was drawn on regional lines between those counties that received more when they retained what they collected and those that did not. Sixteen of the twenty-three votes for Bowman's motion came from representatives of foothills or mountain counties. N.C. JOURNAL OF THE CONSTITUTIONAL CONVENTION OF 1875, at 145; see *infra* note 159.

159. The Daily News (Raleigh, N.C.), Sept. 29, 1875, at 1, col. 3; see N.C. JOURNAL OF THE CONSTITUTIONAL CONVENTION OF 1875, at 146. The amendment was proposed by A. C. Avery, a Conservative from Burke who later served as a member of the North Carolina Supreme Court from 1888 to 1897. Avery was quoted as noting that the "bill did not meet the wishes of the people of the West." The Daily News (Raleigh, N.C.), Sept. 29, 1875, at 1, col. 3.

160. 84 N.C. 688 (1881).

161. *Id.* at 693. "State," in this context, appears to include local as well as state government. The distinction drawn is between moneys accruing to public agencies and moneys accruing to private parties. With the exception of a passing reference in *Commissioners of Wake v. City of Raleigh*, 88 N.C. 120, 122 (1893), the early ordinance cases, see *infra* text accompanying notes 206-11, indicated that ordinance penalties did accrue to the "State."

162. 116 N.C. 502, 21 S.E. 968 (1895).

163. MO. CONST. art. IX, § 7; see *supra* notes 57-59, 65 and accompanying text.

164. *Sutton*, 116 N.C. at 505, 21 S.E. at 968. The court reaffirmed this line of cases in *State ex rel. Carter v. Wilmington & W.R.R.*, 126 N.C. 437, 36 S.E. 14 (1900) (court rejected, on basis of precedent, defendant's argument that penalty awarded in *qui tam* action should go to school fund).

165. This reasoning also explains why punitive and multiple damages, although penalties, do not violate the constitutional provision. These damages never accrue to the State. See *supra* text accompanying notes 118-21.

Its opinion, as quoted above, is based on the idea that the penalties imposed in a *qui tam* action are subject to the constitutional appropriation and that the "clear proceeds" are the gross amount of these penalties minus the plaintiff's share.

In 1905 the court, in *State v. Maulsby*,¹⁶⁶ returned to the earlier understanding. In *Maulsby* the court reiterated that the Constitution affected only those penalties that accrued to the State¹⁶⁷ and distinguished fines from penalties in a more satisfying way than had the *Henderson* opinion. "From their very nature, being punishment for violation of the criminal law, [fines] are imposed in favor of the State and belonging to the State, the General Assembly cannot appropriate the clear proceeds of fines to any other purpose than the school fund."¹⁶⁸ That fines, by "their very nature," belong to the State may or may not be historically sound,¹⁶⁹ but the court's statement does support a distinction between civil and criminal penalties that respects the language of section 7. Civil penalties, of course, had historically been given to private parties; they had not accrued to the State. The distinction also assists in answering the other two questions posed above.

It was not until after *Henderson* that the court discussed the meaning of "clear proceeds," and its first discussions were at least partially dicta. In *School Directors v. Asheville*¹⁷⁰ the court suggested that clear proceeds might be determined by deducting from gross proceeds "a reasonable commission for collecting the fines." The court noted the statute that gave the clerk a five percent commission on all fines and penalties paid.¹⁷¹ This limited notion of permissible deductions from gross proceeds was echoed later the same year in *Maulsby*.¹⁷² Indeed, the *Maulsby* court was perhaps even more restrictive, stating that "clear proceeds" is the "total sum less only the sheriff's fees for collection

166. 139 N.C. 583, 51 S.E. 956 (1905).

167. *Id.* at 584, 51 S.E. at 956.

168. *Id.* at 585, 51 S.E. at 956.

169. In *School Directors v. City of Asheville*, 137 N.C. 503, 50 S.E. 279 (1905), the court had stated as follows:

It is common custom to give either, all, or a part of penalties to the person aggrieved or any person who will sue for the same, whereas it would introduce a novelty into our law to distribute a fine imposed for the violation of the criminal law and bring many strange and dangerous innovations into our criminal jurisprudence.

Id. at 511, 50 S.E. at 282.

The distinctions between civil and criminal proceedings, drawn in *Maulsby* and *School Directors*, may not have been as sharply understood in the mid-nineteenth century. For example, the following section from the 1854 Revised Code of North Carolina exhibits elements of both criminal and civil proceedings:

If the justice or constable shall be denied a view of the receipt, the offender shall forfeit and pay one hundred dollars, one half for the State, and the other half for the constable or any other who will sue for the same; and the justice, if the denial be to him, shall forthwith issue his warrant for the recovery thereof; and if to a constable, he shall arrest the party and carry him before some justice of the peace, who shall issue his warrant for the penalty, and determine the cause.

Rev. Code of N.C., ch. 99, § 47 (1855).

170. 137 N.C. 503, 512, 50 S.E. 279, 282 (1905).

171. *Id.* at 512, 50 S.E. at 282. At that time clerks of court were compensated by fees rather than by salary.

172. *Maulsby*, 139 N.C. 583, 51 S.E. 956.

...”¹⁷³ Both cases, however, suggest that only charges directly attributable to collection of the fine are deductible.

The court of appeals facially accepted this understanding in its second decision in the *Cauble v. City of Asheville* parking penalty litigation by holding that only items bearing “a reasonable relation to the costs of collection” could be deducted from total proceeds.¹⁷⁴ However, the court’s discussion indicated that it had an overly expansive notion of collection costs. The earlier cases¹⁷⁵ each used charges arising only after a court had levied the fine or penalty being collected as examples of collection costs. The court of appeals, however, conceded that the collection costs of parking penalties “often surpass the amounts collected.”¹⁷⁶ Such a result is possible only if the court envisioned not only collection costs as defined in earlier cases, but also enforcement and prosecution costs—especially the costs of checking parking meters and of ticketing violators.¹⁷⁷ If these are collection costs, then so are the law enforcement costs of investigating and charging the defendant in any crime and the State’s costs in prosecuting that crime. In its most recent *Cauble* decision, the supreme court recognized the implications of the court of appeals’ opinion.¹⁷⁸ The supreme court accepted that collection costs were indeed deductible, but specifically denied that enforcement costs also were deductible.¹⁷⁹

If the appropriate deductions from total proceeds of both fines and penalties are collection-related costs only, what then is the general assembly’s role? Two points are clear. First, case law makes clear that the general assembly may not permit the deduction of costs unrelated to collection.¹⁸⁰ Second, it is implicit in the North Carolina cases and consistently upheld in other states that the general assembly does have the power to define those collection-related costs that are deductible.¹⁸¹ The unanswered question is whether any deduction is possible in the absence of legislative permission.

None of the nineteenth century North Carolina cases raised a “clear proceeds” issue, but the Wisconsin Supreme Court did consider the legislative role

173. *Id.* at 585, 51 S.E. at 956. The Iowa Supreme Court took an even narrower view of permissible deductions, limiting them to the costs of converting tangible property to cash.

The framers of the constitution probably contemplated that fines might be made payable in county orders or state warrants, or that there might be a forfeiture of property as a fine for a breach of some penal laws, and therefore required that the clear proceeds of such should be applied to the several school districts.

Woodward v. Greeg, 3 Greene 287, 288 (Iowa 1851).

174. *Cauble v. City of Asheville*, 66 N.C. App. 537, 543, 311 S.E.2d 889, 893 (1984), *aff’d*, 314 N.C. 598, 336 S.E.2d 59 (1985).

175. *E.g.*, *Maultsby*, 139 N.C. at 583, 51 S.E. at 956; *School Directors*, 137 N.C. at 503, 50 S.E. at 279.

176. *Cauble*, 66 N.C. App. at 543, 311 S.E.2d at 894.

177. Asheville sought a definition of permitted deductions that included all costs associated with the police officers and meter checkers who issued parking citations. Asheville argued that deductions should include wages, training expenses, uniform expenses, and the cost of equipment, including motor vehicles. Record at 23, *Cauble*.

178. 314 N.C. 598, 336 S.E.2d 59 (1985).

179. *Id.* at 604, 605, 336 S.E.2d at 63, 64.

180. *Maultsby*, 139 N.C. at 583, 51 S.E. at 956.

181. *E.g.*, *Gunn v. Mahaska County*, 155 Iowa 527, 136 N.W. 929 (1912).

in defining clear proceeds in 1881. In *State ex rel. Guenther v. Miles*¹⁸² the court held that no deductions were permissible in the absence of legislative action. In 1912 the Iowa Supreme Court reached a similar conclusion.¹⁸³ Arrayed against this position is the North Carolina Court of Appeals, which in its second *Cauble* decision clearly indicated that the courts could permit deductions despite legislative inaction.¹⁸⁴

No clear answer to this question emerges from the cases arising contemporaneously with adoption of section 7, which leaves the matter to competing claims of public policy. On balance, it seems preferable for the courts to permit deductions for collection costs, even if the general assembly has taken no action. The supreme court has made clear that the Constitution permits deduction of collection costs.¹⁸⁵ The general assembly could, as a matter of State policy, limit the amount of such deductions or deny them altogether, but if it has not done so, the court's rulings should retain their precedence. Therefore, if collection costs are clearly identifiable, a court should permit their deduction from total proceeds, as long as such a deduction does not impair legislatively established policies.

D. "Collected in the several counties"

Michigan's Constitution allocates all fines "collected in the several counties and townships" for public library purposes.¹⁸⁶ In 1914 Michigan's Attorney General suggested that the constitutional provision did not apply to a penalty assessed in a corporate quo warranto proceeding brought by the Attorney General in the state capital because the proceeding was not one that occurred among the "several counties."¹⁸⁷ He argued that the Constitution's requirement applied only to proceedings "local in character."¹⁸⁸ Although no court seems to have directly accepted this argument, its implications are important and it therefore deserves discussion. If the argument is accepted, it would be possible for various state agencies that collect fines or penalties in proceedings in Wake County, North Carolina, and perhaps elsewhere, to argue that the resulting moneys are not subject to section 7 because the moneys were not, and could not be, collected in the *several* counties. Such an argument could involve such moneys as tax-related penalties collected by the North Carolina Department of Revenue,¹⁸⁹ antitrust penalties collected by the North Carolina Attorney

182. 52 Wis. 488, 9 N.W. 403 (1881).

183. *Gunn*, 155 Iowa at 527, 136 N.W. at 929.

184. *Cauble*, 66 N.C. App. at 540, 311 S.E.2d at 892. After the court of appeals' decision, the general assembly did in fact define permissible deductions as "actual costs of collection, not to exceed ten percent of the amount collected." Act of July 17, 1985, ch. 779, § 1, 1985 N.C. Sess. Laws 879, 879 (codified at N.C. GEN. STAT. § 115C-437 (1983 & Supp. 1985)). The supreme court gave this statute a prospective application only. *Cauble*, 314 N.C. at 605 n.1, 336 S.E.2d at 63 n.1.

185. *Cauble*, 314 N.C. at 604, 336 S.E.2d at 63.

186. MICH. CONST. art. VIII, § 9.

187. 1915 MICH. ATT'Y GEN. REP. 155.

188. *Id.* at 158.

189. N.C. GEN. STAT. § 105-236 (1985).

General,¹⁹⁰ and environmental penalties paid to the North Carolina Environmental Management Commission.¹⁹¹ The argument should be rejected.

To advance the Michigan argument in North Carolina would misrepresent the effect of the 1875 changes to the Constitution. Monetary payments protected by this argument clearly would have been subject to the 1868 provision: they are fines, penalties, or forfeitures that accrue to the State. As has been argued earlier, the only changes made or intended by the 1875 amendments were first, to appropriate the moneys to current school operations rather than to a permanent school fund, and second, to leave the moneys in the county of collection rather than send them to Raleigh for redistribution.¹⁹² There is no evidence that the Convention intended to diminish the revenues subject to the constitutional provision, and the nineteenth century judicial evidence reinforces the notion that no such change was intended.¹⁹³

For the most part, the kinds of payments that would be protected by the Michigan argument did not exist in 1875. Little state administrative structure existed to enforce and collect such payments. What contemporary evidence there is, however, cuts against the Michigan argument. Section 1959 of the 1883 Code required railroads to make an annual report to the Governor,¹⁹⁴ and section 1960 imposed a 500 dollar penalty for failure to do so.¹⁹⁵ An action to recover the penalty was to be brought in the name of the State in Wake County.¹⁹⁶ Thus, it was not a penalty that could be collected in the "several counties."

Section 1960 was the subject of *State ex rel. Hodge v. Marietta & North Georgia Railroad*,¹⁹⁷ in which the court held that only the State, and not a private citizen, could sue for this penalty.¹⁹⁸ Writing for himself and three other members of the five-member court, Justice Clark noted that "here the statute imposing the penalty provides for its recovery by the state, and the Constitution devotes such penalties and forfeitures to the school fund."¹⁹⁹ Because the disposition of the penalty was not before the court, the statement was dicta. However, the statement clearly indicates an assumption that there was nothing unusual about this penalty that would cause it to be treated differently from other penalties accruing to the state.

Furthermore, the concentration of penalty and fine payments in Wake County is more apparent than real. For example, an administrative agency in Raleigh assesses the various environmental penalties. If the penalties are not

190. *Id.* § 75-15.2.

191. *Id.* § 143-215.69(a) (1983) (water quality); *id.* § 143-215.17(b) (water use); *id.* § 143-215.36(b) (dam safety); *id.* § 143-215.91(a) (discharge of oil or other hazardous substances).

192. *See supra* text accompanying notes 60-81.

193. *See supra* text accompanying notes 155-59.

194. Code of N.C. vol. 1, ch. 49, § 1959 (1883).

195. *Id.* § 1960.

196. *Id.*

197. 108 N.C. 24, 12 S.E. 1041 (1891).

198. *Id.* at 26, 12 S.E. at 1041.

199. *Id.*

voluntarily paid, however, the agency must sue for the penalty in either the county in which the violations took place or the county in which the violator resides.²⁰⁰ Should the agency have to sue for the penalty, it obviously would be collected in one of the several counties, and a voluntarily paid penalty could be traced to the same county. The same sort of analysis could distribute any tax-related penalties to the county in which the taxpayer resided.²⁰¹ There would remain a few penalties or fines paid for violations not traceable to a particular county, and Wake County would likely benefit from these. However, these would not be many in number and should not be cause to divert the moneys collected from the Wake County school fund.

E. Local Ordinance Violations

Until 1872 the only method available to cities to enforce their ordinances was to impose a penalty on violators and collect the penalty in a civil action.²⁰² In 1872 the general assembly enacted the statute now codified in North Carolina General Statutes section 14-4,²⁰³ making violation of any city ordinance a misdemeanor.²⁰⁴ From that time on cities could rely on this general criminalization of ordinances for enforcement, or they could in addition impose civilly-collected penalties. The most recent modification to this system was made in 1972 when the general assembly authorized cities to impose civil penalties *in lieu* of the criminal remedies of section 14-4, as well as in addition to those criminal remedies.²⁰⁵

The early case law in this area distinguished, for purposes of section 7, between civil and criminal enforcement of city ordinances. In *Commissioners of Wake v. City of Raleigh*²⁰⁶ the county sought to recover moneys collected by the city through the enforcement of city ordinances. The court held that the moneys were not subject to the constitutional provision, giving the three following

200. *E.g.*, N.C. GEN. STAT. § 143-215.17(b)(4) (1983).

201. In *State ex rel. Att'y Gen. v. Rose*, 78 Kan. 600, 604, 97 P. 788, 790 (1908), the Kansas Supreme Court, sitting in the state capital, fined Rose for contempt for ignoring an order issued in a quo warranto action to vacate the office of Mayor of Kansas City. The opinion held that the fine should go to the county in which Kansas City was located—the site of the offense—rather than the county in which the state capital was located—the site at which the fine was imposed.

202. *See, e.g.*, *Commissioners of Louisburg v. Harris*, 52 N.C. 281 (1859) (ordinance assigning fine of not less than, nor more than, \$20 held void for vagueness); *Commissioners of Washington v. Frank*, 46 N.C. 436 (1854) (penalty imposed on slaves who violated town ordinance prohibiting disorderly conduct).

203. N.C. GEN. STAT. § 14-4 (1981 & Supp. 1985).

204. Act of Feb. 12, 1872, ch. 195, § 2, 1871-72 N.C. Pub. Laws 344, 344. This Act simply made violation a misdemeanor. When the Act was included in the Code of 1883, maximum sanctions were set at a \$50 fine, 30 days in jail, or both, where they remain today. Code of N.C. vol. 2, ch. 62, § 3820 (1883). This legislation was necessary because local governments have no independent authority to classify behavior as criminal. *See Henderson*, 126 N.C. at 691, 36 S.E. at 159 ("A municipal corporation has the right, by means of its corporate legislation, commonly called town ordinances, to create offenses, and fix penalties for the violation of its ordinances, and may enforce these penalties by civil action; but it has no right to create criminal offenses.")

205. N.C. GEN. STAT. § 160A-175 (1982). Counties first received general ordinance-making power in 1969, Act of Mar. 6, 1969, ch. 36, 1969 N.C. Sess. Laws 23, *repealed by* Act of May 24, 1973, ch. 822, § 1, 1973 N.C. Sess. Laws 1233, 1233, and now have the same enforcement choices as cities, *see* N.C. GEN. STAT. § 153A-123 (1983).

206. 88 N.C. 120 (1883).

reasons: First, the moneys did not accrue to the state; second, they were not collected for a breach of a penal law; and last, they were not collected by county officers.²⁰⁷ The court's discussion of the issue was brief, and no distinction was made between civil and criminal actions. Seventeen years later the court decided *Henderson*,²⁰⁸ in which plaintiff school board sought only those moneys collected in criminal actions pursuant to the predecessor of section 14-4. In its opinion, which upheld the school board's claim, the court recounted the history of enforcement of city ordinances and drew a distinction between civil and criminal enforcement. Criminal enforcement resulted in fines that belonged to the school fund, as such actions were brought under a penal law of the state.²⁰⁹ Civil enforcement, however, resulted in penalties that the town could retain. This was not because the ordinances were not penal, but rather because there was no violation of a penal law of the state.²¹⁰ The court distinguished between laws enacted by *state government* and *ordinances* enacted by *town government*; only the laws fit the constitutional language, and therefore only the former were subject to the constitutional appropriation.²¹¹

It was against this background that the city of Asheville was sued in 1977. Like most North Carolina cities, Asheville imposed a small civil penalty, usually one dollar, on violators of its overtime parking ordinances. The city expected violators to pay the penalty voluntarily, and most violators did. Payment was made to the city, and the city retained the money. Asheville did not bring civil actions for unpaid penalties because the amounts involved were normally too small. Rather, because the city had not used its power to exclude these ordinances from section 14-4, it would proceed under that statute against persons who did not voluntarily pay the penalty. Plaintiff in the Asheville litigation—a taxpayer's class action—sought an order directing the city to turn the amounts voluntarily paid to it for parking violations over to the local school system on the ground these penalties were subject to section 7.²¹²

In *Cauble v. City of Asheville*²¹³ a divided supreme court agreed with plaintiff. The majority began with the distinction drawn in *Henderson* between civil and criminal actions and with the requirement of that case that criminal fines go to the school fund.²¹⁴ The majority then declared that if the underlying offense was criminal any money collected from the violator was therefore a fine.²¹⁵ Because Asheville had not excluded its parking ordinances from the coverage of section 14-4, the court argued that violation of the ordinance was a breach of a penal law of the state, and the money paid—although called a "penalty" and

207. *Id.* at 122.

208. 126 N.C. 689, 36 S.E. 158 (1900).

209. *Id.* at 692, 36 S.E. at 159.

210. *Id.*

211. *Id.*

212. *Cauble*, 301 N.C. at 341, 271 S.E.2d at 259.

213. 301 N.C. 340, 343, 271 S.E.2d 258, 260 (1980). The majority's and minority's opinions were reiterated in *Cauble*, 314 N.C. at 598, 336 S.E.2d at 59.

214. *Henderson*, 126 N.C. at 691, 36 S.E. at 159.

215. *Cauble*, 301 N.C. at 344, 271 S.E.2d at 260.

paid voluntarily—was a fine for constitutional purposes.²¹⁶

The dissent argued that it was not the nature of the offense that was crucial but the nature of the proceeding in which the money was collected.²¹⁷ Although agreeing that a fine is a sum exacted from a person guilty of a misdemeanor, the dissent argued that guilt had to be proved in a proper proceeding and the fine had to be imposed by a court.²¹⁸ The payments made to Asheville did not result from criminal proceedings. They were voluntary payments that were made at the inception of a civil proceeding to avoid the criminal proceeding.²¹⁹

Based on the North Carolina cases decided in the thirty years after the 1875 Convention and on contemporaneous cases involving local ordinances decided in other states, the dissenters in *Cauble* were clearly closer to the original understanding of section 7.

This section has noted that the court in *Henderson* held that civil penalties collected for violation of town ordinances were not subject to section 7 because such ordinances were not penal laws of the state.²²⁰ This result, and indeed this rationale, was mirrored in the nineteenth century cases from other states that decided whether moneys collected as a result of local ordinance violations must go to education. Save in Nebraska, where peculiar constitutional language gave that state court no choice,²²¹ each of these early decisions held that towns could retain these moneys collected as a result of local ordinance violations. The Indiana court reached this conclusion by a unique route, holding that “penal laws” meant “criminal laws” and that an action to enforce a town ordinance was not a criminal action.²²² Three other courts, however, each acting in the late 1870s, excused local ordinance moneys from the constitutional appropriation on the same ground as the *Henderson* court. These courts held that there is a distinction between statutes or laws, on the one hand, and ordinances on the other, and the constitutional provision applied only to the statutes or laws.²²³

In all of these early decisions, in North Carolina and elsewhere, the focus was on the nature of the proceeding and not on the offense. In *People ex rel. Fennell v. Common Council*,²²⁴ for example, the Michigan court noted that cer-

216. *Id.* at 344, 271 S.E. at 261.

217. *Id.* at 346, 271 S.E.2d at 261 (Exum, J., dissenting).

218. *Id.* at 347, 271 S.E.2d at 262 (Exum, J., dissenting).

219. *Id.*

220. See *supra* text accompanying notes 208-11.

221. *State ex rel. School-Dist. v. Heins*, 14 Neb. 477, 16 N.W. 767 (1883). The Nebraska constitutional provision stated, in part, that

all fines, penalties, and license money arising under the rules, by-laws, or ordinances of cities, villages, precincts, or other municipal subdivision[s] less than a county, shall belong and be paid over to the same respectively. All such fines, penalties, and license money shall be appropriated exclusively to the use and support of the common schools in the respective subdivisions where the same may accrue

NEB. CONST. art. VII, § 5. No other state's constitutional provision expressly mentioned local ordinances.

222. *Common Council v. Fairchild*, 1 Ind. 315 (1848).

223. *People ex rel. Fennell v. Common Council*, 36 Mich. 186 (1877); *State ex rel. Rosenstock v. Swift*, 11 Nev. 128 (1876); *Village of Platteville v. Bell*, 43 Wis. 488 (1878).

224. 36 Mich. 186, 190 (1877).

tain offenses under the town ordinance involved in its case were also offenses under state law. Because the town ordinances imposed different punishments, however, they were excluded from the constitutional appropriation.²²⁵ This notion of parallel enforcement techniques was found in North Carolina as well. The North Carolina statutes in the late nineteenth century often provided for enforcement both by criminal and by civil proceedings, with the civil penalty often allocated to a private prosecutor.²²⁶ More to the point, the North Carolina Supreme Court in 1905 noted that "[a] party violating a town ordinance may be prosecuted by the State for the misdemeanor and sued by the town for the penalty."²²⁷ In the context of the case, the court clearly understood that the town kept the penalty when it sued the violator. This statement, of course, directly supports the position of the *Cauble* dissent and opposes that of the court's majority.²²⁸

F. *Infractions*

The 1985 general assembly introduced the concept of infractions into North Carolina law. In legislation that became effective July 1, 1986, certain offenses, primarily involving motor vehicles, are classified as infractions rather than misdemeanors.²²⁹ The intent behind the legislation was to decriminalize those offenses. With such an offense a person is found "responsible for an infraction" rather than "guilty of a misdemeanor," and the punishment is labeled a penalty rather than a fine.²³⁰ Two aspects of this legislation raise section 7 issues that should be considered briefly.

First, the legislation provides that persons found responsible for an infraction are to pay the proceeds of any penalties to the appropriate county to be used for schools.²³¹ The initial question is whether this appropriation is constitutionally mandated or whether some portion of the penalty could be legislatively allocated to some other use. The proper answer is that these penalties are subject to

225. *Id.*

226. The following sections of the Code of 1883 are representative: § 52 prohibits setting fire to woods, Code of N.C. vol. 1, ch. 7, § 52 (1883); § 53 enforces that prohibition through both a \$50 penalty collected in a *qui tam* proceeding and by making violation a misdemeanor, *id.* § 53; § 678 requires the clerk of superior court to collect and remit moneys, upon incorporation of business corporations and provides for enforcement by both *qui tam* action and criminal prosecution for a misdemeanor, *id.* § 678; and § 1882, which prohibits a public officer from acting without a bond, provides for a forfeiture by the officer and for criminal enforcement, *id.* ch. 46, § 1882.

227. *School Directors v. City of Asheville*, 137 N.C. 503, 510, 50 S.E. 279, 281 (1905).

228. In response to the most recent decision in the Asheville litigation, *Cauble*, 314 N.C. at 598, 336 S.E.2d at 59, several cities have amended their ordinance codes to decriminalize city parking ordinances. *See, e.g.*, *News & Observer* (Raleigh, N.C.), Apr. 17, 1986, at 22C, col. 1. Other cities had modified their codes after the first supreme court decision. *See e.g.*, 1 CARRBORO, N.C., CODE § 1-10, at 1-3; *id.* § 6-32, at 6-23 to -24. If a city denies itself the ability to use criminal prosecution to collect parking penalties that are not voluntarily paid, then the justification for treating voluntarily paid moneys as criminal fines is lost. In the terms of the majority's opinion in *Cauble*, the underlying offense is now only the city ordinance. Because the ordinance is not a penal law of the State, the city will be able to keep the moneys paid as a result of the ordinance's violation.

229. Act of July 15, 1985, ch. 764, § 1, 1985 N.C. Sess. Laws 1111, 1111 (codified at N.C. GEN. STAT. § 14-3.1 (Supp. 1985)).

230. N.C. GEN. STAT. § 14-3.1 (Supp. 1985).

231. *Id.*

section 7 and that only collection costs may constitutionally be deducted from total proceeds.

A law that is enforced as an infraction is clearly a penal law. A monetary payment is imposed upon proof of its violation, and the penalty is clearly intended to be punitive rather than compensatory. Furthermore, the penalty accrues to the state. Just as criminal proceedings are prosecuted by state officials, so are infraction proceedings. There is no private prosecutor to whom the penalty might be awarded, and so the proceeds of infraction penalties should be treated just as are the proceeds of criminal fines.²³²

Second, the legislation amended North Carolina General Statutes section 14-4 to provide that violation of a local ordinance "regulating the operation or parking of vehicles" constitutes an infraction rather than a misdemeanor.²³³ Because the proceeds of infraction penalties are appropriated to education, the question is whether this change concerning parking ordinances decided the *Cauble* litigation by requiring that all penalties imposed for parking violations go to the school fund.²³⁴ The clear answer is no.

The proper reading of city and county choice on parking and vehicular ordinances is that they may be enforced by infraction penalties or by civil penalties. Both North Carolina General Statutes section 153A-123,²³⁵ which applies to counties, and North Carolina General Statutes section 160A-175,²³⁶ which applies to cities, set out enforcement methods for local ordinances and begin with cross-references to section 14-4. Both statutes contain statements indicating that unless the governing board of the county or city takes further action, local ordinances are to be enforced pursuant to section 14-4.²³⁷ The next subsection of these statutes then authorizes the use of civil penalties.²³⁸ The infraction legislation amends only the subsections that cross-reference to section 14-4, leaving the civil penalty subsection unchanged.²³⁹ The double use of "penalty" is unfortunately prone to confusion, but the distinctions remain clear. Because

232. The legislation provides that "[t]he proceeds of penalties for infractions are payable to the county in which the infraction occurred for the use of the public schools." *Id.* Although this may have been unintended, the language might be thought to indicate that there are to be no deductions from total proceeds.

233. Act of July 15, 1985, ch. 764, § 2, 1985 N.C. Sess. Laws 1111, 1111 (codified at N.C. GEN. STAT. § 14-4 (1981 & Supp. 1985)).

234. The majority in the most recent *Cauble* decision seemed to think the infraction legislation had some impact on the questions raised in the *Cauble* litigation. In a long footnote the majority summarized the legislation, but then noted that it was inapplicable because it would not be effective until July 1, 1986. *Cauble*, 314 N.C. at 604 n.1, 336 S.E.2d at 63 n.1. As the discussion in the text demonstrates, the legislation is inapplicable, but the reason is that it has nothing to do with *civil* penalties.

235. N.C. GEN. STAT. § 153A-123 (1983 & Supp. 1985).

236. *Id.* § 160A-175 (1982 & Supp. 1985).

237. *Id.* § 153A-123(b) (1983 & Supp. 1985); *id.* § 160A-175(b) (1982 & Supp. 1985).

238. *Id.* § 160A-175(c) (1982 & Supp. 1985) reads:

An ordinance may provide that violation shall subject the offender to a civil penalty to be recovered by the city in a civil action in the nature of debt if the offender does not pay the penalty within a prescribed period of time after he has been cited for violation of the ordinance.

239. In both cases, the language of the subsections referring to § 14-4 was merely changed from providing that violation of an ordinance is a misdemeanor, as provided by § 14-4, to providing that

the penalties involved in *Cable* were civil penalties, the infraction legislation had no impact on the issues of that litigation.

III. CONCLUSION

The premise of this Article has been that article IX, section 7 of the North Carolina Constitution, which appropriates the clear proceeds of certain fines, penalties, and forfeitures to county school funds, should be interpreted in the manner of a statute, with a careful regard for the legislative intent of its drafters. Furthermore, that intent is most likely to be discovered through a better understanding of the historical circumstances surrounding insertion of the provision in the Constitution and by a close reading of those court cases that interpreted the provision soon after its adoption. Reference to contemporaneous cases interpreting similar provisions in other state constitutions enhances this judicial evidence. The better understanding of section 7 that this search for intent provides can then be the basis for interpreting the provision's application to practices that did not exist when it was adopted.

Using this procedure, this Article has reached a number of conclusions. First, "penal laws" are those that impose a monetary punishment upon violators. Second, the terms "fines," "penalties," and "forfeitures" include any payment imposed for the purpose of punishment, even those associated with damage awards to private litigants. To this point, the reach of the constitutional provision is extensive. However, the third conclusion is that the provision includes only those fines, penalties, and forfeitures that accrue to the state; punitive monetary payments that are paid directly to private litigants are unaffected by its requirements. Fourth, of the total proceeds that do accrue to the state, only collection costs, as permitted by the general assembly, may be deducted before the moneys are turned over to local school systems. Fifth, the provision applies to any penalty that accrues to state government, not just those that are susceptible to collection in the several counties. Last, section 7 does not extend to civil penalties voluntarily paid to local governments by ordinance violators, even when the city or county had the power, under the ordinance, to criminally prosecute the violator.

These conclusions, if generally accepted, will increase significantly the amounts of money coming to local school systems through section 7. The greatest practical impact would be on civil penalties now imposed by or for the benefit of a variety of state agencies, which are now retained by state government.²⁴⁰

violation of an ordinance is a misdemeanor *or infraction*, as provided by § 14-4. See *id.* §§ 153A-123(b), 160A-175(b).

240. The total proceeds collected by the State from civil penalties is not now readily available. The report on civil penalties mandated by the 1986 general assembly, see *supra* text accompanying note 15, was not made. Telephone interview with Linda Powell, Fiscal Research Division, North Carolina General Assembly (Oct. 7, 1986). The general assembly's Fiscal Research Division has therefore requested state agencies to report to it in the Fall of 1986 on the amounts of penalties collected by each, but not all have yet responded. *Id.* The magnitude of state civil penalty collections is suggested, however, by the amount of penalties collected in 1985-86 for environmental violations, which was \$136,339. Telephone interview with Barry K. Sanders, North Carolina Office of the State Budget (Oct. 7, 1986).

The direct impact on local government revenues would be smaller, probably affecting only those penalties imposed for late-listing of property for taxes, which are now retained by local governments.²⁴¹ Concededly, this general result would cause some minor disruption of present arrangements and prevent some attractive funding relationships, such as was proposed for the state-level RICO in 1985.²⁴² Indeed, given current attitudes toward education and the large amounts of state and local moneys that are appropriated for education, the constitutional appropriation of fines, penalties, and forfeitures might now be an anachronism. However, the proper way to deal with a constitutional anachronism, if this be one, is by straightforward amendment of the Constitution and not by judicial interpretation that balances the provision against competing policies and thereby risks distortion and confusion of the constitutional text.

241. The amount of late-listing penalties collected by local governments is also difficult to determine, because most local governments do not distinguish in their financial reports between such penalties and interest collected for late payment of taxes. However, the magnitude is suggested by the amount collected by the city of Raleigh, which was \$154,000 in 1985-86. Telephone interview with Perry James, Deputy Finance Director, city of Raleigh, N.C. (Aug. 25, 1986).

242. See *supra* text accompanying notes 16-17.

