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NOTES

Civil Procedure—New Rules for an Old Game: North Carolina Compulsory Counterclaim Provision Applies in Divorce Suits

Piecemeal litigation has been a prevalent feature in divorce actions. Adverse parties filing similar claims in separate counties, racing to judgment in hopes of barring the other's claim, is a common pattern in marital disputes.¹ Traditionally, the doctrine of abatement, which requires that an action initiated during the pendency of a prior action be dismissed if the two are sufficiently similar, provided a way to dispose of unnecessary litigation. In divorce actions, however, the doctrine has been narrowly applied.² In contrast, employment of a compulsory counterclaim theory could prevent unnecessary litigation in circumstances in which strict application of abatement would not. Thus, it was anticipated that the adoption of a compulsory counterclaim rule as part of the North Carolina Rules of Civil Procedure³ could alter the procedures once followed in divorce suits.⁴ In *Gardner v. Gardner*,⁵ the North Carolina Supreme Court made this change clear by holding that counterclaims for divorce, with one narrow exception, are compulsory counterclaims within the meaning of rule 13(a).⁶

In *Gardner*, a wife sued for alimony and divorce on the ground that her husband had abandoned her when he moved out of the marital home.⁷ Shortly before the husband was required to answer, his own

1. See, e.g., *Fullwood v. Fullwood*, 270 N.C. 421, 154 S.E.2d 473 (1967); *Beeson v. Beeson*, 246 N.C. 330, 98 S.E.2d 17 (1957); *Cameron v. Cameron*, 235 N.C. 82, 68 S.E.2d 796 (1952); *Cook v. Cook*, 159 N.C. 46, 74 S.E. 639 (1912); *McLeod v. McLeod*, 1 N.C. App. 396, 161 S.E.2d 635 (1968).

2. E.g., *Cameron v. Cameron*, 235 N.C. 82, 68 S.E.2d 796 (1952).

3. N.C. GEN. STAT. § 1A-1 (1969).

4. See *McCarley v. McCarley*, 289 N.C. 109, 114, 221 S.E.2d 490, 494 (1976) (dictum); 2 R. LEE, NORTH CAROLINA FAMILY LAW §144 (3d ed. Supp. 1976) (author suggests new rules of civil procedure may alter prior case law).

5. 294 N.C. 172, 240 S.E.2d 399 (1978).

6. *Id.* at 181, 240 S.E.2d at 406. N.C.R. Civ. P. 13(a) provides:

A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. But the pleader need not state the claim if

- (1) At the time the action was commenced the claim was the subject of another pending action, or
- (2) The opposing party brought suit upon his claim by attachment or other process by which the court did not acquire jurisdiction to render a personal judgment on that claim, and the pleader is not stating any counterclaim under this rule.

7. 294 N.C. at 174, 240 S.E.2d at 401; see N.C. GEN. STAT. § 50-16.2(4), -7(1) (1976). The wife prayed initially for alimony without divorce. She later amended her complaint to state a

claim for absolute divorce based on the one-year statutory separation period⁸ accrued.⁹ While his wife's action was pending, the husband filed his divorce claim in another county.¹⁰ The wife, relying on both abatement and compulsory counterclaim theories, moved that her husband's action be dismissed or stayed until her own action could be determined.¹¹ The court denied her motions,¹² and the court of appeals denied her writ of certiorari.¹³

On appeal,¹⁴ the North Carolina Supreme Court decided for the wife.¹⁵ The court held, based on the compulsory counterclaim rule,¹⁶ that the husband's claim for divorce was a compulsory counterclaim in the wife's suit.¹⁷ The governing rule, 13(a), makes counterclaims arising out of the same transaction or occurrence as the plaintiff's claim

claim for alimony and divorce from bed and board, a judicial separation of husband and wife that can be nullified by resumption of marital relations. 294 N.C. at 174, 240 S.E.2d at 401.

8. See N.C. GEN. STAT. § 50-6 (Supp. 1977).

9. See 294 N.C. at 174, 240 S.E.2d at 401-02. N.C.R. Civ. P. 12(a)(1) provides in part: "A defendant shall serve his answer within 30 days after service of the summons and complaint upon him." The summons and complaint in the wife's action were served on the husband on May 17, 1976. His claim accrued on May 28, 1976, one year after he had left home. Brief for Appellant at 2.

10. 294 N.C. at 174, 240 S.E.2d at 402. The wife filed her claim in Wayne County one day after she moved there from the Johnston County residence she and her husband had maintained for many years. Before filing his independent action, the husband moved to transfer the wife's action to Johnston County, where he still lived, on the basis of improper venue. The motion was denied. While appeal of the motion was pending, the husband moved to transfer the wife's action on *forum non conveniens* grounds. *Id.* at 173-74, 240 S.E.2d at 401.

11. *Id.* at 174-76, 240 S.E.2d at 402-03.

12. *Id.* at 174, 240 S.E.2d at 402. Petitioner's motions were heard and denied in Johnston County District Court. Petitioner filed for a writ of certiorari in the court of appeals requesting review of the order. Brief for Appellant at 3.

13. Brief for Appellant at 4.

14. The North Carolina Supreme Court ordered that petitioner's writ for discretionary review under N.C. GEN. STAT. § 7A-31 (Cum. Supp. 1977) be allowed. Brief for Appellant at 4. The court emphasized that it took the case not because the appellate court had abused its discretion, but "because we desired to address the important and novel questions relating to the applicability of the compulsory counterclaim provisions . . . for the guidance of the bench and bar." 294 N.C. at 173, 240 S.E.2d at 401.

15. 294 N.C. at 181, 240 S.E.2d at 406.

16. The wife had abandoned her reliance on the abatement theory. *Id.* at 175-76, 240 S.E.2d at 402-03. Her husband, however, contended that the abatement theory and the prior case law based on it were still good law. *Id.* at 175, 240 S.E.2d at 402; see Brief for Appellee at 4-12. While the court hinted that abatement might still be a viable doctrine, its adoption of the compulsory counterclaim procedures appears to negate the use of the doctrine in a *Gardner* context.

17. Relying on the premise that his wife's amendment should not relate back and thus her action should be considered one for alimony without divorce, the husband argued that N. C. GEN. STAT. § 50-16.8 (1969) made his claim merely permissive. Brief for Appellee at 7. The statute provides in part: "The procedure in actions for alimony . . . shall be as in other civil actions except as provided in this section." It also provides that actions for alimony may be filed as counterclaims in divorce actions and actions for divorce may be filed as counterclaims in alimony without divorce proceedings. The court, while failing throughout its opinion to distinguish between the wife's original and amended claim, pointed out that the statute was enacted in 1955 at a

compulsory in the plaintiff's suit. The court also held that when a claim that is compulsory in a prior pending suit is filed separately, the claim should be either stayed or dismissed with leave to file in the first suit.¹⁸ Although the compulsory counterclaim rule does not specify this result,¹⁹ the court thought its holding necessary to promote the rule's policies of avoiding wasteful litigation and inconsistent results.

The court further stated that if the second claim were filed after final judgment in the first action, the claim would not be barred by the compulsory counterclaim rule.²⁰ It emphasized that this limitation was consistent with a policy courts have strongly adhered to—that of maintaining the marital ties. A spouse undesirous of pursuing a divorce is not forced to do so by the institution of a related action by the other spouse, yet remains free to change his mind later.²¹

Prior to North Carolina's adoption of the rules of civil procedure, there was no compulsory counterclaim rule.²² Rather, any claim arising out of the same transaction as the plaintiff's claim was permitted to be filed either as a counterclaim²³ or in a separate suit.²⁴ When a claim

time when there was no compulsory counterclaim concept and counterclaims for alimony in actions for divorce were not allowed. Having placed the statute in its historical context, the court reasoned it would not undermine the legislative intent to superimpose rule 13(a) on the statute and make the counterclaim compulsory. 294 N.C. at 178, 240 S.E.2d at 404.

18. 294 N.C. at 177, 240 S.E.2d at 403 (citing 6 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE §§ 1409, 1418 (1971)).

19. See note 6 *supra*. See also 6 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1418 (1971). The authors point out:

Although it is well established that a party is barred from suing on a claim that should have been pleaded as a compulsory counterclaim in a prior action, one closely related question remains unsettled. What would prevent a party who does not want to assert his claim as a compulsory counterclaim in a suit instituted by his opponent from bringing an independent action on that claim while the first action still is pending?

20. 294 N.C. at 181, 240 S.E.2d at 406. The court noted, however, that the doctrine of res judicata may operate to bar a subsequent claim. *Id.* at 181 n.7, 240 S.E.2d at 406 n.7.

21. *Id.* at 181, 240 S.E.2d at 405-06. As one court noted, there is a paucity of case law on the effect of the compulsory counterclaim provisions on divorce actions. *Stolar v. Stolar*, 359 A.2d 597, 598 n.2 (D.C. Cir. 1976). The *Gardner* court, in carving out this exception to the counterclaim rule, relied on *Moats v. Moats*, 168 Colo. 120, 450 P.2d 64 (1969), which pointed out that without the exception, the rule would interfere with substantive rights. *Id.* at 125, 450 P.2d at 66. Other courts have reached differing conclusions on the effects of the rule. In *Stolar*, rule 13(a) was applied to bar a claim for absolute divorce on the ground that the claim should have been filed as a counterclaim in an earlier unsuccessful divorce suit filed by the other spouse. 359 A.2d at 599. On the other hand, the Missouri Supreme Court has stated in dictum that notwithstanding the compulsory counterclaim rule, a defendant still has a choice of asserting a divorce claim in a separate suit. *State ex rel. Fawkes v. Bland*, 357 Mo. 634, 645, 210 S.W.2d 31, 36 (1948).

22. W. SHUFORD, NORTH CAROLINA CIVIL PRACTICE AND PROCEDURE § 13-2 (1975).

23. *Id.* The former statutory provision relating to counterclaims, CODE OF CIVIL PROCEDURE § 101 (1868) (formerly codified at N.C. GEN. STAT. § 1-137 (1953)) (repealed 1970), also permitted as counterclaims all contract actions.

24. *E.g.*, *Union Trust v. McKinne*, 179 N.C. 328, 102 S.E. 385 (1920).

was filed separately during the pendency of a prior related action, the doctrine of abatement was often invoked by the original plaintiff to force dismissal of the second suit.²⁵ Like the compulsory counterclaim rule, the doctrine is designed to avoid multiple actions and inconsistent results.²⁶

The doctrine, however, has grave weaknesses. It is applied only when both actions are filed in North Carolina.²⁷ Moreover, some courts refuse to apply it in divorce actions,²⁸ producing wasteful litigation and confusion. Further, the doctrine requires dismissal of the second divorce action only if the plaintiff in that action can obtain the same relief by counterclaiming in the first and if his claim would be defeated by a judgment in favor of the plaintiff in the first suit.²⁹ This

25. See, e.g., *McDowell v. Blythe Bros.*, 236 N.C. 396, 72 S.E.2d 860 (1952). The conditions for abating an action because of the pendency of a prior action are traditionally that the two be substantially identical in parties, subject matter, issues involved, and relief demanded. *Whitehurst v. Hinton*, 230 N.C. 16, 22, 51 S.E.2d 899, 903 (1949).

26. *Reece v. Reece*, 231 N.C. 321, 322, 56 S.E.2d 641, 642 (1949).

27. Historically, the doctrine of abatement has not required dismissal of an action filed in one state while a related action is pending in another. See *Cushing v. Cushing*, 263 N.C. 181, 139 S.E.2d 217 (1964). Courts, however, have sometimes made discretionary determinations that the second action should be stayed pending the outcome of the first. See *Acorn v. Jones Knitting Corp.*, 12 N.C. App. 266, 182 S.E.2d 862, cert. denied, 279 N.C. 511, 183 S.E.2d 686 (1971).

28. In *Beeson v. Beeson*, 246 N.C. 330, 98 S.E.2d 17 (1957), the court allowed an alimony without divorce action filed subsequent to an absolute divorce action to proceed independently. While the abatement doctrine was argued strenuously on appeal, Brief for Appellant at 4-7; Brief for Appellee at 2-3, the court omitted any reference to it. Instead, it reasoned from a recent statutory change that for the first time allowed a wife to counterclaim in her husband's divorce action. 246 N.C. at 332, 98 S.E.2d at 18. This change, according to the court, gives a wife a choice of asserting her claim in either a pending or a separate suit. *Id.*; see 36 N.C.L. REV. 203 (1958). In *Fullwood v. Fullwood*, 270 N.C. 421, 154 S.E.2d 473 (1967), the *Beeson* fact situation was reversed and both claims were again allowed to proceed independently. While mentioning in dictum the abatement theory, the *Fullwood* court permitted the second action to proceed because the husband's claim for absolute divorce based on the statutory separation period had not accrued in time for him to assert it in his wife's prior suit. *Id.* at 423, 154 S.E.2d at 475. Although the *Fullwood* result would appear to be the same after *Gardner*, see note 45 and accompanying text *infra*, the vitality of *Beeson* is less certain. The *Gardner* court's superimposition of the compulsory counterclaim provision on the statute that allows counterclaims for alimony in divorce suits (and counterclaims for divorce in alimony suits), see note 17 *supra*, appears to change the *Beeson* result. This conclusion is complicated, however, because the statute specifically allows the alimony claim to be filed either separately or as a cross action, while it states merely that cross actions for divorce "shall be allowable" in alimony suits. Since the *Gardner* opinion, which dealt with the latter situation, concentrated on the entire statute in holding the former filing option mandatory, it is likely that the section allowing alimony claims to be filed separately will be held only to cover situations in which there is no previously filed divorce claim. If so, then *Beeson* is no longer controlling.

29. The requirements for abatement in the divorce context were enunciated most clearly in *Cameron v. Cameron*, 235 N.C. 82, 68 S.E.2d 796 (1952). The court held that the ordinary test for determining whether an action should be abated is not applicable when "the parties to the prior action appear in the subsequent action in reverse order, and the plaintiff in the second action, as defendant in the first, has failed to plead a counterclaim or cross demand for the same cause of action." *Id.* at 85, 68 S.E.2d at 798. In such a case, the law devises a special test. *Id.* at 86, 68

test, based on principles of *res judicata*,³⁰ is so restrictive that the second action has rarely been dismissed.³¹

The *Gardner* decision has done away with the confusing procedures and wasteful results dictated by prior case law. The abatement approach, with its emphasis on whether *res judicata* would necessarily bar a subsequent claim, is now replaced by a simpler approach that focuses on the common factual bases of the related claims. Because application of the abatement doctrine is so laden with rules and exceptions that related claims are often permitted to proceed independently,³² the new approach is an important step in the direction of

S.E.2d at 799. The fact situation the *Cameron* court was referring to was and is obviously a pattern common to divorce actions.

30. The term "res judicata" is used to encompass the doctrines of bar, merger and collateral estoppel. See F. JAMES, CIVIL PROCEDURE 532 (2d ed. 1977).

31. The adverse effects of the special application of the abatement theory in the divorce context were illustrated in *Cook v. Cook*, 159 N.C. 46, 74 S.E. 639 (1912), in which a husband filed an action for divorce based on a 10 year separation period and his wife subsequently initiated a separate suit for a limited divorce on the ground of abandonment. A divided court allowed the wife's action to proceed, reasoning that to force her to bring her claim in the prior action would be particularly inappropriate in a marital context "where a party may not desire to presently seek affirmative relief, in the hope that a different course would more likely lead to a reconciliation." *Id.* at 50, 74 S.E. at 641. Further, since the substantive law at the time allowed an absolute divorce based on the statutory separation period irrespective of fault, the court concluded that the issues to be determined in the husband's action would not be the same as those in the wife's abandonment claim and thus doctrines of former adjudication would pose no bar to her action. The dissent recognized the need to adjudicate divorce actions in one proceeding and the practical problems inherent in the majority's result. It pointed out the obvious: had the husband been granted an absolute divorce prior to the entry of judgment in the wife's action, her claim for divorce, absolute or limited and regardless of the grounds, would have necessarily been barred. *Id.* at 52, 74 S.E. at 642 (Clark, C.J., dissenting).

In *McLeod v. McLeod*, 1 N.C. App. 396, 161 S.E.2d 635 (1968), the court held that an alimony without divorce action would not abate a subsequently filed claim for absolute divorce because a judgment on the merits in the first action would not bar the second. *Id.* at 398, 161 S.E.2d at 636. While technically this was true, *McLeod* demonstrated the ineffectiveness of the *Cameron v. Cameron*, 235 N.C. 82, 68 S.E.2d 769 (1952), test in protecting against needless litigation time and expense. See note 29 *supra*.

The other prong of the *Cameron* text—that the plaintiff in the second action be able to obtain the same relief in the first—coupled with peculiar laws governing alimony, also produced unnecessary litigation. Until 1967, a dependent spouse could not secure alimony and an absolute divorce at the same time. 2 R. LEE, *supra* note 4, § 135. Her only means of preserving alimony was by first initiating an action for alimony and later an action for divorce. A prior alimony decree would survive a divorce judgment granted either spouse. *Id.* § 135, at 51-55 (1963). Because before 1955 a wife could only file an alimony action in a separate proceeding, it followed that, under the abatement test, a wife's action for alimony without divorce could proceed independently of her husband's prior divorce suit. *Reece v. Reece*, 231 N.C. 321, 322-23, 56 S.E.2d 641, 642-43 (1949).

32. For example, the doctrine of collateral estoppel operates to make conclusive a prior determination of an issue of fact in a subsequent proceeding if the issue was actually litigated in the first action. Some courts require the common issue to have been an essential element or ultimate fact in both actions, *King v. Chase*, 15 N.H. 9 (1844); others apply the doctrine to an evidentiary fact in the first or second if certain factors exist, *The Evergreens v. Nunan*, 141 F.2d 927 (2d Cir. 1944).

effective use of court time. Furthermore, by creating a narrow exception when the second claim is filed after judgment in the first, the court demonstrated it will not allow procedural policies to interfere with the substantive policy of maintaining the marital bonds.³³

The *Gardner* opinion, however, leaves room for disregard of these procedural aims in allowing judges an apparently unrestricted option to stay, as well as dismiss, a separately filed claim that is a compulsory counterclaim in a prior pending suit. Under the prior procedure, the abatement doctrine was applied to require dismissal of the second action as a matter of law.³⁴ By appearing to permit in all circumstances the alternative of a stay, the court is sanctioning a second suit after judgment in the first, which would defeat the efficiency goals of the compulsory counterclaim rule.³⁵ The emphasis throughout *Gardner* on avoiding wasteful litigation and circuity of action, however, suggests that it may be necessary to confine those situations in which a stay might be appropriate.

The *Gardner* court, unfortunately, failed to provide any standards. In giving courts the options of stay and dismissal, it cited various federal court decisions, some of which have stayed and others of which have dismissed the compulsory counterclaim filed as a separate suit.³⁶ These courts, in general, also provide little guidance concerning when a stay might be appropriate.

One justification for granting a stay of the second action could be to protect the second plaintiff's choice of forum. Although courts rarely

33. For a discussion of treatment of this issue by other state courts, see note 21 *supra*. In certain statutory areas, the federal courts have found substantive policies to outweigh the procedural policies behind rule 13(a). See 6 C. WRIGHT & A. MILLER, *supra* note 19, § 1412. For example, in *Local 11, Int'l Bd. of Elec. Workers v. G.P. Thompson Elec., Inc.*, 363 F.2d 181 (9th Cir. 1966), the court refused to require grievances pending in arbitration to be pleaded as compulsory counterclaims in actions brought on grievances outside the scope of arbitration because to do so would be contrary to a national labor policy that encourages arbitration. *Id.* at 185.

34. *W.S. Boyd Sales Co. v. Seymour*, 255 N.C. 714, 122 S.E.2d 605 (1961).

35. A total eclipse of the rule's goals would be avoided because a stay would still eliminate the races to judgment that existed in the past. Moreover, collateral estoppel will preclude litigation in the second suit of issues actually decided in the first. Furthermore, *res judicata* could, it seems, operate to foreclose many of these second suits since it precludes a suit between the same parties on a claim that has been previously litigated between them. Yet, because the compulsory counterclaim and *res judicata* doctrines serve many of the same policies, it may be inconsistent to allow a compulsory counterclaim to be stayed and then to say later that *res judicata* requires it to be barred.

36. 294 N.C. at 177, 240 S.E.2d at 403.

give forum protection much consideration,³⁷ federal courts have in general been more sympathetic to the idea when it appears that forum shopping alone motivated the original plaintiff's forum choice.³⁸ Indeed, forum protection may often justify a stay in a divorce controversy because the substantive law governing divorce claims enables one spouse easily to thwart the other's choice of forum. A typical scenario follows: The wife's claim for alimony without divorce or for limited divorce on the ground of abandonment arises as soon as the husband leaves home; the husband, however, must wait until the one-year separation period expires before his absolute divorce claim accrues. By a timely filing of her claims so that her spouse's claim accrues prior to his deadline for answering, the wife can force her husband's compulsory counterclaim³⁹ and defeat his forum choice. The husband, to protect his forum preference, must ask for transfer of venue in his wife's action and/or, according to *Gardner*, file his claim independently and petition for a stay. A stay pending the outcome of the wife's action may therefore be justified to protect the husband's forum preference.

A stay would be particularly well justified when there is additional evidence that "forum thwarting" motivated the choice of situs in the first suit as, for example, when the wife files suit in one jurisdiction the day after she moves there from another jurisdiction in which she and her husband have lived for many years.⁴⁰ Indeed, there may be other special reasons for staying the second action. Absent undue prejudice, however, the ease with which litigants can travel between courts within the same state coupled with the advantages of consolidating litigation should be weighed heavily in determining the limits of *Gardner's* license to stay claims that are compulsory counterclaims in prior pending suits.

The application of the counterclaim rule to circumstances different from *Gardner* is uncertain. In *Gardner*, because both claims were based on the separation that occurred when the husband left home,⁴¹

37. Judicial protocol requires that when two courts of competent jurisdiction entertain related actions, the court in which the first action was brought should be given priority. *McDowell v. Blythe Bros.*, 236 N.C. 396, 72 S.E.2d 860 (1952).

38. See *Mattel, Inc. v. Louis Marx & Co.*, 353 F.2d 421, 424 n.4 (2d Cir. 1965); *Leonard F. Fellman Co. v. Smith-Corona Marchant Inc.*, 27 F.R.D. 263 (E.D. Pa. 1961).

39. The husband's counterclaim will not be forced, of course, if he avails himself of the counterclaim exception and files suit only after judgment on his wife's claim. Clearly, however, in many circumstances central issues in the second suit will be precluded by the doctrine of collateral estoppel.

40. The situation in *Gardner* was a good example of this problem of "forum thwarting." See note 10 *supra*.

41. 294 N.C. at 176, 240 S.E.2d at 403.

they were characterized as arising out of the "same transaction or occurrence" and thus deemed compulsory. However, a divorce claim based on adultery, for example, may not be held to arise out of the same factual circumstances as one based on mental cruelty.⁴² Another requirement of a compulsory counterclaim is that it be a claim "which at the time of serving the pleading, the pleader has against any opposing party."⁴³ While in *Gardner* the husband's claim for divorce arose before the time he was required to answer in his wife's suit,⁴⁴ this definition requires that when the claim arises afterwards, both actions may proceed independently.⁴⁵

The scope of the counterclaim exception created by the court for circumstances in which the second claim is filed after judgment in the first also remains uncertain. In *Gardner*, the husband's claim was for a complete divorce.⁴⁶ Had he filed it after judgment in his wife's action, the court said, the compulsory counterclaim rule would not bar its prosecution because of the policy of protecting the marital bonds.⁴⁷ If the court's reasoning is carried further, counterclaims for alimony without divorce or for any remedy less than a complete severance of the marital ties could be barred if not asserted in the first action, because requiring their assertion if available may not be held to offend the policy that led the court to limit its holding.⁴⁸ Nevertheless, a counterclaim for a limited divorce may prove sufficiently offensive to the policy favoring marriage to trigger the exception.

Finally, the employment of *Gardner's* counterclaim rule when one of the two actions is filed outside North Carolina is also unclear. It seems certain that when the North Carolina action is filed last, North Carolina courts no longer have the discretion to continue proceeding as

42. The issue of the compulsory nature of the claim may be largely academic because a number of grounds are normally stated in a divorce claim, one of which is abandonment. In fact, in *Gardner*, abandonment was one of numerous grounds, *id.* at 174, 240 S.E.2d at 401, yet the court focused solely on abandonment in holding that both claims were part of the same occurrence, *id.* at 176, 240 S.E.2d at 403.

43. N.C.R. Civ. P. 13(a), *quoted in* note 6 *supra*.

44. *See* note 9 *supra*.

45. The same result was reached in *Fullwood v. Fullwood*, 270 N.C. 421, 154 S.E.2d 473 (1967), *discussed in* note 28 *supra*, prior to the enactment of the rules of procedure. Of course, as has been pointed out, a wife could avoid this situation by a timely filing of her claim.

46. 294 N.C. at 173, 240 S.E.2d at 402.

47. *Id.* at 181, 240 S.E.2d at 406.

48. A recent statutory change, however, requires a court to ensure that all support and alimony claims, if existent, have been adjudicated before it grants an absolute divorce based on the statutory separation period. N.C. GEN. STAT. § 50-6 (Supp. 1977).

they did under the abatement doctrine,⁴⁹ but are required either to dismiss or to stay the claim.⁵⁰ What other jurisdictions will do when they entertain the second action remains to be seen. A refusal to dismiss or stay the second claim when it is a compulsory counterclaim in the North Carolina suit is arguably a violation of the Constitution's full faith and credit clause,⁵¹ which requires states to honor the public acts and judicial proceedings of other states absent a strong state policy dictating otherwise.⁵² The compulsory counterclaim rule in general has, however, met with problems in interstate actions,⁵³ with states invoking this exception and refusing to honor the rules of other states on the ground that they are protecting their own citizens.⁵⁴ Until the United States Supreme Court rules on the status of compulsory counterclaims in interstate actions, races to judgment will continue when similar actions are filed in separate states.

The *Gardner* result was a logical implementation of the policy underlying the rules of procedure of avoiding wasteful litigation and inconsistent results. The new practice that the court prescribed is a needed amendment of the old, but the court did not go far enough in effectuating the rules' aims. Instead, it left the question whether to stay or dismiss the second claim wholly to the discretion of trial judges, permitting possible frustration of the rules' intent. Many other questions, though not squarely presented in *Gardner*, are also certain to arise—questions such as the appropriate solution in interstate actions, the compulsory nature of a claim for less than a complete divorce, and the reach of the "transaction or occurrence" test. The courts must now

49. See note 27 *supra*.

50. There is nothing in *Gardner* to suggest that the compulsory counterclaim rule does not cross state lines. However, because the court did note that the substantive law governing abatement is not necessarily abrogated, 294 N.C. at 175 n.5, 240 S.E.2d at 402 n.5, it is possible that courts will continue to use the old procedure.

51. U.S. CONST. art. IV, § 1.

52. This clause "does not automatically compel a forum state to subordinate its own statutory policy to a conflicting public act of another state; rather, it is for this Court to choose in each case between the competing public policies involved." *Hughes v. Fetter*, 341 U.S. 609, 611 (1951).

53. See *Kennedy, Counterclaims Under Federal Rule 13*, 11 HOUS. L. REV. 255, 280-83 (1974).

54. Of course a foreign court in a *Gardner* situation could also contend that giving effect to North Carolina's compulsory counterclaim rule deprives its citizens of substantive rights because the substantive divorce law of North Carolina does not afford them much protection. See *Vestal, Reactive Litigation*, 47 IOWA L. REV. 11, 20-21, 24 (1961).

pick up where *Gardner* left off and resolve these issues consistent with the purpose of the compulsory counterclaim rule.

HARRIET S. SUGAR

Criminal Law—*State v. Looney*: Defendants' Need for Court-Ordered Psychiatric Evaluations of Witnesses' Credibility Outweighed by Witnesses' Right to Privacy

A growing number of states have held that in criminal trials judges have the discretion to order a psychiatric examination of a key prosecution witness when there is evidence the examination may disclose an abnormal mental condition bearing on credibility.¹ In a case of first impression, however, the North Carolina Supreme Court in *State v. Looney*² refused to join this growing body of jurisdictions recognizing such discretion in the trial court. Without expressly deciding whether the trial judge lacked the inherent authority to order a witness to submit to a psychiatric exam, the supreme court strongly suggested that under present North Carolina criminal procedure the trial judge should not order such an examination of a witness in the absence of specific statutory guidelines provided by the North Carolina legislature.³ The *Looney* court then concluded that, even if the trial court could properly have granted defendant's motion for a court-ordered exam, denial of the motion under the circumstances of the *Looney* case was not an abuse of discretion.⁴

On December 30, 1974, the mutilated body of defendant Looney's wife was discovered in the Looney home.⁵ Subsequent investigation of

1. For a recent case evidencing the trend toward sanctioning court-ordered psychiatric exams, see *Forbes v. State*, 559 S.W.2d 318, 321 (Tenn. 1977). For a collection of cases on the subject, see Annot., 18 A.L.R.3d 1433 (1968). Federal courts trying criminal cases also have the authority to order a government witness to submit to a psychiatric examination in order to probe the witness' credibility. See, e.g., *United States v. Benn*, 476 F.2d 1127, 1130 (D.C. Cir. 1973).

2. 294 N.C. 1, 240 S.E.2d 612 (1978).

3. *Id.* at 28, 240 S.E.2d at 627.

4. *Id.*

5. Record at 22. The police officials involved in the case and the pathologist who performed an autopsy on the body later testified under cross-examination that the case was the most, or one of the most, brutal homicides they had encountered. *Id.* at 22, 25, 31, 34. The decedent received several blows and stabs that independently would have been fatal. *Id.* at 34. The body showed evidence of more than 60 severe wounds. *Id.* at 32. In support of his motion for a psychiatric

the murder led to the arrest of Richard Stanley Matthews who, in a signed confession, stated that he killed the decedent after she rejected his sexual advance.⁶ Matthews was examined at a state hospital and was found sane and competent to stand trial.⁷ In exchange for a reduction in the charge against him,⁸ Matthews agreed to testify for the State, alleging that defendant, Jasper David Looney, hired him to do the killing.⁹ Defendant repeatedly denied his guilt, claiming that he had been happily married and that he had never met Matthews.¹⁰ Nevertheless, Looney was convicted of conspiring with Matthews to commit murder and of being an accessory before the fact.¹¹

exam defendant Looney argued that the brutality of the murder suggested it was performed by a psychopathic killer. *Id.* at 11; *see* note 12 *infra*.

6. Matthews' statement described in detail how he accomplished the slaying with a hammer, a pair of scissors, and two knives. Record at 8-9. In his motion for a court-ordered exam defendant pointed to Matthews' statement, "I . . . started to hit her in the head . . . and the more blood I seen the more blood I wanted to see," *id.* at 9, as further evidence that Matthews had a psychopathic personality that would affect the accuracy and veracity of his testimony, *id.* at 11.

7. 294 N.C. at 4, 240 S.E.2d at 614. Matthews was examined at Dorothea Dix Hospital in Raleigh, North Carolina, which provides care and treatment for the insane. *Id.* at 17, 240 S.E.2d at 621. During the psychiatric exam Matthews denied having killed Mrs. Looney. Record at 16. The examining staff psychiatrist stated in his report to the court:

He was given the MMPI [Minnesota Multiphasic Personality Inventory] . . . and the results . . . strongly suggested that the patient has a need to see himself as an extremely virtuous individual. He presented himself in an unrealistically favorable light concerning self-control, moral values, and freedom from everyday human frailties. Individuals with his results do at times show maladaptive hyperactivity, irritability, anger, and an inability to postpone gratification. . . . Psychiatric examination of the defendant, does not reveal the presence of a psychiatric disorder which would render the patient unable to know right from wrong or unable to know the nature and consequences of his actions. . . . PSYCHIATRIC DIAGNOSIS: Without Psychosis, Not Insane.

Id. at 15-16.

The psychiatrist later testified for defendant Looney as follows:

The results of the tests and interviews [with Matthews] indicated the possibility of a psychopathic personality and a maniac state which is the opposite of depression.

. . . As a result of my psychological testing and interviews with Richard Stanley Matthews I found evidence indicating that he had personality characteristic of a psychopath. . . . The characteristics of a psychopathic personality reveal one that is notoriously disloyal, unable to form trusting relationships, dishonest, feels no guilt over pain and suffering they inflict on others, unable to postpone gratification and will do anything they can to get their way.

. . . My opinion is that that conduct [suggested by State's exhibits of the body's condition] is highly suggestive but not necessarily diagnostic of a psychopath.

Id. at 123-24.

8. Record at 48.

9. *Id.* Thus, in a one-month period witness Matthews took three positions with respect to his guilt: first, that he had killed the decedent acting alone (statement to police); second, that he was innocent (statement to psychiatrist); and finally, that he had performed a "contract killing" for defendant Looney (plea-bargaining position). Matthews thereafter pleaded guilty to second degree murder and received a life sentence. 294 N.C. at 3-4, 240 S.E.2d at 613.

10. 294 N.C. at 8-9, 240 S.E.2d at 616.

11. *Id.* at 3, 240 S.E.2d at 613. Looney had also been charged with murder, but that charge was later dismissed. *Id.*

Looney moved unsuccessfully on two occasions prior to trial for the court to order Matthews to submit to a psychiatric examination to determine whether Matthews had an abnormal mental condition that would affect his credibility.¹² Looney contended on appeal¹³ that the brutality of the crime,¹⁴ the findings of abnormal personality in Matthews' competency examination,¹⁵ the inconsistent positions taken by Matthews,¹⁶ and the importance of his testimony¹⁷ justified an order for a second psychiatric exam to explore the possibility that Matthews was a psychopathic liar.¹⁸ Defendant further pointed out that the earlier exam had focused on Matthews' sanity as a defendant, not on Matthews' credibility as a witness.¹⁹ Overruling this and other exceptions,²⁰ the North Carolina Supreme Court upheld both counts of

12. In his first motion Looney recited the brutality of the murder and Matthews' inconsistent positions concerning the crime and alleged that Matthews' acts were those of an independent psychopathic killer. Looney contended that it was essential to his defense to determine the complainant's psychological make-up and that a psychological exam could be helpful in arriving at the truth. Record at 11-12. The motion continued:

NOW, THEREFORE, the defendant moves that a psychiatric examination of Richard Stanley Matthews, Jr. be granted this defendant; that a Court order issue whereby he is to submit himself under proper supervision to a psychiatric examination by a psychiatrist not under the direct control of the State of North Carolina, and that a copy of that report be furnished to the defendant

Id. at 12. The motion was denied, the judge stating that he questioned whether a trial court had the authority to order such a psychiatric evaluation. *Id.* at 17. Defendant repeated his motion after learning the results of Matthews' competency/sanity examination, which had revealed personality abnormalities. See note 7 *supra*. Although defendant cited some authority for the proposition that the court could order the exam, the motion was again denied. The judge stated that defendant had not presented any substantial additional facts regarding Matthews' psychiatric make-up and noted that Matthews had already received one psychiatric examination. Record at 17-19.

13. The supreme court allowed defendant to consolidate his appeal from the conspiracy conviction to the North Carolina Court of Appeals with his appeal from the accessory conviction to the North Carolina Supreme Court. 294 N.C. at 3, 240 S.E.2d at 613.

14. See note 5 *supra*. In his testimony Matthews explained the brutality of the crime by saying defendant had requested that Matthews make it look like a maniac had done the job. 294 N.C. at 6, 240 S.E.2d at 615.

15. 294 N.C. at 16-17, 240 S.E.2d at 621; see note 7 *supra*.

16. Record at 11; see note 9 *supra*.

17. Record at 12. The North Carolina Supreme Court agreed with defendant that Matthews' testimony "was the key to the prosecution's case against the defendant." 294 N.C. at 16, 240 S.E.2d at 621. The State, however, introduced six witnesses to rebut defendant's claims that he had been happily married, including evidence that he was having an extramarital affair, and that he did not know Matthews. Record at 53-79. The State also showed that defendant was co-beneficiary of life insurance policies on his wife's life totalling \$68,000. 294 N.C. at 6-8, 240 S.E.2d at 615-16.

18. 294 N.C. at 16-17, 240 S.E.2d at 622.

19. *Id.* at 29, 240 S.E.2d at 628.

20. The supreme court rejected defendant's claim that his conspiracy conviction was a lesser included offense of his accessory before the fact conviction, noting that the reaching of an agreement was an essential element of the conspiracy offense but not of the accessory offense, and that

Looney's conviction.²¹ In its opinion the *Looney* court surveyed the decisions of other states that have held that their trial courts have the discretionary authority to order a prosecution witness to submit to a psychiatric examination.²² The supreme court concluded that these decisions underestimated the jury's ability to reach an appropriate evaluation of the credibility of a mentally disturbed witness without expert assistance,²³ and also overlooked the burden a court-ordered psychiatric exam places on the witness.²⁴ Employing a balancing-of-interests test, the court reasoned that an innocent defendant's need for a court-ordered exam was outweighed by the witness' right to privacy and by the public interest in encouraging testimony. The court strongly implied that for these reasons, North Carolina courts should not grant a motion for a court-ordered exam without specific statutory authority.²⁵ The court then concluded that, even if the court below had the discretion to order such an exam, it properly refused to do so because defendant had failed to show a "compelling necessity" for the exam.²⁶

actual commission of the related felony was essential to an accessory charge but not to a conspiracy charge. *Id.* at 10-11, 240 S.E.2d at 617-18. The court also rejected defendant's contention that because Matthews had previously been examined by a state-employed psychiatrist, it was "fundamentally unfair" for the State to deny him an opportunity to have Matthews examined by an independent psychiatrist. *Id.* at 17, 240 S.E.2d at 621 (distinguishing *State v. Butler*, 27 N.J. 560, 143 A.2d 530 (1958)).

21. *Id.* at 29, 240 S.E.2d at 628.

22. *Id.* at 18-28, 240 S.E.2d at 622-27.

23. *Id.* at 18, 28, 240 S.E.2d at 622, 627.

24. *Id.* at 23, 28, 240 S.E.2d at 624, 627.

25. *Id.* at 28, 240 S.E.2d at 627. The supreme court did not expressly hold that to order a witness to submit to a psychiatric exam would be beyond the judicial power. The court did, however, clearly express its opinion that the need for the exam was outweighed by the burden it placed on the witness and on the prosecutorial function, and implied that to allow the granting of Looney's motion would be a "drastic change" in North Carolina criminal procedure. *Id.* That the court went on to conclude that even if the trial court had the power, its denial of the motion was not an abuse of discretion, suggests that the supreme court only reached a firm conclusion on the propriety of ordering an exam, not on the power of the court to order the exam.

26. *Id.* at 28-29, 240 S.E.2d at 628. The supreme court apparently raised on its own motion the general issue whether a court-ordered exam would ever be proper in North Carolina. The State conceded in its brief that the court below had discretionary authority to order the exam based on inherent judicial power and on implications of present statutory powers. Brief for Appellee at 9 (citing N.C.R. Civ. P. 35, 45(b); *State v. Woods*, 293 N.C. 58, 235 S.E.2d 47 (1977)). The State's primary argument was that there had been no abuse of discretion in denying defendant's motions. Brief for Appellee at 13. The court agreed. 294 N.C. at 28, 240 S.E.2d at 627.

In a concurring opinion Justice Exum agreed with the majority that there had been no abuse of discretion, but stated that he would hold that North Carolina trial courts should grant a similar motion if the defendant makes a "strong showing" that a psychiatric examination would probably reveal a mental condition raising serious question about the witness' credibility. *Id.* at 29, 240 S.E.2d at 628 (concurring opinion).

In the criminal law context a psychiatric examination, and the expert opinion drawn from its results, may be used for four distinct purposes. First, examination of a criminal defendant is often required to aid the trial judge in determining whether the accused is competent to stand trial.²⁷ Second, there may be an examination of the defendant by one or more psychiatrists who later give testimony to aid the jury in deciding whether the accused was sufficiently sane to be held legally responsible for his alleged criminal acts.²⁸ Third, and less frequently, psychiatric examination of a witness in a criminal trial may be useful to the judge in determining whether the person examined is a competent witness²⁹ or, fourth, useful to the jury in weighing witness credibility.³⁰

The *Looney* decision runs counter to the trend in other states in which there has been increasing acceptance of the fourth use of court-ordered exams mentioned above—to aid the jury in assessing witness credibility.³¹ As noted by the *Looney* court,³² the impetus for finding

27. The legal standards for making judgments about abnormalities in a defendant's or a witness' mental condition vary among the states. In general, when presented with an issue of competency to stand trial, the trial judge must determine whether the accused has sufficient understanding of the nature and consequences of the charges and proceedings being brought against him and whether he has the ability to cooperate with his lawyer in preparing his defense. See, e.g., *State v. Willard*, 292 N.C. 567, 575, 234 S.E.2d 587, 592 (1977).

28. Although various tests have been employed, in most states the accused will be held legally responsible for his acts or will be treated as criminally insane depending on whether, in the jury's opinion, given his mental condition at the time of his alleged criminal conduct, the accused had the ability to know what he was doing and whether it was right or wrong. See generally *Durham v. United States*, 214 F.2d 862 (D.C. Cir. 1954). The North Carolina rule was recently stated as follows: "[T]he test of insanity as a defense to a criminal charge is the capacity to distinguish between right and wrong at the time of and in respect to the matter under investigation." *State v. Cooper*, 286 N.C. 549, 569, 213 S.E.2d 305, 318 (1974).

29. The emerging modern standard for witness competency is whether the prospective witness has such mental capacity to observe, recollect, and relate events that his testimony will aid the jury in finding facts. See generally MCCORMICK'S HANDBOOK ON THE LAW OF EVIDENCE § 62 (2d ed. E. Cleary 1972) [hereinafter cited as MCCORMICK]. The rule in North Carolina is whether the proposed witness has the capacity "to understand and to relate under the obligation of an oath facts which will assist the jury in determining the truth with respect to the ultimate facts which it will be called upon to decide." *State v. Cooke*, 278 N.C. 288, 290, 179 S.E.2d 365, 367 (1971).

30. See generally MCCORMICK, *supra* note 29, § 45. The cases that have accepted this fourth use of psychiatric testimony are cited in note 37 *infra*. The issue whether the court below should have granted defendant's motion for a court-ordered psychiatric examination of Matthews involves the last of these four uses of psychiatric testimony. It is relevant to the weight a trial judge should give any previous examinations of the witness that in the first three situations a person's mental condition is assessed for the purpose of making an absolute legal classification, that is, a person either is or is not competent to stand trial, criminally insane, or competent as a witness. But in the fourth situation, a psychiatrist's testimony concerning the witness' mental condition is intended to be helpful to the jury in deciding what weight to give a witness' testimony, not whether a witness is absolutely incredible or completely credible. See note 67 *infra*.

31. See note 1 *supra*.

32. 294 N.C. at 18, 240 S.E.2d at 622.

trial court discretion to order a prosecution witness to submit to psychiatric evaluation was provided by Dean Wigmore.³³ Influenced by alleged advances in psychiatry, and more specifically the use of psychiatric examination in identifying rape complainants suffering from delusion,³⁴ Wigmore proposed that a psychiatric examination of the complainant be *required* in sex-offense cases.³⁵

Although no state has adopted a mandatory exam rule,³⁶ most states confronted with the issue have upheld the trial court's discretion to order such an exam.³⁷ A survey of jurisdictions employing a discretionary rule reveals differing judicial treatment of three primary issues arising from application of the rule. First, certain courts strictly limit the rule to sex-offense cases,³⁸ while other courts employ a rule of general applicability, permitting the trial judge to order witness-credibility

33. 3A J. WIGMORE, EVIDENCE § 924a (J. Chadbourn rev. 1970).

34. Professor Wigmore cited five medical authorities to support his conclusion that many innocent men were sentenced to prison because without the results of psychiatric examinations of the complaining witnesses they were unable to attack the plausibility of the complainants' testimony. *See id.* at 740-46.

35. Since Wigmore's proposal, substantial progress has been made in psychiatric diagnosis of abnormal personalities and in the understanding of the extent to which mental disorders may affect credibility. *See generally* Conrad, *Psychiatric Lie Detection*, 21 F.R.D. 199, 214-15 (1957); Juviler, *Psychiatric Opinions as to Credibility of Witnesses: A Suggested Approach*, 48 CALIF. L. REV. 648 (1960).

36. *See, e.g.*, State v. Wahrlich, 105 Ariz. 102, 112, 459 P.2d 727, 730 (1969); State v. Maestas, 190 Neb. 312, 313, 207 N.W.2d 699, 700 (1973). Several states expressly rejected Wigmore's proposal. *See, e.g.*, State v. Walgraeve, 243 Or. 328, 412 P.2d 23 (1966); State v. Klueber, 81 S.D. 223, 132 N.W.2d 847 (1965).

37. *See, e.g.*, State v. Wahrlich, 105 Ariz. 102, 459 P.2d 727 (1969); Ballard v. Superior Court, 64 Cal. 2d 159, 410 P.2d 838, 49 Cal. Rptr. 302 (1966); Taborsky v. State, 142 Conn. 619, 116 A.2d 433 (1955); McDonald v. State, 307 A.2d 796 (Del. 1973); Dinkins v. State, 244 So. 2d 148 (Fla. Ct. App. 1971); State v. Kahinu, 53 Haw. 536, 498 P.2d 635 (1972), *cert. denied*, 409 U.S. 1126 (1973); People v. Glover, 49 Ill. 2d 78, 273 N.E.2d 367 (1971); Easterday v. State, 254 Ind. 13, 256 N.E.2d 901 (1970); State v. Oswald, 306 S.W.2d 559 (Mo. 1957) (by implication); State v. Maestas, 190 Neb. 312, 207 N.W.2d 699 (1973); State v. Butler, 27 N.J. 560, 143 A.2d 530 (1958); State v. Clasey, 252 Or. 22, 446 P.2d 116 (1968); State v. Klueber, 81 S.D. 223, 132 N.W.2d 847 (1965); Forbes v. State, 559 S.W.2d 318 (Tenn. 1977); State v. Miller, 35 Wis. 2d 454, 151 N.W.2d 157 (1967). For a discussion of the early cases cited above, see Note, *Criminal Law—Psychiatric Examination of Prosecutrix in Rape Case*, 45 N.C.L. REV. 234 (1966).

A mandatory exam rule in sex-offense cases prevailed briefly in Indiana. *Burton v. State*, 232 Ind. 246, 111 N.E.2d 892 (1953). The mandatory aspect of that decision was soon overruled. *Wedmore v. State*, 237 Ind. 212, 143 N.E.2d 649 (1957). Massachusetts has a statute granting the trial judge discretion to order a psychiatric examination of a witness, which provides: "In order to determine the mental condition of any party or witness before any court of the commonwealth, the presiding judge may, in his discretion, request the department to assign a qualified physician, who, if assigned shall make such examinations as the judge may deem necessary." MASS. ANN. LAWS ch. 123, § 19 (Michie/Law. Co-op 1972).

38. *See, e.g.*, Ballard v. Superior Court, 64 Cal. 2d 159, 172, 410 P.2d 838, 846, 49 Cal. Rptr. 302, 310-11 (1966). The *Looney* court found no significant distinction between sex-offense cases and non-sex-offense cases. 294 N.C. at 26, 240 S.E.2d at 626. This conclusion allowed the court to point to the states that restricted the rule to sex-offense cases and conclude that they had made an

examinations in any criminal case.³⁹ Second, the various courts disagree, at least semantically, on the standard to be applied by the trial court when deciding whether the evidence set forth by the defendant justifies an examination. "Compelling reason" is a popular guide,⁴⁰ but other opinions use "substantial showing of need and justification,"⁴¹ "most compelling of circumstances where it is necessary to insure a just and orderly disposition of the cause,"⁴² or "strong showing."⁴³ Third, courts would react differently to the possibility of a witness refusing to submit to the exam. There is general agreement that an uncooperative patient cannot be satisfactorily examined by a psychiatrist,⁴⁴ and, therefore, a contempt citation is not considered to be a viable enforcement mechanism.⁴⁵ Some courts propose that the witness' submission to the exam be made a precondition to accepting the witness' testimony.⁴⁶ Others suggest allowing the defense to comment on the witness' refusal,⁴⁷ and one commentator advocates a stay or dismissal of the proceedings in the event a witness refuses to submit to the court-ordered psychiatric examination.⁴⁸

The *Looney* court's apparent conclusion that a motion for a court-ordered exam should never be granted was grounded, in part, on the argument that "[i]t is for the jury to determine in the particular case whether the particular witness is or is not telling the truth."⁴⁹ But court-ordered psychiatric exams of witnesses should not be rejected on

arbitrary exception to the general rule against court-ordered psychiatric exams. *Id.* at 18, 26, 240 S.E.2d at 622, 626.

39. *See, e.g.*, *State v. Wahrlich*, 105 Ariz. 102, 106, 459 P.2d 727, 731 (1969) (kidnapping); *State v. Butler*, 27 N.J. 560, 605, 143 A.2d 530, 556 (1958) (homicide).

40. *See, e.g.*, *McDonald v. State*, 307 A.2d 796, 798 (Del. 1973); *State v. Clasey*, 252 Or. 22, 24, 446 P.2d 116, 117 (1968). *But see* *People v. Russel*, 69 Cal. 2d 187, 198, 443 P.2d 794, 802, 70 Cal. Rptr. 210, 218 (1975) (court suggested that trial court should rule liberally in favor of defendant and reversed as abuse of discretion trial court's denial of defendant's motion for court-ordered exam).

41. *See, e.g.*, *State v. Butler*, 27 N.J. 560, 605, 143 A.2d 530, 556 (1958).

42. *See, e.g.*, *Dinkins v. State*, 244 So. 2d 148, 150 (Fla. Ct. App. 1971); *Forbes v. State*, 559 S.W.2d 318, 321 (Tenn. 1977).

43. 294 N.C. at 29, 240 S.E.2d at 628 (Exum, J., concurring). The *Looney* majority used the phrase "compelling necessity" in ruling that the court below had not abused its discretion in denying *Looney's* motion. *Id.*

44. *See* M. GUTTMACHER & H. WEIHOFEN, *PSYCHIATRY AND THE LAW* 286-87 (1952).

45. *See, e.g.*, *Ballard v. Superior Court*, 64 Cal. 2d 159, 177, 410 P.2d 838, 849, 49 Cal. Rptr. 302, 313 (1966).

46. *See, e.g.*, *State v. Miller*, 35 Wis. 2d 454, 471-72, 151 N.W.2d 157, 165 (1967).

47. *See, e.g.*, *Ballard v. Superior Court*, 64 Cal. 2d 159, 177, 410 P.2d 838, 849, 49 Cal. Rptr. 302, 313 (1966).

48. *See* Comment, *Psychiatric Evaluation of the Mentally Abnormal Witness*, 59 YALE L.J. 1324, 1340-41 (1950).

49. 294 N.C. at 27, 240 S.E.2d at 627.

the ground that because credibility is ultimately a matter for the jury, allowing expert testimony about the witness' mental condition as it bears on credibility would invade the province of the jury.⁵⁰ By analogy to the issue of a defendant's sanity, also a jury question, courts have recognized that psychiatrists may lend their special expertise to aid the jury in assessing a person's mental condition.⁵¹ States that sanction court-ordered examinations of witnesses to aid in evaluating credibility are concerned that witnesses with certain mental abnormalities may fabricate or fantasize so convincingly, and with such internal consistency, that without expert psychiatric testimony the jury may be unable to properly assess such a witness' credibility.⁵² Assuming *arguendo* that such convincing perjurers exist and that psychiatric examination can lead to detection of mental conditions that result in unusually credible perjury, fairness to the accused would seem to require permitting a court-ordered examination of the witness in cases in which the witness' testimony is uncorroborated and in which some evidence is produced tending to show that the witness is mentally abnormal. The *Looney* court, however, revealed more confidence in the jury's credibility-assessing acuity than have advocates of court-ordered exams.⁵³

50. The North Carolina Supreme Court recently stated:

We conclude, therefore, that in determining whether expert medical opinion is to be admitted into evidence the inquiry should be not whether it invades the province of the jury, but whether the opinion expressed is really one based on the special expertise of the expert, that is, whether the witness because of his expertise is in a better position to have an opinion on the subject than is the trier of fact.

State v. Wilkerson, 295 N.C. 559, 568-69, 247 S.E.2d 905, 911 (1978). See generally McCORMICK, *supra* note 29, § 13.

51. See, e.g., State v. Potter, 285 N.C. 238, 204 S.E.2d 649 (1974); State v. DeGregory, 285 N.C. 122, 203 S.E.2d 794 (1974).

52. According to one commentator:

"The witness who is an unknown paranoid schizophrenic often sounds very convincing. Judges and jurors are likely to accept this testimony without the slightest question. A person suffering from such a mental state may have an obvious psychotic paranoid delusion about one area of his thinking and not about another unrelated area; therefore, if the testimony does not impinge on the area of this particular paranoid delusion, this witness' testimony would make good sense and would not be obvious to the casual observer. For example, if a witness has a paranoid delusion toward men, she may give convincing testimony about a defective stairwell which causes injury to a child. The psychiatrist, however, is aware that the delusional system in a paranoid schizophrenic is not specifically limited to certain very narrow confines; rather, it may reflect serious disturbed thinking and spurious reasoning in all areas of the patient's thinking. The qualified psychiatrist would be familiar with the dynamics of such a mental state."

Mack, *Forensic Psychiatry and the Witness: A Survey*, 7 CLEV.-MAR. L. REV. 302, 306 (1958) (quoting Dr. Carolyn H. Montier of the Cleveland Psychiatric Institute). See also M. GUTTMACHER & H. WEIHOFFEN, *supra* note 44; Davidson, *Testimonial Capacity*, 39 B.U.L. REV. 172, 179 (1959); Karpman, *Lying*, 40 J. CRIM. L. & CRIMINOLOGY 135 (1949).

53. 294 N.C. at 18, 28, 240 S.E.2d at 622, 627.

In further support of its conclusion concerning the inappropriateness of court-ordered exams, the *Looney* court also stressed that North Carolina allows an unrestricted attack on witness credibility during cross-examination and collaterally.⁵⁴ In some states creation of a rule allowing expert testimony based on a court-ordered psychiatric examination would be an exception to a general rule against collateral attacks on a witness' mental condition.⁵⁵ In North Carolina properly obtained evidence of a witness' psychiatric abnormalities is always admissible.⁵⁶ Thus, in weighing the *need* for a court to order a witness to submit to a psychiatric credibility exam, because of its estimate of the jury's capabilities and the broad availability of impeachment tools, the North Carolina court found less reason for a court-ordered exam than have many states.

The *Looney* court also concluded there had been insufficient concern in other jurisdictions over the *burden* a court-ordered exam would place on the witness and on the prosecutorial function.⁵⁷ The court's belief that a witness ordered to submit to psychiatric evaluation would probably suffer humiliation, damage to his or her career, and a major invasion of the right to privacy, and that this would have a chilling effect on prospective witnesses' willingness to testify, was the basis of its conclusion that this burden outweighed the need for such a court-ordered exam.⁵⁸ The court did not compare this burden with other burdensome procedures that state law already imposes on prospective witnesses: subpoenas, sequestration, competency hearings, and cross-examination.⁵⁹ Moreover, the court's concern for possible humiliation of the witness appears inconsistent with North Carolina cases refusing

54. *Id.* at 19, 27, 240 S.E.2d at 623, 626. The court's opinion would seem to leave open the possibility that, in the event the defendant could arrange for the witness to be examined without obtaining a court order, a psychiatrist could testify to the results. *See, e.g.,* State v. Armstrong, 232 N.C. 727, 62 S.E.2d 50 (1950); Moyle v. Hopkins, 222 N.C. 33, 21 S.E.2d 826 (1942); State v. Wright, 29 N.C. App. 752, 225 S.E.2d 645 (1976). This, in effect, happened in *Looney*, since defendant used the testimony of the psychiatrist who conducted the examination of Matthews at Matthews' request in connection with his own trial. 294 N.C. at 4, 240 S.E.2d at 614.

55. *See* McCORMICK, *supra* note 29, § 45, at 94 n.19; Ballard v. Superior Court, 64 Cal. 2d 159, 173, 410 P.2d 838, 847, 49 Cal. Rptr. 302, 311 (1966).

56. 294 N.C. at 19, 240 S.E.2d at 623. *See also id.* at 6, 240 S.E.2d at 620 (citing 2 STANSBURY'S NORTH CAROLINA EVIDENCE §§ 38, 42, 44 (H. Brandis rev. 1973)).

57. *Id.* at 26-27, 240 S.E.2d at 626. The court stated that requiring a witness to submit to a psychiatric examination "is a drastic invasion of the witness's own right to privacy. To be ordered by a court to submit to such an examination is, in itself humiliating and potentially damaging to the reputation and career of the witness." *Id.* at 27, 240 S.E.2d at 626.

58. *Id.* at 28, 240 S.E.2d at 627.

59. *E.g.,* State v. Woods, 293 N.C. 58, 235 S.E.2d 47 (1977) (competency); State v. Taylor, 280 N.C. 273, 185 S.E.2d 677 (1972) (sequestration); *In re* Pierce, 163 N.C. 247, 79 S.E. 507 (1913) (subpoena). In civil actions N.C.R. Civ. P. 35 empowers the trial judge to order a party to submit

to limit the scope of character impeachment.⁶⁰ Nor is the court's concern for the witness' privacy and career consistent with a case such as *Looney* in which the witness is an admitted coparticipant serving a life prison sentence at the time request for an examination is made.⁶¹ The court's description of the burden placed on the witness seems rather to assume that the witness is always an innocent bystander or victim. In the plea-bargaining context, however, the witness often agrees, as in *Looney*, to subject his credibility to the jury's scrutiny under cross-examination in exchange for a reduction in the charge against him. When there is a *quid pro quo* of this nature, the burden of a witness credibility exam is clearly more fairly imposed.⁶²

Because it stopped short of laying down an absolute rule against court-ordered psychological exams, the *Looney* opinion proceeded to analyze whether the denial of defendant's motion constituted an abuse of discretion. The court noted that Matthews had previously been examined in connection with his own trial by a psychiatrist who concluded that he was competent to stand trial and not insane at the time he allegedly murdered Looney's wife.⁶³ The trial judge who denied Looney's second motion that Matthews be examined again for the purpose of assessing his mental condition as it might bear on credibility, and the supreme court in reviewing that denial, seemed to take the position that "one exam is enough."⁶⁴ Logically, there are serious

to a psychiatric exam if good cause for the exam is shown. *Cf. Williams v. Williams*, 29 N.C. App. 509, 224 S.E.2d 656, cert. denied, 290 N.C. 667, 228 S.E.2d 458 (1976) (child custody proceeding; husband, wife, and child ordered to submit to psychiatric exam).

60. For example, North Carolina allows an unrestricted attack using the witness' prior convictions. *Ingle v. Roy Stone Transfer Corp.*, 271 N.C. 276, 156 S.E.2d 265 (1967) (traffic violation). Other states have concluded that the value of such an unrestricted attack on the witness' credibility is outweighed by the burden placed on the witness. *See McCORMICK, supra* note 29, § 43.

61. Matthews was serving a life sentence at Central Prison in Raleigh, North Carolina, at the time of the *Looney* trial. Brief for Appellee at 14.

62. The court apparently believed the only function of allowing the judge to consider a motion for a court-ordered exam to be a means to compel the witness to submit to an exam against his will. The court framed the issue presented by defendant's appeal as whether the court should "hold that a trial court in this state may require a witness, against his will, to subject himself to a psychiatric examination." 294 N.C. at 28, 240 S.E.2d at 627. The facts in *Looney*, however, suggest another function may be played by the court order. In a situation in which an alleged coparticipant is testifying against his alleged partner in exchange for a reduction in charges, the witness may actually be indifferent to undergoing psychiatric evaluation. In this context, the role of the court order may be to overcome the State's opposition to the examination of a willing witness. In other contexts, a witness may sensibly reject a direct request by the defense that he undergo psychiatric examination, but the same witness may respect an impartial determination by the trial judge that an exam is needed in the interests of justice.

63. *See* note 7 *supra*.

64. *See* 294 N.C. at 29, 240 S.E.2d at 628; Record at 18-19; note 12 *supra*.

problems with this conclusion. The four occasions for the use of psychiatric evaluation⁶⁵ are governed by different legal standards. Thus, a finding that a prospective witness was previously competent to stand trial is not conclusive on the question whether he has a mental abnormality bearing on credibility.⁶⁶ The examining psychiatrist in the competency to stand trial situation may conduct a more limited exploration of a person's mental condition and may measure his observation of the patient by different guidelines than if he were asked to evaluate how a person's mental condition bears on credibility.⁶⁷

Most states have found that corroborative evidence supporting the testimony of the witness whose credibility is challenged militates against finding there is sufficient reason for ordering a psychiatric evaluation of the witness' credibility.⁶⁸ The quantity of corroborative evidence in *Looney* may have justified the North Carolina Supreme Court's finding that there had been no abuse of discretion in the denial of defendant's motion.⁶⁹ But in suggesting that court-ordered exams

65. See text accompanying notes 27-30 *supra*.

66. Presumably, there are certain mental incompetents who are so incapacitated that they would be found insane, incompetent to stand trial, and not credible as a witness. But for most levels of mental defect a separate inquiry should be made, keeping in mind the legal standard to be applied. See 2 STANSBURY'S NORTH CAROLINA EVIDENCE §§ 38, 42, 44 (H. Brandis rev. 1973); Comment, *Pre-Trial Psychiatric Examination as Proposed Means for Testing the Complainant's Competency to Allege a Sex Offense*, 1957 U. ILL. L.F. 651.

67. For example, a psychiatrist examining a person who has asserted an insanity defense must focus on the person's sanity at some point in the past and will not be considering how the person's present mental condition might bear on credibility. Psychiatrists tend to analyze a patient's mental problems in terms of thresholds in determining whether and what type of treatment is called for, and may resort to a similar threshold analysis when asked to apply the different legal standards for insanity, competency, and credibility. See Pollack, *The Role of Psychiatry in the Rule of Law*, in PSYCHIATRISTS AND THE LEGAL PROCESS: DIAGNOSIS & DEBATE 11, 18-19 (R. Bonnie ed. 1977); Pollack, *Principles of Forensic Psychiatry for Psychiatric-Legal Opinion Making*, 1971 LEGAL MED. ANN. 261. Both defendant and the State recognized in their briefs the important difference in the goals and definitions of an exam to test criminal insanity and competency to stand trial, and an exam to investigate the person's mental condition as it bears on credibility. Brief for Appellant at 5; Brief for Appellee at 12. See also McCORMICK, *supra* note 29, §§ 33, 61.

68. See, e.g., *State v. Clasey*, 252 Or. 22, 24, 446 P.2d 116, 117 (1968); Brief for Appellant at 8.

69. See note 17 *supra*. In applying the "compelling necessity" standard the *Looney* court's finding of no abuse of discretion appears inconsistent with other courts' application of analogous standards. The court noted that defendant was able to adduce some strong evidence raising doubts about Matthews' credibility because of his mental condition, and therefore concluded that he failed to show a compelling necessity for the exam. 294 N.C. at 29, 240 S.E.2d at 628. Other courts, in contrast, might have required defendant's initial showing of mental abnormality as necessary to pass a threshold evidentiary test used to screen out frivolous requests. See, e.g., *State v. Kahinu*, 53 Haw. 536, 546, 498 P.2d 635, 642 (1972), *cert. denied*, 409 U.S. 1126 (1973). The *Looney* opinion therefore may require defendants to walk a tightrope of producing sufficient evidence that the witness has a mental condition bearing on credibility to justify an exam, but not so much evidence that the exam will be considered unnecessary.

can never be justified,⁷⁰ the supreme court may have undervalued the need for a psychiatric examination that can arise in special circumstances, overreacted to the burden such an exam imposes on certain witnesses, and denied North Carolina trial courts a potentially effective evidentiary tool for assessing witness credibility.⁷¹

KURT D. WINTERKORN

Federal Jurisdiction—Civil Rights—*Monell v. Department of Social Services*: The Court Compromises on Municipal Liability Under Section 1983

Section 1983 of the Civil Rights Act¹ provides a federal² cause of action for any person whose constitutional rights have been violated "under color of state law." Since the Supreme Court's expansive definition of "under color of state law" in *Monroe v. Pape*³ in 1961, the

70. For a discussion of the role of the expert psychiatric witness in the interaction of law and modern science and an earlier reluctance of the North Carolina courts to increase reliance on psychiatric opinion, see *A Survey of Statutory Changes in North Carolina in 1943*, 21 N.C.L. REV. 323, 348 (1943).

71. Justice Exum, in his concurring opinion, concluded, "Situations calling for the entry of such an order would, it seems, be rare indeed. But if called for, our judges should have the power to enter the order." 294 N.C. at 29, 240 S.E.2d at 628 (concurring opinion).

1. 42 U.S.C. § 1983 (1976) provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

2. Jurisdiction to hear § 1983 claims is conferred upon the federal courts by 28 U.S.C. § 1343(3) (1970), which provides in part:

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

3. 365 U.S. 167 (1961).

statute has been the principal tool used by the federal judiciary to protect citizens' constitutional rights from state encroachment and to provide compensation for persons injured by constitutional violations.⁴ The utility of section 1983 was, however, long impaired by the holding in *Monroe* that municipalities and other local governmental entities were not "persons" for section 1983 purposes and hence could not be sued pursuant to the statute.⁵ In *Monell v. Department of Social Services*⁶ the Court overruled *Monroe*, holding that municipalities can be sued under section 1983 when a municipal policy, ordinance, regulation, or custom inflicts constitutional injury.⁷ The Court did, however, place a significant limitation on the scope of municipal liability under section 1983 by holding that local governments cannot be held liable on a *respondeat superior* theory for the section 1983 violations of their employees.⁸ In addition, the Court intimated that a further limitation on municipal liability—in the form of a qualified immunity for municipal defendants in section 1983 actions—may be developed in the near future.⁹

Monell was initiated by several employees of the Department of Social Services and the Board of Education of the City of New York who brought a class action under section 1983 challenging, on due process grounds, the constitutionality of a mandatory pregnancy leave policy allegedly adopted by the Board and the Department.¹⁰ Plaintiffs sought declaratory and injunctive relief, as well as back pay for the period of forced leave.¹¹ As defendants, the complaint named the Department and its Commissioner, the Board and its Chancellor, and the City of New York and its Mayor.¹² The individual defendants were

4. For an extensive survey of § 1983 law, with particular emphasis on the statute's impact on state-federal relations, see *Developments in the Law—Section 1983 and Federalism*, 90 HARV. L. REV. 1133 (1977).

5. 365 U.S. at 187.

6. 436 U.S. 658 (1978).

7. *Id.* at 690.

8. *Id.* at 694.

9. *Id.* at 701.

10. *Id.* at 661. According to the employees' allegations, this policy arbitrarily required them to take unpaid leaves of absence at a certain stage of their pregnancies, regardless of their physical capability to work beyond that stage. *Id.*

11. *Id.* Plaintiffs were required to quit work approximately one month before it would have become medically necessary for them to do so. *Monell v. Department of Social Servs.*, 394 F. Supp. 853, 855 (S.D.N.Y. 1975), *aff'd*, 532 F.2d 259 (2d Cir. 1976), *rev'd*, 436 U.S. 658 (1978).

12. 436 U.S. at 661.

sued solely in their "official capacity," meaning that any monetary recovery from them was to be paid out of municipal funds.¹³

While the *Monell* case was pending in federal district court,¹⁴ the Supreme Court, in *Cleveland Board of Education v. Laflour*,¹⁵ struck down, on due process grounds, a mandatory pregnancy leave policy similar to that involved in *Monell*. The district court recognized that under *Laflour* the New York City policy in *Monell* was unconstitutional,¹⁶ but dismissed the action nonetheless, holding that any attempt to secure back pay from the City under section 1983, either by suing the Board, the Department, or the City directly, or by suing the individual defendants in their official capacity, was barred by the doctrine of municipal immunity announced in *Monroe v. Pape*.¹⁷ The district court's judgment was affirmed by the United States Court of Appeals for the Second Circuit on similar grounds.¹⁸

The Supreme Court, in a seven to two decision based entirely on the legislative history of the Civil Rights Act, reversed the judgments of the lower courts, holding that municipalities and other local governmental entities may, in some circumstances, be held liable under section 1983. In so doing, the Court rejected the interpretation of the legislative history of section 1983 that had formed the sole basis of the *Monroe* Court's holding that local governments were immune from liability under the statute.¹⁹

Section 1983 originated as section one of the Civil Rights Act of 1871,²⁰ sometimes known as the Ku Klux Klan Act.²¹ During consideration of the Act, the House rejected an amendment, offered by Senator Sherman, that would have imposed liability on towns and counties

13. For a discussion of official capacity suits, see notes 38-40 and 47-48 and accompanying text *infra*.

14. 394 F. Supp. 853 (S.D.N.Y. 1975).

15. 414 U.S. 632 (1974).

16. 394 F. Supp. 853, 855 (S.D.N.Y. 1975).

17. *Id.* The court held plaintiffs' claims for injunctive and declaratory relief moot because both the Board and the Department had abolished their mandatory pregnancy leave policies. *Id.*

18. 532 F.2d 259 (2d Cir. 1976).

19. The *Monroe* Court expressly refused to consider policy reasons for or against municipal immunity. 365 U.S. at 191.

20. Ch. 22, § 1, 17 Stat. 13.

21. The general purpose of the Act was to suppress violence in the post-Civil War South, where gangs of Klan members were allegedly terrorizing blacks and white Republicans. For a vivid description of the situation the Act was intended to remedy, see the remarks of Senator Sherman, CONG. GLOBE, 42d Cong., 1st Sess. 154-58 (1871).

for damage done to their inhabitants "by persons riotously and tumultuously assembled."²² The *Monroe* Court interpreted the House rejection of the Sherman Amendment as an indication of Congress' intent that municipalities not be held liable under any portion of the Act, including section 1983.²³ In *Monell*, the Court concluded, after a thorough reexamination of the legislative history of the Act, that *Monroe* had erred in its interpretation of legislative intent and that the 1871 Congress, despite its rejection of the Sherman Amendment, had intended that municipalities be included as "persons" within section 1983.²⁴

The key to the Court's opinion in *Monell* is the distinction drawn between municipal liability under the Sherman Amendment and that imposed by section 1983. The Sherman Amendment was a rather drastic piece of "riot act" legislation. It provided that towns and counties would be liable for all damage done to person or property by *private* persons "riotously and tumultuously assembled," even if the government had no prior knowledge of the impending riot.²⁵ According to the Court, section one of the Act (now section 1983), on the other hand, imposed liability only for the municipality's *own* constitutional violations.

Therefore the Court did not find in the debates on the Sherman Amendment a complete bar to municipal liability under section 1983.²⁶

22. *Id.* at 800. The full text of the Sherman Amendment is included in the appendix to the majority opinion in *Monell*. 436 U.S. at 702.

23. 365 U.S. at 191. According to the *Monroe* Court's interpretation, the 1871 Congress considered itself constitutionally powerless to impose § 1983 liability on towns and counties, because local governments were instrumentalities of state, not federal, law. *Id.* at 190.

24. 436 U.S. at 690.

25. According to its sponsor, the purpose of the Sherman Amendment was to compensate for the state courts' inability to cope with the Klan problem. Senator Sherman noted that, despite the prevalence of Klan violence, indictments of Klan members were rare. And even when an indictment was handed down, a jury of sympathetic peers would usually render a verdict of not guilty. Sherman felt that his amendment, by holding the town or county liable for Klan violence, would encourage the local citizenry to take action to suppress the Klan. Sherman claimed that a similar law had been enacted in England to quell the widespread social disorder following the Norman Conquest, and that several states had enacted statutes to the same effect. CONG. GLOBE, 42d Cong., 1st Sess. 760, 761 (1871) (remarks of Sen. Sherman).

26. The most prominent objection to the Sherman Amendment was that it would impose on towns and counties an obligation to protect their citizens and their property from rioters. In effect, the Sherman Amendment would have required local government entities to establish police forces to keep the peace. Several congressmen believed that since a local government was an instrumentality of state law, the federal government had no constitutional power to impose such an obligation on towns and counties. *See, e.g., id.* at 788-89 (remarks of Rep. Kerr). Justice Brennan, reasoning from established case law existing at the time of the 1871 debates, concluded that the Congressmen would not have perceived a similar constitutional problem in simply requiring local governments to abide by the Constitution in their own actions. 436 U.S. at 679-82. Furthermore,

They did find, however, in the rejection of the Sherman Amendment, a significant limitation on that liability. On the basis of the plain language of the statute and "Congress' rejection of the only form of vicarious liability presented to it,"²⁷ the Court concluded that the 1871 Congress did not intend municipalities to be vicariously liable under traditional principles of tort law for the section 1983 violations of their employees.²⁸ Instead, the Court held that a municipality can be named as a defendant in a section 1983 action only when some municipal policy, ordinance, regulation, or custom inflicts a deprivation of constitutional rights.²⁹

The Court's opinion in *Monell* concluded with a cursory discussion of the possibility that a limited form of immunity may be conferred upon municipal defendants in section 1983 actions.³⁰ Though the Court chose to "express no views on the scope of municipal immunity beyond holding that municipal bodies . . . cannot be entitled to an absolute immunity,"³¹ the possibility of a *qualified* immunity for local governments—similar to that granted to governmental officials in section 1983 actions—was implicitly left open.

Though *Monroe v. Pape* greatly expanded the scope of section 1983³² by interpreting "under color of state law" to include the misuse of power by state officials,³³ the *Monroe* Court also placed a major restriction on the utility of section 1983 with its holding that municipalities were not "persons" for section 1983 purposes and hence could not

Brennan pointed to certain passages in the debates that showed "unequivocally" that Congress intended municipalities to be held liable under § 1983. *Id.* at 683-90.

27. 436 U.S. at 693 n.57.

28. *Id.* at 694. Mr. Justice Stevens did not join this portion of the Court's opinion, because it was "merely advisory" and not necessary to resolve the issues presented by *Monell*. *Id.* at 714 (concurring opinion).

29. *Id.* at 690.

30. *Id.* at 701.

31. *Id.*

32. Prior to *Monroe*, § 1983 had been interpreted narrowly by the courts and, as a result, only a handful of § 1983 actions were successfully maintained. For a brief analysis of the statute's slow beginnings, see *Developments in the Law—Section 1983 and Federalism*, *supra* note 4, at 1156-61. The *Monroe* decision paved the way for a phenomenal increase in the use of § 1983. Though there are apparently no statistics on the exact number of § 1983 actions brought each year, one authority estimates that while approximately 300 § 1983 claims were filed in 1960, over 12,000 such claims were filed in 1977. Newman, *Suing the Lawbreakers: Proposals To Strengthen the Section 1983 Damage Remedy For Law Enforcers' Misconduct*, 87 YALE L.J. 447, 452 (1978).

33. In *Monroe*, plaintiffs sought monetary relief under § 1983 for injuries allegedly inflicted by Chicago police officers. Plaintiffs alleged that the officers broke into their home without a warrant, ransacked the house, and took one of the plaintiffs to a police station where he was interrogated for 10 hours without being placed under arrest or taken before a magistrate. 365 U.S. at 169. The defendants argued that § 1983 was inapplicable to these facts because the officers were

be sued pursuant to the statute. An attempt in *City of Kenosha v. Bruno*³⁴ to limit *Monroe* to its facts, by arguing that the immunity applied only to actions for damages and not to suits for equitable relief, was unsuccessful. *Monroe* and *Kenosha* combined to produce a doctrine of absolute municipal immunity from any action, legal or equitable, brought under section 1983.³⁵

From its inception, the municipal immunity doctrine was unpopular both with commentators, who criticized it frequently,³⁶ and with the lower federal courts, which devised several means to circumvent *Monroe*. The Supreme Court's eleventh amendment jurisprudence³⁷ provided one method of awarding injunctive relief against a municipality despite the *Monroe* immunity doctrine.³⁸ This was accomplished through the familiar fiction of "official capacity" suits. The plaintiff, seeking an injunction against some unconstitutional municipal action, would simply bring suit against the responsible individual governmental employee in his official capacity. By ordering the "official capacity" defendant to cease enforcement of the unconstitutional municipal practice, the court would reach a result tantamount to an injunction against the municipality itself. All the courts of appeals agreed that "official capacity" suits for equitable relief were cognizable under section 1983, despite their similarity to actions directly against the governmental entity.³⁹ The Supreme Court itself gave implicit recognition to the "official capacity" method of circumventing *Monroe* while ostensibly adhering to the municipal immunity doctrine.⁴⁰ Thus, well before *Monell*, injunctive relief under section 1983 could be awarded against a municipality, albeit indirectly.

acting *contrary* to state law, not pursuant to it, and hence the "under color of state law" requirement was not satisfied. *Id.* at 172. The Court rejected this argument, holding that "[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is taken 'under color of' state law.'" *Id.* at 184 (quoting Justice Stone in *United States v. Classic*, 313 U.S. 299, 326 (1941)).

34. 412 U.S. 507 (1973).

35. The municipal immunity doctrine has been the subject of extensive commentary. For an exceptionally thorough and well-documented analysis, see Levin, *The Section 1983 Municipal Immunity Doctrine*, 65 GEO. L.J. 1483 (1977).

36. *E.g.*, Kates & Kouba, *Liability of Public Entities Under Section 1983 of the Civil Rights Act*, 45 S. CAL. L. REV. 131, 134-35 (1972); Comment, *Developing Governmental Liability Under 42 U.S.C. § 1983*, 55 MINN. L. REV. 1201, 1205-07 (1971).

37. *See, e.g.*, *Ex parte Young*, 209 U.S. 123 (1908).

38. *See generally* Levin, *supra* note 35, at 1496-504.

39. *See id.* at 1501 n.67.

40. In *City of Charlotte v. Local 660, Int'l Ass'n of Firefighters*, 426 U.S. 283 (1976), a municipal workers union named the City of Charlotte, the City Council, and the individual council members in their official capacity as defendants in a suit to obtain an injunction ordering that union dues be withheld from members' paychecks. The Court held that the municipal immunity

The lower courts continued their efforts to circumvent the municipal immunity doctrine by devising monetary damage remedies for persons injured by unconstitutional municipal action. Much of this activity centered around the judicial creation of a cause of action against local governmental entities similar to that created by the Court in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*.⁴¹ In *Bivens*, the Court held that a cause of action could be implied from the fourth amendment, giving a person whose fourth amendment rights are violated by a federal officer a monetary damage remedy against the offending officer.⁴² By analogy to *Bivens*, commentators argued that a similar cause of action against local governmental entities could be implied from the fourteenth amendment.⁴³ By proceeding under a *Bivens*-type cause of action, rather than section 1983, a person injured by municipal constitutional violations could evade the restrictions imposed by the section 1983 municipal immunity doctrine and thereby obtain compensation from the municipality in the form of money damages. By the time *Monell* was decided, four federal courts of appeals had accepted the *Bivens* analogy and found a cause of action against local governmental entities implied under the fourteenth amendment.⁴⁴ Three others intimated that such an action might be maintained,⁴⁵ while one refused to find an implied cause of action.⁴⁶

doctrine barred suit against the City or the Council but that the suit could nonetheless be maintained against the individual council members in their official capacity. *Id.* at 284 n.1. In considering this decision, one commentator noted that "the Court did not pause to explain what conceivable interests could be furthered by such a ruling." Levin, *supra* note 35, at 1502.

41. 403 U.S. 388 (1971).

42. *Id.* at 397.

43. *E.g.*, Hundt, *Suing Municipalities Directly Under the Fourteenth Amendment*, 70 Nw. U.L. REV. 770 (1975); Note, *Damage Remedies Against Municipalities for Constitutional Violations*, 89 HARV. L. REV. 923 (1976). The movement toward the creation of a *Bivens*-type cause of action against municipalities was fueled by language in the majority and concurring opinions in *City of Kenosha v. Bruno*, 412 U.S. at 514, 516, that seemed to indicate that the Court would find no obstacle to such a development.

44. *Turpin v. Maillet*, 579 F.2d 152, 164 (2d Cir. 1978) (decided one day before *Monell*; holding that plaintiff, victim of officially condoned police harassment, could maintain action against city); *Owen v. City of Independence*, 560 F.2d 925, 933 (8th Cir. 1977) (public official's job terminated without due process), *vacated for reconsideration in view of Monell*, 98 S. Ct. 3118 (1978); *Hostrop v. Board of Junior College Dist. No. 515*, 523 F.2d 569, 577 (7th Cir. 1975) (employee dismissed without due process); *Hanna v. Drobnick*, 514 F.2d 393, 398 (6th Cir. 1975) (citizen's fourth amendment rights violated by city building inspectors).

45. *Stapp v. Avoyelles Parish School Bd.*, 545 F.2d 527, 531 n.7 (5th Cir. 1977); *Cox v. Stanton*, 529 F.2d 47, 50 (4th Cir. 1975); *Gray v. Union County Intermediate Educ. Dist.*, 520 F.2d 803, 805 (9th Cir. 1975).

46. *Kostka v. Hogg*, 560 F.2d 37, 43 (1st Cir. 1977). Finding a *Bivens*-type cause of action on the facts of *Kostka* would have required the court to impose vicarious liability on municipalities for the constitutional violations of their employees. The court indicated that they may have found

Another method of circumventing *Monroe* in order to award damages to persons injured by unconstitutional municipal action was adopted by two courts of appeals. These courts extended the "official capacity" method of recovery to actions for money damages by ordering "official capacity" defendants to obtain compensatory payments from the funds of the governmental entity that would have been immune had it been sued directly.⁴⁷ These decisions were cited prominently in petitioners' brief in *Monell*, providing a basis for the core of their argument that the individual defendants, sued in their official capacity, could be ordered to obtain funds from the municipal treasury in order to compensate the employees for the period of illegal forced leave.⁴⁸

The willingness of some courts to extend the "official capacity" method of recovery to actions for monetary damages, like the creation of a *Bivens*-type cause of action against municipalities, was illustrative of the lower courts' desire to fashion some means of compensation for constitutional injury inflicted by local governments, and of their continued dissatisfaction with the municipal immunity doctrine. By approaching the matter straightforwardly and overruling *Monroe* outright, the Court has done much to clarify an area of the law that had become seriously confused as a result of the lower courts' attempts to circumvent the municipal immunity doctrine. Some aspects of the Court's opinion suggest, however, that this area will still be a controversial one. The Court's refusal to impose *respondeat superior* liability on local governments for the constitutional torts of their agents,⁴⁹ and the suggestion that local governments may eventually be accorded a qualified immunity from section 1983 liability,⁵⁰ suggest that section

a *Bivens*-type cause of action had the municipality been directly responsible for the alleged constitutional violation. *Id.* at 45. The argument that the fourteenth amendment created a *Bivens*-type cause of action against local governments was before the Supreme Court in *Mt. Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977), but the Court refused to decide the issue because it had been raised only at oral argument and had not been fully briefed. *Id.* at 278.

47. *Burt v. Board of Trustees*, 521 F.2d 1201 (4th Cir. 1975) (award of back pay from public funds); *Incarcerated Men v. Fair*, 507 F.2d 281 (6th Cir. 1974) (attorneys' fees).

48. Brief for Petitioners at 32-69. The court of appeals decision in *Monell* rejected this argument, drawing a distinction between "official capacity" suits for equitable relief and those for money damages by analogy to a similar distinction in Supreme Court eleventh amendment cases. 532 F.2d 259, 265-67 (2d Cir. 1976). This analogy, however, was tenuous; the Court had, in an earlier case, explicitly stated that the language of § 1983 did not permit any distinction based on "the nature of relief sought." *City of Kenosha v. Bruno*, 412 U.S. at 513. The *Kenosha* language effectively precluded the Court from adopting the court of appeals rationale in *Monell*, as Mr. Justice Powell recognized in his concurrence. 436 U.S. at 712 (concurring opinion).

49. 436 U.S. at 694.

50. *Id.* at 701.

1983 will remain a hollow remedy for many persons injured by unconstitutional municipal action.

The *respondeat superior* limitation is especially significant, and strong policy reasons argue against it. Under the *Monell* standard of municipal liability, a local government will be subject to section 1983 liability only when it is *directly* responsible for a constitutional violation, such as when some officially adopted policy or ordinance inflicts constitutional injury. A local government will not, under *Monell*, be liable for its employees' ultra vires constitutional torts, that is, those committed without governmental authority. In practical terms this means that victims of unreasonable searches and seizures, police brutality, and other forms of police misconduct will still be unable to seek compensation for their injuries by bringing a section 1983 action against the employing governmental entity. The only avenue of relief for these persons is an action against the offending officer, which has long been criticized as being ineffective from both a compensatory and deterrence standpoint.⁵¹

When a citizen sues a police officer alleging some form of police misconduct, several factors combine to make a jury verdict for the plaintiff unlikely. The officer is protected by a qualified immunity,⁵² which insulates him from liability in all but the most egregious of situations.⁵³ Also, the jury is naturally reluctant to levy a damage judgment against the policeman, whose job is difficult, dangerous, and not very lucrative.⁵⁴ Even in those situations in which a judgment against the officer is obtained, the plaintiff's prospects of compensation are subject to the possibility that the officer may be judgment-proof.⁵⁵ Commentators have argued that the compensatory purpose of section 1983 would

51. See generally K. DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES § 26.03 (1976); Kates & Kouba, *supra* note 36, at 136-42; Newman, *supra* note 32, at 447-67; Comment, *supra* note 36, at 1209.

52. *Pierson v. Ray*, 386 U.S. 547 (1967).

53. The immunity protects the officer from liability for action taken in good faith and with reasonable grounds to believe in the constitutionality of the action. In practice, this qualified immunity often has the effect of an absolute one. See notes 89-91 and accompanying text *infra*.

54. The Hon. Jon O. Newman, Federal District Judge for the District of Connecticut, writes from his own experience: "A jury understandably succumbs easily to the argument, stated or implied, that recovery should be denied because the damages must come from the paycheck of a hard-working, underpaid police officer." Newman, *supra* note 32, at 456.

55. See, e.g., Kates & Kouba, *supra* note 36, at 136-37; Comment, *supra* note 36, at 1209. Professor Davis has summed up the situation with this description of a fictional conversation between an attorney and a client who has been injured by police misconduct:

What the lawyer says to the bruised and battered client is something like this: "I believe you when you say the policeman beat you up. A suit against him will cost several thousand dollars, and we have about one chance in ten to get a judgment. If we get it, the

be much better served by an action directly against the governmental entity, on a *respondeat superior* theory.⁵⁶ Such an action would also serve as a more effective deterrent to police misconduct than the action against the individual officer, because high government officials would be influenced to supervise their employees more closely, and to discipline officers who violate citizens' constitutional rights.⁵⁷

The *Monell* Court did not consider any of these policy arguments in reaching its decision not to impose *respondeat superior* liability on municipalities. Instead that decision was based solely on prior case law interpretation of the statutory language of section 1983, combined with Congress' rejection in 1871 of the Sherman Amendment.⁵⁸ In *Rizzo v. Goode*,⁵⁹ the Court interpreted the language of section 1983 to preclude the imposition of *respondeat superior* liability on a section 1983 defendant, holding that liability could result only when the defendant had acted affirmatively to "cause" the constitutional violation.⁶⁰ Defendant in *Rizzo*, however, was an individual supervisory official who, under a *respondeat superior* theory, would be held personally liable for any constitutional injury inflicted by subordinates. Arguably, the case for vicarious liability is stronger when the defendant is a governmental entity which, unlike the individual official, is capable of absorbing the cost of employees' liability and spreading it across the entire

amount may be several hundred dollars. And we have no assurance of collecting it. Do you want me to file an action?"

K. DAVIS, *supra* note 51, at 595.

56. *E.g.*, K. DAVIS, *supra* note 51; Kates & Kouba, *supra* note 36, at 136-44; Newman, *supra* note 32, at 455-58. This argument was adopted by some lower federal courts that found *respondeat superior* liability under a *Bivens*-type cause of action. *E.g.*, Santiago v. City of Philadelphia, 435 F. Supp. 136 (E.D. Pa. 1977); Sanabria v. Village of Monticello, 424 F. Supp. 402 (S.D.N.Y. 1976); Collum v. Yurkovich, 409 F. Supp. 557 (N.D. Ill. 1975); Williams v. Brown, 398 F. Supp. 155 (N.D. Ill. 1975). In *Santiago*, the court noted that the action against the individual officer rarely results in compensation for the injured citizen and added: "[T]he employer, rather than the injured party, is in a better position to absorb the costs, insure against them and distribute the cost to society." 435 F. Supp. at 148.

57. *E.g.*, K. DAVIS, *supra* note 51, at 597; Kates & Kouba, *supra* note 36, at 140; Comment, *supra* note 36, at 1209. It has been argued that a direct action against the municipality may have the opposite effect. Because, under a *respondeat superior* standard, the officer would not be personally liable for unconstitutional misconduct, it is contended that the officer would no longer have any incentive to refrain from such action. Crosley v. Davis, 426 F. Supp. 389, 393 n.11 (E.D. Pa. 1977). This seems highly implausible. First, the present inefficacy of the remedy against the officer throws great doubt on its deterrent effect. Second, though an officer would not be personally liable under a *respondeat superior* standard, he would be subject to disciplinary action by superiors. The threat of losing one's job would probably be a more effective deterrent than the threat of a lawsuit which, as experience has shown, rarely results in an adverse judgment.

58. 436 U.S. at 691-95.

59. 423 U.S. 362 (1976).

60. *Id.* at 371. The facts of *Rizzo* are discussed in note 71 *infra*.

community.⁶¹

The Court's legislative history argument is also vulnerable because of the difference between the nature of liability imposed on municipalities by the Sherman Amendment and that imposed by a *respondeat superior* theory of municipal liability. The Sherman Amendment would have held towns and counties liable for damage done by *private* citizens "riotously and tumultuously assembled." In contrast, a *respondeat superior* standard would impose liability only when the municipality's *own agents* inflict constitutional injury. Because of this distinction, it is indeed questionable to infer from the House rejection of the Sherman Amendment that the congressmen would have similarly rejected a proposal to hold local governments liable for the constitutional torts of their employees.

Policy considerations, though not articulated in the opinion, may also have influenced the Court in enunciating the *Monell* standard of municipal liability. Many of the lower courts that found a *Bivens*-type cause of action against local governments stopped short of imposing vicarious liability on municipalities.⁶² These courts, of course, did not consider the language of section 1983 or the statute's legislative history when making that decision, but instead relied solely on policy rationales.

The primary concern expressed by these lower courts was that *respondeat superior* liability might decimate municipal treasuries, many of which already are strained almost to the breaking point.⁶³ Others

61. Though the language of § 1983 does not differentiate between governmental and natural "persons" in this fashion, support for such a distinction can be found in the statute's legislative history. In the only portion of the debates that speaks directly to the issue of how courts should construe the language of § 1983, Representative Shellabarger emphasized that the section is "remedial" in nature and that "such statutes are liberally and beneficently construed." CONG. GLOBE, 42d Cong., 1st Sess. 68 (1871). Given the remedial inefficacy of § 1983 for persons injured by police misconduct, a finding of *respondeat superior* liability under the statute might be just the type of liberal construction envisioned by its authors.

62. See *Turpin v. Mailet*, 579 F.2d 152, 165-66 (2d Cir. 1978); *Owen v. City of Independence*, 560 F.2d 925, 933 n.9 (8th Cir. 1977), *vacated for reconsideration in view of Monell*, 98 S. Ct. 3118 (1978); *McDonald v. Illinois*, 557 F.2d 596, 604-05 (7th Cir. 1977); *Riley v. City of Minneapolis*, 436 F. Supp. 954, 956-57; *Adekalu v. New York City*, 431 F. Supp. 812, 819-20 (S.D.N.Y. 1977). See also *Kostka v. Hogg*, 560 F.2d 37, 44-45 (1st Cir. 1977) (refusing to find *Bivens*-type cause of action because case involved vicarious liability); *Hanna v. Drobnick*, 514 F.2d 393 (6th Cir. 1975) (finding *Bivens*-type cause of action when city ordinance was alleged to be unconstitutional); *Crosley v. Davis*, 426 F. Supp. 389, 392 (E.D. Pa. 1977) (suggesting, but not adopting, standard of municipal liability similar to that in *Monell*). A few lower federal courts, however, did find *respondeat superior* liability under a *Bivens*-type cause of action. See cases cited note 56 *supra*.

63. E.g., *Turpin v. Mailet*, 579 F.2d 152, 165-66 (2d Cir. 1978); *Adekalu v. New York City*, 431 F. Supp. 812, 820 (S.D.N.Y. 1977). Judge Kaufman, writing for the court of appeals in *Turpin*, stated: "[B]y permitting liability only in those instances where the municipality is directly responsible for the unconstitutional behavior, the drain on the local fisc will be minimized. In a

questioned the need for this liability,⁶⁴ given the practice, now adopted in several states, of government indemnification of officers who suffer adverse judgments in section 1983 actions.⁶⁵ According to these courts, this practice substantially alleviates the problem of judgment-proof policemen, and guarantees that plaintiffs injured by police misconduct will be compensated.⁶⁶ Imposing vicarious liability on municipalities by judicial fiat also would have entailed a substantial federal reordering of local affairs, thereby raising serious questions of federalism.⁶⁷ Perhaps the Court considered the decision to impose *respondeat superior* liability on municipalities one to be made by the states, by amendment to their respective tort claims acts.

Though the *respondeat superior* limitation will insulate local governments from liability for their officers' ultra vires misconduct, it should not apply to those cases in which a municipality (or its policy-making officials) has, for instance, actively encouraged police abuse of citizens' constitutional rights, or has tolerated such abuse in the face of a pattern of police misconduct.⁶⁸ Governmental action of this kind would rise to the level of a "policy" or "custom" of advocating police misconduct, and would then fit squarely within the standard of municipal liability announced in *Monell*. Lower courts, in delineating the degree of governmental involvement necessary to find liability under a *Bivens*-type cause of action, have recognized this distinction and have

circuit whose contours include the City of New York, we are not insensitive to the financial plight of local governmental bodies." 579 F.2d at 165 (footnote omitted).

64. *E.g.*, *Crosley v. Davis*, 426 F. Supp. 389, 392 n.7 (E.D. Pa. 1977).

65. For a complete listing of the various indemnification statutes, see Freed, *Executive Official Immunity for Constitutional Violations: An Analysis and a Critique*, 72 Nw. U.L. REV. 526, 564 n.182 (1978).

66. *E.g.*, *Crosley v. Davis*, 426 F. Supp. 389, 392 n.7 (E.D. Pa. 1977). This claim is debatable. Many of the statutes apply only if the officer was acting in good faith. Consequently, they do not provide indemnification for policemen suffering adverse judgments in § 1983 actions who, because of the qualified immunity, must have been acting maliciously in order to incur § 1983 liability. *Kates & Kouba*, *supra* note 36, at 137. Also, the system of indemnification has no effect on the jury's natural bias in favor of the police officer. *K. DAVIS*, *supra* note 51, at 595. Thus, many of the inadequacies of the action against the individual officer remain, despite the availability of indemnification.

67. *Kostka v. Hogg*, 560 F.2d 37, 44 n.6 (1st Cir. 1977). The Court has become increasingly sensitive to federal reordering of local affairs. *See, e.g.*, *National League of Cities v. Usery*, 426 U.S. 833 (1976); *Rizzo v. Goode*, 423 U.S. 362 (1976). *See generally Developments in the Law—Section 1983 and Federalism*, *supra* note 4.

68. A paradigmatic case is suggested by a recent report of the Tennessee division of the U.S. Civil Rights Commission, that found, after an investigation of numerous police brutality claims in Memphis, Tennessee, that "police misconduct [in Memphis] is both pervasive and uncontrolled." NEWSWEEK, September 18, 1978, at 35 (quoting U.S. Civil Rights Commission). The Memphis Police Department is now being investigated by a subcommittee of the United Nations Human Rights Commission. *Id.*

indicated that liability would attach when a local government has encouraged, or tacitly approved of, police abuse of constitutional rights.⁶⁹

The conclusion that liability can be imposed under section 1983 for mere "tolerance" of police misconduct may be challenged, however, on the basis of language in *Rizzo v. Goode*⁷⁰ in which the Court stated that some "affirmative link" between the defendant and the constitutional violation was necessary to satisfy the section 1983 causation requirement.⁷¹ *Rizzo* involved an attempt to impose section 1983 liability on supervisory officials by alleging that they had failed to supervise their subordinate officers to prevent constitutional violations. The fact situation faced by the Court in *Rizzo* is, however, distinguishable from that posed when a plaintiff proves a pattern of police misconduct, thereby raising the inference that municipal officials, by acquiescing in the face of this pattern, had adopted a de facto policy of advocating police abuse. In *Rizzo* such a pattern was alleged but not proved, and the Court emphasized that only a few instances of police misconduct had been shown actually to have occurred.⁷² When unconstitutional police behavior is more prevalent,⁷³ a different result than that reached

69. *E.g.*, *Turpin v. Mailet*, 579 F.2d 152, 167-68 (2d Cir. 1978); *Owen v. City of Independence*, 560 F.2d 925, 933 n.9 (8th Cir. 1977), *vacated for reconsideration in view of Monell*, 98 S. Ct. 3118 (1978); *Riley v. City of Minneapolis*, 436 F. Supp. 954, 957 (D. Minn. 1977); *Adekalu v. New York City*, 431 F. Supp. 812, 820 (S.D.N.Y. 1977).

70. 423 U.S. 362 (1976). This issue is discussed in *Smith v. Ambrogio*, 456 F. Supp. 1130, 1135-36 (D. Conn. 1978), apparently the first lower court opinion to consider whether a municipality may be held liable for tolerance of police misconduct under the *Monell* standard. In that case, the court expressed some doubt whether such an action could be maintained in light of *Rizzo*. *Id.* at 1136. The decision appears, however, to be based on a faulty assumption concerning the precise holding in *Rizzo*. At the outset of its discussion, the court wrote: "What the Supreme Court [in *Rizzo*] found insufficient was the supervisors' failure to act in the face of a statistical pattern of unconstitutional action by subordinates." *Id.* at 1135 (citation omitted). In fact, a "statistical pattern" of police misconduct was not proved in *Rizzo*—a factor the Court found to be of some importance. *See* note 72 and accompanying text *infra*.

71. 423 U.S. at 371. *Rizzo* involved a class action brought by a group of Philadelphia citizens against various municipal officials alleging, among other things, that the officials had failed to take adequate measures to correct a "pervasive pattern of illegal and unconstitutional mistreatment by police officers." *Id.* at 366. The Court denied plaintiffs' claim for injunctive relief partly because the constitutional violations had actually been committed by subordinate officers, not by the named defendants who, as supervisory officials, played no affirmative role in the unconstitutional conduct. *Id.* at 371.

72. Mr. Justice Rehnquist, writing for the majority in *Rizzo*, noted that though the plaintiffs had complained of "an 'unacceptably high' number of those incidents [of police misconduct]," they had proved only a small number, "some 20 in all . . . occurring . . . in a city of 3 million inhabitants, with 7,500 policemen." *Id.* at 373. Justice Rehnquist considered it significant that "there was no showing that the behavior of the Philadelphia police was different in kind or degree from that which exists elsewhere." *Id.* at 375.

73. As a practical matter, the problems of presenting adequate proof in this situation will be considerable, unless the plaintiff can produce authoritative documentation of widespread police misconduct such as that discussed in note 68 *supra*. *See, e.g.*, *Smith v. Ambrogio*, 456 F. Supp. 1130, 1136-37 (D. Conn. 1978) (court discusses procedural requirements for bringing such an ac-

in *Rizzo* may be based on recognition of the lack of any substantive difference between passive tolerance of widespread police misconduct and affirmative advocacy of such misconduct. In addition, concerns of federalism played an important role in the Court's decision in *Rizzo* because of the interference in the municipality's affairs that would have resulted from the injunction sought by plaintiffs.⁷⁴ Similar concerns would not be raised by awarding damages to persons injured by specific police abuse. These damage awards would influence municipal officials to alter their procedures in order to deter police misconduct, but they could do so on their own terms rather than those of a federal court judge.

Another issue that should attract the immediate attention of the lower courts concerns the development of a qualified immunity for municipal defendants in section 1983 actions.⁷⁵ Presumably this would be similar to immunities granted government officials in section 1983 actions,⁷⁶ and would protect a local government from liability for action taken in good faith and with reasonable grounds to believe that the action was constitutional.⁷⁷ The desirability of such an immunity is, however, questionable. Not only is a qualified immunity for municipalities not justified by the rationales used by the Court to support official immunity in past decisions, but it also would have the effect of eviscerating the section 1983 damage remedy for persons injured by unconstitutional municipal action.

In deciding some of the official immunity cases under section 1983, the Court has simply adopted the tort immunity accorded the various officials at common law,⁷⁸ apparently with the belief that the 1871 Congress did not intend to disturb existing common law doctrines when enacting section 1983.⁷⁹ The same approach to the issue of municipal

tion and notes that "[t]he standard for municipal liability predicated on inaction of senior personnel must be frankly acknowledged as difficult to meet").

74. 423 U.S. at 378-80.

75. Both the majority and concurring opinions in *Monell* mentioned the possibility of such a development. 436 U.S. at 701, 713-14.

76. See *Procunier v. Navarette*, 434 U.S. 555 (1978) (prison officials); *Wood v. Strickland*, 420 U.S. 308 (1975) (school board members); *Scheuer v. Rhodes*, 416 U.S. 232 (1974) (state executives); *Pierson v. Ray*, 386 U.S. 547 (1967) (police officers). For a survey of the Court's action on § 1983 official immunity, see *Freed*, *supra* note 65.

77. The Court explained this standard in *Wood v. Strickland*, 420 U.S. 308, 321-22 (1975).

78. See, e.g., *Imbler v. Pachtman*, 424 U.S. 409, 421 (1976); *Pierson v. Ray*, 386 U.S. 547, 554 (1967); *Tenney v. Brandhove*, 341 U.S. 367, 372-76 (1951).

79. In finding judges absolutely immune under § 1983, the Court wrote: "The legislative record gives no clear indication that Congress meant to abolish wholesale all common law immunities. . . . We presume that Congress would have specifically so provided had it wished to abolish the doctrine of absolute judicial immunity." *Pierson v. Ray*, 386 U.S. 547, 554-55 (1967).

immunity is unavailable, however, because under nineteenth century common law a municipality was absolutely immune for any activity that could subject it to a section 1983 claim.⁸⁰ Though common law doctrines regarding municipal tort liability have recently been abrogated in most jurisdictions,⁸¹ local governments still retain absolute immunity for any tort liability arising from the exercise of "discretionary functions,"⁸² which include any policy-making or legislative activity. Thus, even under contemporary notions of municipal tort liability, a municipality would be absolutely immune for any activity cognizable under section 1983. This proves further the futility of looking to tort doctrines to justify any form of municipal immunity under section 1983.

Policy considerations have also played a major role in the Court's past official immunity decisions.⁸³ First, the Court has felt that some form of immunity was needed to ameliorate the unfairness of imposing personal liability on officials who were merely doing their job in good faith and without any intention to inflict constitutional injury.⁸⁴ Consequently, the Court has required that officials must have been acting maliciously or without reasonable grounds to believe in the constitutionality of their actions in order to incur section 1983 liability. Second, the Court has feared that the threat of personal liability might chill an official's proper exercise of discretion⁸⁵ or might even deter citizens from pursuing public service.⁸⁶

These concerns are significantly alleviated when a municipality is made the defendant. Indeed, municipal liability provides a refreshing

80. Under common law doctrines prevailing during the nineteenth century, a municipality's liability in tort depended upon the type of activity that gave rise to the claim. *See generally* W. PROSSER, HANDBOOK OF THE LAW OF TORTS 977-87 (4th ed. 1971). If the activity was of a "proprietary" nature — *i.e.* similar to that performed by a private corporation — the local government enjoyed no immunity. Examples of proprietary activities included the municipal operation of a public utility, ferry, airport, or garage. *Id.* at 980-81. But municipalities were absolutely immune from any liability arising from its involvement in uniquely "governmental" activities, such as passing laws or implementing governmental policies, *id.* at 979, the only activities that would give rise to a § 1983 claim under the *Monell* standard of municipal liability.

81. *See generally* K. DAVIS, *supra* note 51, § 25.00 to .00-2.

82. *Id.* § 25.13. The justification for the discretionary function exception is that the judiciary should not interfere with legislative freedom by levying damage judgments against local governments when legislative decisions cause personal injury. *Id.* This separation of powers argument is, of course, inapplicable to the issue of municipal immunity under § 1983 because the very purpose of the statute is to ensure federal court supervision over local affairs.

83. *See, e.g.,* Wood v. Strickland, 420 U.S. 308, 319-20 (1975); Scheuer v. Rhodes, 416 U.S. 232, 240 (1974).

84. *E.g.,* Scheuer v. Rhodes, 416 U.S. 232, 240 (1974).

85. *Id.*

86. Wood v. Strickland, 420 U.S. 308, 320 (1975).

solution to the problems of unfairness and potential deterrence posed by official liability. Holding a municipality responsible for constitutional violations will remove the harshness of imposing liability on individual officials and will instead spread the cost of constitutional injury among all the community's taxpayers as an expense of government. Moreover, though some government officials may be inhibited by the possible impact of their actions on the municipal treasury, the chilling effect would surely not be as great as that attendant to personal liability.⁸⁷

There may, however, be another policy reason justifying a qualified immunity from municipal defendants in section 1983 actions. Mr. Justice Powell noted in his concurrence that such an immunity may be necessary to "remove some of the harshness of liability for good-faith failure to predict the often uncertain course of constitutional adjudication."⁸⁸ Though this is a genuine concern, the Court should be wary of any rationale supporting a qualified immunity for municipalities. Past experience with similar immunities for government officials has shown that, in practice, a qualified immunity often has the effect of an absolute one.⁸⁹ This is because the qualified immunity protects government officials unless their actions are contrary to "settled" constitutional law.⁹⁰ Because few areas of law are clearly "settled," the official who violates constitutional rights can almost always hide behind the qualified immunity.⁹¹ Should the Court find that municipalities in section

87. Note, *supra* note 43, at 957. In the first appellate decision to consider the scope of municipal immunity after *Monell*, the United States Court of Appeals for the Tenth Circuit came to an opposite conclusion. *Bertot v. School Dist. No. 1*, No. 76-1129 (10th Cir. Nov. 15, 1978). The court held that a school district was entitled to the same qualified immunity from § 1983 liability as was its school board members because "conscientious board members will be just as concerned that their decisions or actions might create a liability for damages [against] the board or the local entity as they are that they would against themselves. . . . The restriction on the exercise of independent judgment is the same." *Id.*; see slip op. at 5. Earlier courts of appeals decisions, which questioned the applicability of the deterrence argument to the case of a municipal defendant in a *Bivens*-type cause of action, suggest that there will be a split of opinion on this issue among the circuits. See, e.g., *Owen v. City of Independence*, 560 F.2d 925, 940 (8th Cir. 1977), *vacated for reconsideration in view of Monell*, 98 S. Ct. 3118 (1978) ("primary justification for the defense of good faith . . . , to insure that public officials will not hesitate to discharge their duties out of fear of personal monetary liability . . . , does not exist where the city itself will bear the monetary award"); *Kostka v. Hogg*, 560 F.2d 37, 41 (1st Cir. 1977) ("[w]hile the imposition of damages liability on a political subdivision could conceivably result in chilling the performance of some official functions, the likelihood of substantial inhibition is not great since the officials will not be held personally liable").

88. 436 U.S. at 713.

89. Freed, *supra* note 65, at 564.

90. *Procunier v. Navarette*, 434 U.S. 555, 565 (1978).

91. Freed, *supra* note 65, at 564. The effect of the "settled law" concept can be seen in the Court's recent decision in *Procunier v. Navarette*, 434 U.S. 555 (1978). In that case, plaintiff, a

1983 actions are protected by a qualified immunity based on the "settled law" concept, the decision in *Monell* may well be "'drained of meaning.'"⁹² Such an immunity would largely emasculate the section 1983 damage remedy, making it extremely difficult for citizens to be compensated for constitutional injury inflicted by local governments. The remedial purpose of section 1983 demands that at most only minimal immunity⁹³ be accorded municipal defendants in section 1983 actions.

In *Monell*, the Court finally responded to years of judicial and scholarly criticism of the municipal immunity doctrine by overruling *Monroe v. Pape* and holding that local governments may be subject to liability under section 1983. The decision can best be seen as a compromise between two extremes—the total municipal immunity of *Monroe* on the one hand, and full municipal liability, including *respondent superior* liability, on the other. The Court settled for a standard of municipal liability midway between those two, similar to standards adopted by a number of lower federal courts in *Bivens*-type causes of action. The issue not resolved in *Monell* is the scope of the qualified immunity for municipal defendants in section 1983 actions. The lower courts first considering this issue should recognize that such an immunity could have an extremely damaging effect on the remedial function of section 1983, and, accordingly, should restrict the scope of the immunity.

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state prisoner, alleged that prison officials had violated his first amendment rights by interfering with his outgoing mail. The Court held that the officials were immune under § 1983 because "there was no 'clearly established' First and Fourteenth Amendment right with respect to the correspondence of convicted prisoners in 1971-1972 [when the violations occurred]." *Id.* at 565.

92. 436 U.S. at 701 (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 248 (1974)). Defendants in *Monell*, for example, would be completely absolved of liability under § 1983 because the Court's decision in *Lafleur* was handed down three years after the alleged constitutional violations occurred.

93. One author has suggested that municipal immunity be limited to those situations in which potential liability looms so great that it poses a threat to the continued operation of the municipality. Note, *supra* note 43, at 958. As an example, the author posits a case in which blacks bring an action against an illegally segregated school system, seeking damages for reduced earning capacity totaling millions of dollars. *Id.*

Taxation—Net Gift Transfer of Appreciated Real Property Held Not To Give Rise to Taxable Gain for the Donor

Section 2502(d) of the Internal Revenue Code places the primary liability for payment of gift taxes on the donor.¹ Frequently, however, donors do not have sufficient liquid assets at the time of the contemplated gift to pay the resulting gift taxes, or do not want to disturb their personal liquidity positions. To solve this problem they may make the gift conditional on the donee's agreement to pay the gift taxes, or stipulate that the gift taxes be paid out of the gift property. The Internal Revenue Service has recognized the validity of these arrangements for gift tax purposes and has sanctioned the use of a "net gift" gift tax computation method in such cases, which reduces the amount of the taxable gift by the amount of gift taxes the donee is obligated to pay.²

1. I.R.C. § 2502(d) reads as follows: "The tax imposed by section 2501 [the gift tax] shall be paid by the donor." I.R.C. § 6324(b) provides that if the donor does not make timely payment of the gift tax the tax will become a lien on the gift made and the primary liability for the payment of the gift tax will shift to the donee.

2. The net gift method of valuation of property for gift tax purposes is spelled out in Rev. Rul. 75-72, 1975-1 C.B. 310, that superseded the original ruling in Rev. Rul. 71-232, 1971-1 C.B. 275. These provide that the gift tax paid by the donee may be deducted from the value of the transferred property if it can be shown that the payment of the gift tax by the donee is an express or implied condition of the transfer. The amount of the tax is computed using this net value of the gift property. The final tax result depends on two variables: the taxable value of the gift (which depends on the amount of tax paid) and the amount of tax paid (which in turn depends on the taxable value of the gift). The ruling provides the following algebraic formula to reach a solution for the amount that will be netted from the value of the gift to produce the net gift that is taxed:

$$\frac{\text{Tentative Tax}}{1 + \text{Rate of Tax}} = \text{True Tax (T)}$$

The "Tentative Tax" is the tax computed on the amount of the taxable gift. The "Rate of Tax" is the rate at which the amount of the taxable gift that exceeds the tax bracket amount is taxed. The "True Tax" is the amount to be deducted from the value of the transferred property.

These rulings are the result of the two earlier Tax Court decisions of *Lingo v. Commissioner*, 23 T.C.M. (P-H) ¶ 54,145 (1954), and *Harrison v. Commissioner*, 17 T.C. 1350 (1952), in which gifts were made in inter vivos trusts and the trustees were obligated to make the gift tax payments. The Tax Court held that the present value of the gifts could be reduced by the present worth of the future tax payments, reasoning that the donor did not *intend* the amount of property necessary for the gift tax liability to be a gift, and thus, it was not effective as property passing from the donor.

The net gift transfer is not used as a method of reducing gift tax liability. It does allow the donor to shift his burden of taxation but does not reduce the ultimate amount of the gift tax. Gift tax savings of the net gift vis-à-vis a conventional gift are illusory because the net gift is premised on the assumption that the donor would have had to sell part of the contemplated gift property to be able to pay the gift taxes on the smaller than originally planned conventional gift that would follow the sale. So in either case the gift tax would be computed on a smaller gift.

The true benefit of the net gift is that the donor does not have to sell part of the property to pay the gift taxes. This results in a reduction of the donor's capital gains tax burden. This avoidance of recognition of capital gain is one reason the *income tax* consequences of the net gift have long been disputed. *Lingo*, *Harrison* and Rev. Rul. 75-72 do not provide any direct answer to this income tax issue because they do not address the question.

While income is generally not recognized on the making of outright, unconditional gifts, the question has arisen whether a net gift transfer alters this result.³ The United States Court of Appeals for the Sixth Circuit held in *Turner v. Commissioner*⁴ that it does not. A later Sixth Circuit decision, *Johnson v. Commissioner*,⁵ cast uncertainty on the vitality of *Turner* by holding that a donor realized taxable gain in a transfer slightly different in form from the *Turner* net gift.⁶ Recently however, the United States Court of Appeals for the Fourth Circuit in *Hirst v. Commissioner*,⁷ held that the net gift transfer of appreciated real property to family members does not result in any taxable gain to the donor.⁸

Taxpayer in *Hirst*⁹ owned an undivided one-half interest in three tracts of highly appreciated, unimproved land.¹⁰ In an effort to relieve herself of a heavy estate tax burden and out of a desire to benefit the natural objects of her bounty, she decided to make a gift¹¹ of the tracts

3. The agreement to pay the gift taxes provides several bases on which to argue for income taxation of the donor. As provided in Treas. Reg. § 1.1001-1(e) (1957), the gift could be characterized as part sale, part gift: a sale to the extent the gift tax exceeds the donor's adjusted basis in the property; and a gift to the extent the value of the property is greater than the gift tax. Alternatively, payment of the gift tax could confer benefits on the donor that fall within the broad definition of income found in I.R.C. § 61, especially income from discharge of indebtedness. The donee is made primarily liable for payment of the gift taxes by agreement and thus the donor is discharged from his former obligation to pay the taxes. The donor is also arguably "shedding" a debt by having the donee in essence assume the tax encumbrance placed on the gift property by the donor.

Despite these bases of recovery, it is easy to see why courts are hesitant even to think about the income tax consequences of a net gift. First, they usually occur in a family context and the donative intent of the donor is obvious (although the question of the extent of this intent is not usually raised). Second, the economic benefits to the donor are not as apparent as cash in hand.

4. 410 F.2d 752 (6th Cir. 1969), *aff'g per curiam* 49 T.C. 356 (1968).

5. 495 F.2d 1079 (6th Cir.), *aff'g on other grounds* 59 T.C. 791 (1973), *cert. denied*, 419 U.S. 1040 (1974).

6. See, e.g., Duhl & Cohen, *The Net Gift Technique: A Current Analysis of the Requirements for Its Successful Use*, 42 J. TAX. 158 (1975); Malstrom, *A Shadow Over "Net Gifts,"* 64 ILL. B.J. 50 (1975); Note, *Income Tax Consequences of Encumbered Gifts: The Advent of Crane*, 28 U. FLA. L. REV. 935 (1976); Note, *Bad News for Net Givers: Donee Payment of Gift Taxes Results in Taxable Income to Donor*, 36 U. PITT. L. REV. 517 (1974).

7. 572 F.2d 427 (4th Cir. 1978).

8. *Id.* at 428.

9. Taxpayer was an 81 year old widow whose married son, one of the donees, was her only living child. *Id.* at 434-35.

10. *Id.* at 435. Taxpayer's adjusted basis and the appraised value of each tract was found to be as follows:

	<u>Donor's Adjusted Basis</u>	<u>Value</u>
Tract 1	\$4,654	\$291,832.50
Tract 2	3,723	119,404.50
Tract 3	-0-	33,351.50

11. *Id.* Taxpayer transferred her interest in one tract to her son and his wife outright, and her

to her family. Realizing that she could not pay the resulting gift taxes because of her lack of liquid assets,¹² she had her son agree orally before the transfers that he would pay all the assessable gift taxes on all the transfers.¹³ A gift tax return that computed the taxes due by the net gift method was filed,¹⁴ and the son and his wife actually paid all the gift taxes.¹⁵ The Commissioner asserted a deficiency in taxpayer's income tax return, claiming she recognized taxable gain to the extent the gift taxes paid exceeded her adjusted basis in the property.¹⁶ The Tax Court found for the taxpayer.¹⁷ The court of appeals reversed this decision, but on rehearing en banc, a majority of the court affirmed the Tax Court decision.¹⁸ The majority reasoned that taxpayer intended no sale and received no economic benefit or gain.¹⁹ *Johnson* was distinguished on its facts and the decision rested solely on the authority of *Turner*, which the majority considered dispositive of the question.²⁰ A strong dissent argued that *Turner* was no longer good authority and found that in substance taxpayer exchanged a portion of the gift property for the amount of gift taxes paid.²¹

The authority primarily relied on by the *Hirst* court was *Turner v. Commissioner*. The *Turner* donor made gifts of stock to three of her

interest in the other two tracts to two grandchildren outright and to her son as trustee for her third minor grandchild.

12. *Id.* At the time taxpayer decided to transfer her interests in the land, she owned the house in which she lived, a one-half interest in a house being used as an office building, and had \$25,000 on deposit in savings accounts. *Id.*

13. *Id.* That only two of the five donees agreed to and did pay all the gift taxes in question was not addressed by the court.

14. *Id.* For a discussion of the net gift computation, see note 2 *supra*.

15. 572 F.2d at 435. A total \$85,469.55 in gift tax was paid of which \$68,277.00 was federal gift tax and \$17,192.55 was state gift tax.

16. *Id.* at 435-36. The Commissioner made the following calculations:

Total gift tax paid	\$85,469.55
Less adjusted basis of property	8,377.00
Realized gain	77,092.55
Recognized gain—50% (capital treatment)	38,546.28

17. 63 T.C. 307, 310 (1974), *aff'd per curiam en banc*, 572 F.2d 427 (4th Cir. 1978).

18. 572 F.2d at 428.

19. *Id.* at 431.

20. *Id.* at 428. Senior Circuit Judge Bryan's opinion dissenting from the decision of the panel, later made part of the majority en banc opinion, was based in part on the inviolability of the Tax Court's findings of fact and law. *Id.* at 432-33. This Note does not address this issue. For a discussion of this issue, see *Commissioner v. Court Holding Co.*, 324 U.S. 331, 333-34 (1945); *Commissioner v. Scottish Am. Inv. Co.*, 323 U.S. 119, 123-24 (1944); *Dobson v. Commissioner*, 320 U.S. 489, 501-02 (1943).

21. 572 F.2d at 437-39 (Winter and Butzner, J.J., dissenting).

children outright and six gifts in trust²² for the benefit of her grandchildren. Each transfer was conditioned on the recipient paying the gift tax. The gift taxes were paid by the individuals out of available cash and sales of some of the stock, and by the trusts from sales of part of the stock, loans, and small amounts of current trust income. The Commissioner alleged that the transfers were part sale, part gift.²³ The Tax Court rejected the part sale analysis²⁴ and held that the transfers were net gifts that produced no taxable gain for the donor.²⁵ The United States Court of Appeals for the Sixth Circuit affirmed per curiam.²⁶

The *Turner* decision was questioned by the Court of Appeals for the Sixth Circuit in *Johnson v. Commissioner* (the decision that the

22. The *Turner*, *Johnson*, and *Hirst* decisions are related to a line of cases dealing with gift tax agreements in the context of gifts in trust. Realization of taxable income has generally been found when trust income is used to pay gift taxes because the donor is considered to have retained an income interest in the trust that is taxable to him under I.R.C. §§ 671, 677 (sections attributing trust income to grantor as substantial owner of portion of trust).

In *Staley v. Commissioner*, 47 B.T.A. 260 (1942), *aff'd*, 136 F.2d 368 (5th Cir.), *cert. denied*, 320 U.S. 786 (1943), the decedent donor transferred stock in trust in return for the trustee's promise to pay him cash from the trust income, which the donor used to pay the gift taxes. The United States Court of Appeals for the Fifth Circuit held that this was income reserved by the donor and taxable to him as ordinary income. The *Staley* decision was relied on in a series of cases in which trustees paid the gift tax out of the trust income. In *Sheaffer's Estate v. Commissioner*, 37 T.C. 99 (1961), *aff'd*, 313 F.2d 738 (8th Cir.), *cert. denied*, 375 U.S. 818 (1963), the trustee was given discretion to use the trust income to pay the donor's gift tax liability. The gift tax was paid in part from the current income of the trusts and in part from borrowed funds. The United States Court of Appeals for the Eighth Circuit held that income was reserved for the benefit of the donor and was taxable to him under I.R.C. §§ 671, 677. In *Commissioner v. Morgan's Estate*, 37 T.C. 981 (1962), *aff'd*, 316 F.2d 238 (6th Cir.), *cert. denied*, 375 U.S. 825 (1963), the trustees were given discretion to sell trust corpus or borrow funds using the corpus as security to obtain funds to pay the gift tax. The trustees used borrowed funds to pay the gift tax and then repaid the loans from trust income in subsequent years. The Tax Court held that I.R.C. § 677 did not apply because the gift taxes had been paid and the repayment of the loan did not confer any benefit on the donor. In light of *Morgan* there was an entirely new proceeding in *Sheaffer*. The Tax Court in *Estate of Sheaffer*, 35 T.C.M. (P-H) ¶ 66,126 (1966), held in line with *Morgan* that the repayment of a loan out of trust income did not give rise to taxable income. The court also held, however, that the use of current trust income to pay a later year's tax deficiency was taxable to the donor in accord with the first *Sheaffer* decision.

23. At trial and again on appeal, the Commissioner conceded that the transfers in trust were not sales. 410 F.2d at 753.

24. The Tax Court also rejected the part sale, part gift argument in *Victor W. Krause*, 56 T.C. 1242 (1972), in which the court held that because the donor had no further interest in the trust to which the gift was made, and because the transfer was a net gift, not a part sale, which under *Turner* was not an income producing transfer, the donor realized no taxable gain when the trustee paid the gift taxes out of the proceeds of a loan secured by the trust. The *Turner* rationale was relied on once again in *Davis v. Commissioner*, 40 T.C.M. (P-H) ¶ 71,318 (1971), *aff'd per curiam*, 469 F.2d 694 (5th Cir. 1972), in which the Tax Court held that the donor realized no taxable gain when the trustee paid the gift taxes out of cash on hand from a prior year because the donor retained no interest in the trust and because, as in *Turner*, the donor intended a net gift and not a part sale. The United States Court of Appeals for the Fifth Circuit affirmed per curiam the Tax Court's disposition of the part sale contention. 469 F.2d 694, 694 (5th Cir. 1972).

25. 49 T.C. 356, 363 (1968).

26. 410 F.2d at 753.

Commissioner argued was controlling in *Hirst*). The donor in *Johnson* made a gift in trust for his children of stock that was subject to a security interest under a loan agreement entered into by the donor immediately before making the gift. Under this prior arrangement, the lending bank received a thirty day note on which the donor had "no personal liability." The trustees of the trust to which Johnson transferred the stock, the donor's wife and the bank, replaced the donor's note with their own secured by the trust corpus. The donor used most of the loan proceeds to pay the gift tax. The Tax Court held the transfer to be a part sale resulting in taxable gain to the donor, distinguishing *Turner* on the ground that the *Johnson* gift was not conditioned on payment of the gift taxes by the trustees.²⁷

The Court of Appeals for the Sixth Circuit affirmed the Tax Court result but rejected its reasoning, relying instead on three different bases for finding against the taxpayer. The first basis for the *Johnson* holding was that the gift of \$150,000 worth of stock was an exchange for \$200,000 in cash, which was income regardless of how the donor used the money. The second was that the donee, by paying the gift taxes, discharged the donor's legal obligation, resulting in the donor's constructive receipt of income under the doctrine of *Old Colony Trust v. Commissioner*.²⁸ In that case, payment of income taxes by an employer in consideration for services rendered by an employee was held by the United States Supreme Court to be taxable income to the employee. The third basis, and the one most heavily relied on by the court, was the finding that the donor "shed" his debt to the trust and realized income in that amount, based on the court's extension of the rule in *Crane v. Commissioner*.²⁹ In that case the amount of a mortgage on the seller's house for which neither the seller nor buyer had any primary personal liability was held by the United States Supreme Court to be part of the seller's amount realized on sale of the house.

The court was clearly correct in finding that *Turner* and *Hirst* were

27. 59 T.C. 791, 812-13 (1973). The Tax Court distinguished *Turner* further by finding no reservation of an interest in the trust, and on the ground that the loans were not the same thing as a donor's gift tax liability. *Id.*

28. 279 U.S. 716 (1929).

29. 331 U.S. 1 (1947). The court in *Johnson* extended the narrow *Crane* holding that "shedding" encumbrances constitutes an element of gain in sales of real property, to apply to the situation in which encumbered property is the subject of a gift, the amount of the encumbrance there being treated as a part sale. 495 F.2d at 1083-84. This reasoning may extend to net gift situations in which the gift property is "encumbered" by the obligation to pay the gift taxes, which is assumed by the donee by pre-gift agreement. The scope of application of this "shedding of liability" principle is still very much in debate. See Note, *Income Tax Consequences of Encumbered Gifts: The Advent of Crane*, 28 U. FLA. L. REV. 935 (1976).

factually almost indistinguishable³⁰ and that each involved proper use of the net gift form of transfer.³¹ The court was also correct in finding that *Turner* was not overruled by *Johnson*, but only limited to its facts.³² But the reasoning of the *Hirst* court is weak in several respects due to the acceptance of *Turner* as valid precedent and to the refusal to consider the arguments raised in *Johnson* as they apply to a net gift form of transfer.

First, in accord with *Turner*,³³ the court found that the donor only intended to make a net gift and not a part sale, part gift, as contended by the Commissioner. The gift tax label for the transaction does not, however, automatically determine its income tax consequences.³⁴ The donor's intent pertaining to all portions of the transfer must be analyzed to see if this type of gift transfer creates any basis for finding taxable income. The donative intent behind a net gift differs from that accompanying an unconditional gift. In the former case the donor's donative intent is limited to the net portion of the gift, while in the latter the donative intent goes to the whole gift property.³⁵ It is not clear what the donor's intent is with respect to the part of the property that is allocated to the gift tax. Restructuring the transfer, it is arguable that this portion of the gift property remained with the donor who then exchanged it with the donee for the donee's payment of the gift taxes. The *Hirst* court did not examine the possibility that there was such an exchange.³⁶

Second, the court rejected the argument that the donee's payment of the gift taxes was a discharge of the donor's legal obligation resulting in income to the donor.³⁷ This argument was raised in *Johnson*³⁸ but not in *Turner*.³⁹ The court found the discharge of obligations rule to be

30. 572 F.2d at 428, 433.

31. The correctness of the court's finding is supported by Rev. Rul. 75-72, discussed in note 2 *supra*, which limits the use of this device to cases in which the donee's agreement to pay the gift taxes is a condition of the gift transfer.

32. 495 F.2d at 1086.

33. The *Turner* court affirmed the Tax Court in rejecting only the part sale, part gift argument. 49 T.C. 356, 362-64 (1968).

34. See note 2 *supra*.

35. See *id.*

36. The Tax Court in *Hirst* recognized the possibility that there had been an exchange. 63 T.C. 307, 315 (1974).

37. For a discussion of the discharge of obligations doctrine, see note 3 and text accompanying note 28 *supra*. See also *Helvering v. Bruun*, 309 U.S. 461, 469 (1940).

38. See text accompanying notes 28 & 29 *supra*.

39. 410 F.2d at 753. The Tax Court in *Hirst* conceded that the reasoning used in *Johnson* was a more "realistic" view of the net gift, 63 T.C. 307, 315 (1974), but nevertheless abided by *Turner*, as did the court of appeals.

a flexible one that depends on the relations of the parties and the existence of other obligations.⁴⁰ The court implied in a hypothetical that the son's payment of the gift tax was a "gift back" to his mother resulting in no taxable income to her.⁴¹ The facts do not support this gift back theory however. The donee was obligated by a promise to the donor to pay the gift taxes for the donor's benefit in order to receive the gift of property. Also, the donee paid no gift tax on his payment of the gift taxes. In essence, the transfer was a payment to the donor in return for the gift, which was then used to satisfy the gift taxes.⁴²

Third, the court stated that the substance of the net gift transaction rather than its form should control the donor's tax liability,⁴³ but relied nevertheless on the net gift *form* of the transfer to reach its result.⁴⁴ In substance, the donor in *Hirst* was attempting to arrange for payment of the gift taxes without incurring any taxable gain in the process. This goal was carried out in *Turner* and *Hirst* by use of the net gift transfer. This same goal was attempted in *Johnson* by a transfer in which the net gift device was not used, but in that case the donor had to pay income tax as a cost of achieving this goal. It is difficult to reconcile these opposing tax results given the common underlying substance of the transactions. Had taxpayer in *Hirst*, as in *Johnson*, taken out a loan using the gift property as security before the transfer, used the proceeds to pay the gift taxes, and then transferred the encumbered property, she would have realized taxable income. Had she sold a capital asset before the transfer to raise cash to pay the gift taxes she would have realized taxable gain. Had she retained a portion of the capital asset transferred equal in value to the amount of gift taxes due and exchanged this with the donee for the payment of the gift taxes, she would have realized taxable gain from the exchange. But because she used a net gift form of transfer she could make the same gift and get the taxes paid at no additional tax cost, even though she thereby seemed to

40. 572 F.2d at 431.

41. *Id.*

42. *Cf.* Douglas v. Willcuts, 296 U.S. 1 (1935) (taxpayer realized income when, pursuant to contract, a trust discharged his debt).

43. 572 F.2d at 430; *see* Commissioner v. Court Holding Co., 324 U.S. 331, 334 (1945); Gregory v. Helvering, 293 U.S. 465, 470 (1935).

44. In form, *Hirst* received no cash in hand from the transfer nor did she make a sale of her property in the ordinary sense of the term. But in substance she did not need to receive cash in hand to realize economic benefit from the transfer. For a discussion of the capital gains tax savings available with use of the net gift, *see* note 2 *supra*. Also, in substance she did not need technically to make a sale in order to realize income from the transfer. *See* Helvering v. Bruun, 309 U.S. 461, 469 (1940).

enjoy economic gain. It appears that the court in *Hirst* did not adequately analyze the substance of the net gift and compare it with that of other forms of transfer before deciding on its income tax consequences. In this respect, the court let the form of the transfer control its result.

In *Hirst*, the Court of Appeals for the Fourth Circuit has given renewed approval to the use of the net gift transfer as a tax saving device and has reduced the uncertainty surrounding its use after the *Johnson* decision. Donors lacking cash can still use this gift technique and benefit additionally from the capital gains tax savings that arise from using it. The donee will still only have to pay gift tax on the *net* gift, not the full value of the property transferred. Courts will continue to have to base their tax results on factual distinctions concerning the form of the transfer. Congress ultimately may have to step in and more clearly provide for taxation of the donor in these situations or provide for nonrecognition of gain if policy should so suggest. Until then, however, courts should consider applying existing doctrines such as *Old Colony Trust* and *Crane* to achieve more consistent income tax results.

The issue in *Hirst* is a close one that has given a great deal of conceptual trouble to the courts. Unfortunately, the *Hirst* court decided to adhere to the factually similar *Turner* decision, without adequately dealing with the critical analysis made of that case in *Johnson*. Thus, the court did not fully consider the conditional nature of the gift, the limits to the donative intent, the exchange element of part of the transfer, the presence of economic gain, and the applicability of non-sale bases for finding taxable income such as the *Old Colony Trust* and *Crane* doctrines. A closer examination of these factors should produce a different net gift income tax result than the one reached in *Hirst*. But until Congress acts or the United States Supreme Court decides to resolve the inconsistencies between *Johnson* on the one hand, and *Turner* and *Hirst* on the other, the net gift device will continue to have vitality and tax planning utility in the Fourth Circuit.

WILLIAM L. BROWN

Tort Law—The Continuing Threat to Privacy by Consumer Reporting Agencies

*Tureen v. Equifax, Inc.*¹ presented the United States Court of Appeals for the Eighth Circuit with a request to utilize common law tort principles to provide meaningful protection against encroachments on individual privacy by consumer reporting firms.² These firms collect and retain personal information for subsequent dissemination in consumer and investigative consumer reports,³ thereby creating serious threats to individual privacy. Presently, individuals have virtually no remedy for invasions of privacy by consumer reporting firms;⁴ the activities of these firms do not fit comfortably within the recognized classes of the privacy tort, and the Fair Credit Reporting Act makes insufficient provision for the protection of individual privacy.⁵ Unfortunately, the court of appeals failed to take the opportunity presented in *Tureen* to provide a remedy against abusive reporting practices.

1. 571 F.2d 411 (8th Cir. 1978).

2. Fair Credit Reporting Act, 15 U.S.C. § 1681a(f) (1976), provides:

The term "consumer reporting agency" means any person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties

3. The Fair Credit Reporting Act defines "consumer report" as "any written, oral or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living" that is to be used as a factor in determining the consumer's eligibility for credit, insurance, employment or other purposes authorized by the Act. *Id.* § 1681a(d).

An investigative consumer report is "a consumer report or portion thereof in which information on a consumer's character, general reputation, personal characteristics, or mode of living is obtained through personal interviews with neighbors, friends, or associates of the consumer reported on or with others with whom he is acquainted." *Id.* § 1681a(e).

Consumer reports are often distinguished from investigative consumer reports; the former are typically used by small credit bureaus that furnish information on the credit worthiness of individuals to credit-grantors, while the latter are typically used by investigatory agencies (such as Equifax) that furnish comprehensive dossiers on the personal lives of individuals for insurance companies, prospective employers, prospective landlords and the like. Because of the breadth of personal information included in investigative reports, these reports are more likely than consumer reports to intrude upon individual privacy. Note, *The Fair Credit Reporting Act*, 56 MINN. L. REV. 819, 819-21 (1972).

4. See generally Note, *Credit Investigations and the Right to Privacy: Quest For a Remedy*, 57 GEO. L.J. 509 (1969).

5. The Fair Credit Reporting Act was designed to ensure that consumer reporting agencies operate on the basis of fairness, impartiality and respect for the consumer's right of privacy. 15 U.S.C. § 1681a(4) (1976). The Act restricts access to reports to prospective creditors, insurers, employers and others with a legitimate business need. *Id.* § 1681b(3). Consumers must ordinarily be notified when an investigative report is requested. *Id.* § 1681d(a). Reporting agencies must disclose the contents of their file on an individual upon the individual's request, *id.* § 1681g, and certain obsolete material may not be released except in connection with certain high value transactions, *id.* § 1681c. The Act, however, makes reporting agencies liable only for wilful or negligent

The *Tureen* problem began when Equifax⁶ submitted an investigative report to All-American Insurance Company⁷ containing irrelevant⁸ and allegedly false information⁹ pertaining to plaintiff's past applications for life and health insurance. Plaintiff brought an invasion of privacy action against Equifax in the United States District Court for the Eastern District of Missouri. The action, framed simply as an invasion of privacy,¹⁰ was based on the inclusion of the irrelevant insurance underwriting history¹¹ in Equifax's report. Without elaborating on plaintiff's conclusory allegation of an invasion of privacy, the District Court instructed the jury that in order to find an invasion of plaintiff's privacy, they must find that the underwriting history was irrelevant and that the inclusion of this information on the health report would be

failure to comply with the Act, *id.* §§ 1681n, 1681o, and forbids an action for defamation, invasion of privacy or negligence with respect to the reporting of information against the agency, any user of the information, or any person who furnishes information to the agency, unless false information was furnished with malice or wilful intent to injure the consumer, *id.* § 1681h(e).

Despite rights conferred upon individuals by the Act, there is strong evidence that abusive practices by reporting firms, such as failure to verify adverse information, application of pressure on investigators to produce an unrealistic number of daily reports and quotas of adverse information, continue. Comment, *Commercial Credit Bureaus: The Right to Privacy and State Action*, 24 AM. U.L. REV. 421, 426-38 (1975); Note, *Constitutional Right of Privacy and Investigative Consumer Reports: Little Brother Is Watching You*, 2 HASTINGS CONST. L.Q. 773, 776-82 (1975). See generally Note, *Fair Credit Reporting Act: The Case for Revision*, 10 LOY. L.A.L. REV. 409 (1977).

6. Equifax, formerly known as Retail Credit Company, is the largest individual consumer investigative firm in the country and has been the subject of governmental investigations on invasions of privacy. See Comment, *supra* note 5, at 421-26; Note, *Constitutional Right of Privacy and Investigative Consumer Reports: Little Brother Is Watching You*, *supra* note 5, at 774 n.4.

7. 571 F.2d at 412-14. Plaintiff maintained a health insurance policy with All-American. After suffering two heart attacks, he filed a disability claim for benefits pursuant to this policy. All-American hired Equifax to determine if plaintiff actually was disabled. *Id.* at 412-13.

8. The irrelevance of information on plaintiff's past applications for life and health insurance included in the investigative report "is acknowledged in the report, where, after three insurance carriers are listed it is stated that '[w]e are not quoting the remainder of the 23 insurance companies due to their age.'" *Id.* at 422 n.12 (Heaney, J., dissenting).

9. Plaintiff originally brought this action as two claims, one alleging invasion of privacy, and the other alleging that the report's statements concerning plaintiff's past insurance history were libelous. Because the statute of limitations on the libel claim had run, that claim was dismissed, and the case proceeded to trial solely on the issue of invasion of privacy. *Id.* at 413-14.

10. Plaintiff simply alleged that his privacy had been invaded; he did not classify the invasion according to one of the four torts recognized by Prosser as comprised in the general name "invasion of privacy." See note 34 *infra*.

11. Mr. Tureen objected to the following portion of the report:

FILE DIGEST: A thorough check of our files reveals no previous claim history on Bernard H. Tureen. The last underwriting report was a special life report done on 6-13-68. This report was for Connecticut Mutual Life Insurance Co. . . . Amount applied for was \$100,000 and at the time he was carrying \$4,000,000. Beneficiary was the American Duplex Corp. of which he was President. Insurance history indicates we had reported on 23 occasions to various account numbers for life insurance going back to 1949. Total amount applied for for [sic] life was in excess of \$10,000,000

571 F.2d at 413.

offensive to a person of ordinary sensibilities.¹² A jury verdict for plaintiff was reversed by the court of appeals.¹³ The court recast plaintiff's general invasion of privacy action as one for the specific torts of intrusion and public disclosure of private facts,¹⁴ and found the requisite elements of each tort lacking.

Intrusion and public disclosure of private facts are discrete torts. The tort of intrusion is composed of two elements: (1) intentional intrusion, physical *or otherwise*, upon the solitude or seclusion of another or of his private affairs or concerns, and (2) the intrusion must be highly offensive to a person of ordinary sensibilities.¹⁵ Actionable intrusions have been based on nonphysical invasions such as wiretapping,¹⁶ peering through windows,¹⁷ persistent phone calls,¹⁸ and unauthorized prying into bank accounts.¹⁹

The tort of public disclosure of private facts consists of publicizing matters concerning an individual's private life when the matter publicized is of a kind that would be highly offensive to a reasonable person and is not a matter of legitimate public concern.²⁰ No precise definition of publicity has been formulated, yet the parameters of the term are well established. It is clear that publication in any newspaper²¹ or magazine,²² or by radio²³ or television broadcast,²⁴ meets the requirement of publicity, while publication in the sense of a communication to another person sufficient to satisfy the publication requirement in defamation actions does not.²⁵ Confusion exists about what constitutes

12. *Id.* at 414.

13. The court of appeals held that the district court erred in denying defendant's motion for directed verdict at the close of the evidence. *Id.*

14. *Id.* at 415.

15. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 117, at 808 (4th ed. 1971); RESTATEMENT (SECOND) OF TORTS § 652B (1977).

16. *Billings v. Atkinson*, 489 S.W.2d 858 (Tex. 1973).

17. *Souder v. Pendleton Detectives, Inc.*, 88 So. 2d 716 (La. Ct. App. 1956).

18. *McDaniel v. Atlanta Coca-Cola Bottling Co.*, 60 Ga. App. 92, 2 S.E.2d 810 (1939).

19. *Zimmerman v. Wilson*, 81 F.2d 847 (3d Cir. 1936) (decided on constitutional ground of protection against unreasonable search as well as invasion of privacy); *Brex v. Smith*, 104 N.J. Eq. 386, 146 A. 34 (1929).

20. W. PROSSER, *supra* note 15, at 809-12. Prosser's definition has been accepted in case law. *See, e.g., McNally v. Pulitzer Publishing Co.*, 532 F.2d 69, 78 (8th Cir.), *cert. denied*, 429 U.S. 855 (1976).

21. *Trammell v. Citizens News Co.*, 285 Ky. 529, 148 S.W.2d 708 (1941).

22. *Barber v. Time, Inc.*, 348 Mo. 1199, 159 S.W.2d 291 (1942).

23. *Mau v. Rio Grande Oil Co.*, 28 F. Supp. 845 (N.D. Cal. 1939).

24. *Williams v. KCMO Broadcasting Div.—Meredith Corp.*, 472 S.W.2d 1 (Mo. Ct. App. 1971).

25. *See* RESTATEMENT (SECOND) OF TORTS § 652D, Comment a at 384 (1977).

publicity in the range between media publication and ordinary conversation largely because this question is seldom faced by courts; most public disclosure cases are based on media publication and turn on whether the matter involved is of legitimate public concern.

In assessing plaintiff's claim as one of intrusion, the Court of Appeals for the Eighth Circuit found two possible bases for an actionable intrusion: (1) the utilization of objectionable snooping techniques by Equifax and (2) the mere collection and retention by Equifax of plaintiff's underwriting history.²⁶ Because the information disclosed to All-American was already in Equifax's files, and therefore no snooping was necessary to obtain the information, the first hypothetical basis posed by the court was summarily rejected. The court also rejected the second proposed basis of intrusion. After a brief discussion of the role of consumer reports in modern society, the court held that because there may be a legitimate purpose for the collection of an individual's past insurance history in some circumstances, the collection of plaintiff's past insurance history alone was not an intrusion.²⁷

Public disclosure of private facts as a basis of recovery by plaintiff was likewise rejected by the *Tureen* court. The court's analysis of this tort focused on the requirement that there be a "public" disclosure; the court ultimately concluded that the submission of plaintiff's investigative report to All-American was not a *public* disclosure and, therefore, not an invasion of privacy.²⁸ In its analysis of the publicity requirement the court was handicapped by the lack of authority, both in Missouri and other jurisdictions, on the issue of the extent of publicity required to constitute the tort of public disclosure of private facts. The court relied heavily on *Peacock v. Retail Credit Co.*,²⁹ the only case to address squarely the issue whether submission of credit and investigative reports by consumer reporting firms to its clients constitutes a "public" disclosure of facts. The *Peacock* court held that the "mere submission of a confidential credit report, even when it contains false and libelous information, by a credit information company to its customers, is not a 'public disclosure of embarrassing private facts.'"³⁰ Adhering to this precedent, the *Tureen* court held that the submission

26. 571 F.2d at 415-16.

27. *Id.* at 416-17.

28. *Id.* at 419.

29. 302 F. Supp. 418 (N.D. Ga. 1969), *aff'd*, 429 F.2d 31 (4th Cir. 1970), *cert. denied*, 401 U.S. 938 (1971).

30. *Id.* at 423.

of plaintiff's investigative report to All-American was not a public disclosure.

The *Tureen* court's analysis of the torts of intrusion and publication of private facts is in accord with the modern trend of classifying invasion of privacy actions in terms of Prosser's four categories of the tort.³¹ While disagreement continues about the exact nature of the right of privacy and the interests it protects,³² courts have increasingly adopted³³ Prosser's view that the right of privacy spawned a family of four distinct torts that have little in common except the general name "invasion of privacy."³⁴ Courts have foregone any attempt at a comprehensive definition of the right of privacy, preferring instead to pigeonhole invasion of privacy actions into one of Prosser's categories. Strict application of these categories has rigidified the right of privacy, rendering it incapable of accommodating new fact situations. This development is contrary to the common law³⁵ origins of the right; initially

31. Prosser classifies invasion of privacy actions into four categories: (1) appropriation of the plaintiff's name or likeness for the defendant's personal advantage or benefit; (2) intrusion upon the plaintiff's seclusion or solitude, or into his private affairs; (3) public disclosure of embarrassing private facts about the plaintiff; and (4) publicity that places the plaintiff in a false light in the public eye. W. PROSSER, *supra* note 15, at 802-14. This classification was adopted by the American Law Institute in RESTATEMENT (SECOND) OF TORTS §§ 652A-652E, at 376-400 (1977).

32. A. WESTIN, *PRIVACY AND FREEDOM* 7 (1967) ("Privacy is the claim of individuals, groups or institutions to determine for themselves when, how, and to what extent information about them is communicated to others."); Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890) (right of privacy based on "inviolate personality"); Prosser, *Privacy*, 48 CALIF. L. REV. 383 (1960) (privacy not a right in itself but sum of particular interests in mental tranquility, reputation, and one's own identity protected by this right); Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U.L. REV. 962 (1964) (right of privacy based on human dignity). See generally Gerety, *Redefining Privacy*, 12 HARV. C.R.-C.L.L. REV. 233 (1977); Thomson, *The Right To Privacy*, 4 PHILOSOPHY & PUB. AFF. 295 (1975).

33. See, e.g., *Cabaniss v. Hipsley*, 114 Ga. App. 367, 151 S.E.2d 496, 499-504 (1966).

34. "The law of privacy comprises four distinct kinds of invasion of four different interests of the plaintiff, which are tied together by the common name, but otherwise have almost nothing in common . . ." Prosser, *supra* note 32, at 389.

Taking them in order—intrusion, disclosure, false light, and appropriation—the first and second require the invasion of something secret, secluded or private pertaining to the plaintiff; the third and fourth do not. The second and third depend upon publicity, while the first does not, nor does the fourth, although it usually involves it. The third requires falsity or fiction; the other three do not. The fourth involves a use for the defendant's advantage, which is not true of the rest.

Id. at 407.

35. A common law right of privacy was first recognized by a court of last resort in *Pavesich v. New England Life Ins. Co.*, 122 Ga. 190, 50 S.E. 68 (1905). The right of privacy is now acknowledged in either the common law or the statutes of virtually every jurisdiction. W. PROSSER, *supra* note 15, at 804; e.g., N.Y. CIV. RIGHTS LAW § 50 (McKinney 1976); OKLA. STAT. tit. 21, § 839 (1971); UTAH CODE ANN. §§ 76-9-402 to -405 (1978); VA. CODE § 2.1-378 (1978).

The common law right of privacy recognized in state tort law is not to be equated with emerging constitutional rights of privacy. Although there is no specific mention of a right of privacy in the Constitution, the Supreme Court in *Griswold v. Connecticut*, 381 U.S. 479, 484-85 (1965), recognized the existence of various "zones of privacy" emanating from specific guarantees found

characterized in amorphous terms such as a "right to be let alone"³⁶ or a right "to determine one's mode of life, whether it shall be a life of publicity or of privacy,"³⁷ the early right of privacy provided the individual a broad, flexible basis of protection.³⁸

Tureen exemplifies the inflexible approach to the privacy tort adopted by courts, and the resultant failure³⁹ of the right of privacy to provide meaningful protection in the modern world of extensive data collection and dissemination.⁴⁰ The *Tureen* court narrowly construed the torts of intrusion and public disclosure to deny a remedy for abusive consumer reporting practices.⁴¹ The court could instead have adopted several theories urged upon it that would have expanded the existing conceptual framework of the torts of intrusion and public disclosure to accommodate the *Tureen* facts without doing violence to the recognized elements of these torts.⁴²

in the Bill of Rights. The Supreme Court subsequently held that a constitutional right of privacy is implicit in the "Fourteenth Amendment's concept of personal liberty and restrictions upon state action" or "in the Ninth Amendment's reservation of rights to the people." *Roe v. Wade*, 410 U.S. 113, 153 (1973). Courts have narrowly construed this right, holding thus far that the constitutional right of privacy protects only the most intimate phases of personal life, such as an individual's marital, familial, and sexual activities, from state interference. *McNally v. Pulitzer Publishing Co.*, 532 F.2d 69, 76-77 (8th Cir.), *cert. denied*, 429 U.S. 855 (1976); *Industrial Foundation of the South v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 678-81 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977); *see Eisenstadt v. Baird*, 405 U.S. 438, 453-54 (1972); *Stanley v. Georgia*, 394 U.S. 557, 564-65 (1969). For a discussion of the relationship between the tort of invasion of privacy and a constitutional right of privacy, see Note, *Triangulating the Limits on the Tort of Invasion of Privacy: The Development of the Remedy in Light of the Expansion of Constitutional Privilege*, 3 HASTINGS CONST. L.Q. 543 (1976).

36. *See, e.g.*, *Brents v. Morgan*, 221 Ky. 765, 770, 299 S.W. 967, 969-70 (1927); *Barber v. Time, Inc.*, 348 Mo. 1199, 1205, 159 S.W.2d 291, 294 (1942).

37. *See, e.g.*, *Housh v. Peth*, 165 Ohio St. 35, 38, 133 N.E.2d 340, 343 (1956) (quoting *Pavesich v. New England Life Ins. Co.*, 122 Ga. 190, 190, 50 S.E. 68, 68 (1905)).

38. Early cases, invoking the common law's capacity for growth and expansion and its adaptability to the needs and requirements of changing conditions, recognized violations of a right of privacy in varying fact situations. *See, e.g.*, *Goodyear Tire & Rubber Co. v. Vandergriff*, 52 Ga. App. 662, 184 S.E. 452 (1936) (impersonation of plaintiff by defendant's agent for purpose of procuring confidential information an invasion of plaintiff's privacy); *Brents v. Morgan*, 221 Ky. 765, 299 S.W. 967 (1927) (conspicuous sign in store window advertising plaintiff's debt an invasion of plaintiff's privacy); *Heinisch v. Meir & Frank Co.*, 166 Or. 482, 113 P.2d 438 (1941) (telegram sent to governor bearing plaintiff's unauthorized signature an invasion of plaintiff's right to privacy); *Bennett v. Norban*, 396 Pa. 94, 151 A.2d 476 (1959) (search of plaintiff by store manager an invasion of plaintiff's privacy).

39. *See Weinberger v. Retail Credit Co.*, 498 F.2d 554 (4th Cir. 1974); *Peacock v. Retail Credit Co.*, 302 F. Supp. 418 (N.D. Ga. 1969), *aff'd*, 429 F.2d 31 (5th Cir. 1970), *cert. denied*, 401 U.S. 938 (1971). *See generally* Note, *supra* note 4.

40. *See generally* A. MILLER, *THE ASSAULT ON PRIVACY: COMPUTERS, DATA BANKS AND DOSSIERS* (1971); A. WESTIN, *supra* note 32.

41. *See* note 5 *supra*.

42. 571 F.2d at 416-17. The court's conclusion that the collection of past insurance information pertinent to the legitimate business needs of a reporting agency's customers is sound; this activity is not offensive to a person of ordinary sensibilities, and is an indispensable accoutrement

Specifically, the accepted definition of intrusion is broad enough to encompass the collection by consumer reporting firms of private information unrelated to any conceivable business need, and the distribution of private information that is relevant to some business need served by consumer reports but is not relevant to any legitimate business need served by the particular report.⁴³ The collection and distribution of private information by consumer reporting firms is arguably a nonphysical intrusion upon the individual's private affairs or concerns, not unlike prying into an individual's bank account. Unauthorized prying into bank accounts has been held to be an actionable intrusion;⁴⁴ it is no great conceptual leap to find that the gathering of personal information unrelated to any business need served by consumer reports is a form of prying into one's private concerns and, hence, an intrusion. This argument can be expanded to include the dissemination of information that is relevant to some business need but is not relevant for the purposes of the particular report. By including such irrelevant information in its report, the firm is in effect forcing its customer to pry into the individual's private affairs. The result in both circumstances is the same: strictly private information has become known to persons having no right to this information.

The *Tureen* court did not consider either facet of this intrusion

of modern life. Although this conclusion is sound, the court's reasoning in support is faulty: the court confused the elements of intrusion with those of publication of private facts. The court seemingly conceded that the collection and retention of personal data such as underwriting history constitutes an actionable intrusion because it attempted to justify the intrusion on the basis of overriding public interest. A legitimate public interest in publicized information is a defense to a publication of private facts complaint, but it is not a defense to an intrusion action.

Both *Barber v. Time, Inc.*, 348 Mo. 1199, 159 S.W.2d 291 (1942), and *Langworthy v. Pulitzer Publishing Co.*, 368 S.W.2d 385 (Mo. 1963), which the *Tureen* court cited in support of its conclusion, involved newspaper publication of facts about plaintiffs. Neither case suggested that an otherwise actionable intrusion may be justified by an overriding public interest in the intrusion. Discussion of public interest as a defense to an invasion of privacy action focused on harmonizing the right of privacy with unabridged freedom of the press and application of the principle that the press may report matters of public interest with impunity. 348 Mo. at 206, 159 S.W.2d at 295; 368 S.W.2d at 389-90.

43. The American Law Institute explained the scope of the tort of intrusion in the *Restatement (Second) of Torts*:

The invasion may be by physical intrusion into a place in which the plaintiff has secluded himself It may also be by use of the defendant's senses, with or without mechanical aids, to oversee or overhear the plaintiff's private affairs, as by looking into his upstairs windows with binoculars or tapping his telephone lines. It may be by some other form of investigation or examination into his private concerns, as by opening his private and personal mail, searching his safe or his wallet, examining his private bank account, or compelling him by a forged court order to permit an inspection of his personal documents.

RESTATEMENT (SECOND) OF TORTS § 652B, Comment b at 378-79 (1977).

44. See cases cited note 19 *supra*.

argument, even though a similar argument was raised and rejected in *Peacock*. The *Peacock* court rejected the argument on the ground that Georgia law recognized only physical intrusions analogous to trespass.⁴⁵ Missouri law, the controlling law in *Tureen*, imposes no similar restrictions on intrusion actions;⁴⁶ thus, the court did not have the barrier to adopting this interpretation faced by the *Peacock* court.

The *Tureen* court's analysis of public disclosure was as routine as its intrusion analysis. Lack of authority on the question of what constitutes publicity forced undeserved reliance on *Peacock*. The *Peacock* court drew on a hodgepodge of Georgia case law to reach its conclusion,⁴⁷ apparently operating on the premise that what is not expressly included in the concept of publicity by prior case law is excluded. After cursory examination of a wide variety of invasion of privacy actions, the court declared that none of the cases examined supported the theory that disclosure of private information in credit reports is a "public" disclosure. While it is certainly true that none of the cases cited in *Peacock* lends particular support to the theory that such a disclosure is a "public" disclosure, neither do they lend strong support to the theory that it is not. None of the cited cases dealt specifically with an analysis of the publicity requirement; in fact, the requirement was not even alluded to in a few of these cases.⁴⁸ Furthermore, because the cited cases are old, they are not framed in terms of Prosser's categories. Consequently, it is probably inappropriate to apply unqualifiedly the general statements on invasion of privacy in these cases to the distinct branches of the tort recognized today.

Of the cases cited in *Peacock*, *Gouldman-Taber Pontiac, Inc. v.*

45. 302 F. Supp. at 422.

46. Jurisdiction in *Tureen* was based on diversity of citizenship under 28 U.S.C. § 1332 (1976). Missouri substantive law therefore was controlling. 571 F.2d at 417, 421.

47. Two of the five cases relied upon by the court in *Peacock*, *Waters v. Fleetwood*, 212 Ga. 161, 91 S.E.2d 344 (1956), and *Bazemore v. Savannah Hosp.*, 171 Ga. 257, 155 S.E. 194 (1930), focused on the question of what is a matter of legitimate public concern. The other three, *Gouldman-Taber Pontiac, Inc. v. Zerbst*, 213 Ga. 682, 100 S.E.2d 881 (1957), *Haggard v. Shaw*, 100 Ga. App. 813, 112 S.E.2d 286 (1959), and *Davis v. General Fin. & Thrift Corp.*, 80 Ga. App. 708, 57 S.E.2d 225 (1950), involved debtor-creditor situations and application of the principle that a creditor may take reasonable steps to collect outstanding debts without invading the debtor's privacy.

48. *Waters v. Fleetwood*, 212 Ga. 161, 91 S.E.2d 344 (1956), and *Bazemore v. Savannah Hosp.*, 171 Ga. 257, 155 S.E. 194 (1930), involved newspaper publication of photographs and subsequent resale of the published photographs by the newspaper. The courts explored the scope of the legitimate public concern element and, peripherally, the question of survival of privacy actions. Neither case reached the question of publicity, presumably because the publicity requirement was obviously satisfied.

*Zerbst*⁴⁹ offers the best support for the *Peacock* holding, and this support is at best ambiguous. The question before the court in *Gouldman* was whether a letter written by a creditor to an employer notifying the employer of his employee's indebtedness to the creditor and seeking the employer's aid in collecting the debt constituted a violation of the employee's right of privacy. The court held that this was not an invasion of the employee's privacy, stating that "in giving this information to an employer, it [the creditor] was not giving to the general public information concerning a private matter in which it had, or could have, no legitimate interest," since an employer has a "natural and proper interest in the debts of his employees."⁵⁰ It stretches credibility to infer that the court intended a meaningful exposition of the term "publicity" by this oblique reference to the general public. Any analogy drawn between a creditor and a consumer reporting firm would be inappropriate. The case belongs in a class of debtor-creditor cases⁵¹ that recognizes that creditors can take reasonable steps to collect debts without interfering with the debtor's right of privacy;⁵² it did not deal with the specific torts of public disclosure and intrusion as they are recognized today.

Davis v. General Finance & Thrift Corp.,⁵³ also cited in *Peacock*, offered no support for the *Peacock* holding. The issue of publicity was never reached in *Davis*, and there are even implications that disclosure to one or a few individuals may satisfy the publicity requirement. Plaintiff in *Davis* brought an action for libel and for invasion of privacy, both of which were based on publication by telegram of plaintiff's debt to General Finance and Thrift Corporation.⁵⁴ The telegram in question was sent by defendant to plaintiff notifying him of his unpaid debt; only Western Union employees who handled the message in the course of its transmission could have seen the message. The *Davis* court raised no objections to the invasion of privacy claim based on "publication by telegram"; instead, the court dismissed the claim on the basis that the telegram was not a flagrant breach of decency and propriety⁵⁵ and therefore was inoffensive to a person of ordinary sensibilities.

49. 213 Ga. 682, 100 S.E.2d 881 (1957).

50. *Id.* at 683-84, 100 S.E.2d at 883.

51. *See* Annot., 33 A.L.R.3d 154, 158 (1970).

52. *Haggard v. Shaw*, 100 Ga. App. 813, 112 S.E.2d 286 (1959), reiterated the principle established in *Gouldman* without further clarification. The fact situation in *Haggard* is practically identical to that of *Gouldman*, and the court simply borrowed the *Gouldman* holding.

53. 80 Ga. App. 708, 57 S.E.2d 225 (1950).

54. *Id.* at 708, 57 S.E.2d at 226.

55. *Id.* at 710-11, 57 S.E.2d at 227.

Tureen perpetuated this superficial treatment of authority in its examination of Missouri case law.⁵⁶ *Biederman's of Springfield, Inc. v. Wright*,⁵⁷ cited as support for the proposition that public means "affecting the community at large,"⁵⁸ is actually authority for a more circumscribed definition of publicity. The court in *Biederman's* quoted Prosser's expansive definition of publicity,⁵⁹ but the facts of the case indicate that such a broad definition of publicity could not have been operative in the court's decision. The invasion of privacy claim in *Biederman's* was based on the conduct of defendant store's collection agent. The agent followed plaintiff around the cafe in which she worked on three separate occasions, loudly declaring that plaintiff and her husband were "deadbeats" and refused to pay their bills.⁶⁰ The court found that the agent's oral publication of plaintiff's debt in the cafe satisfied any "reasonable requirement" of publicity.⁶¹

The *Tureen* fact situation could easily have been brought within the public disclosure of facts tort had the court not placed so much weight on the actual number of persons apprised of particular facts. The tort does not require that a communication actually reach a large number of people, it merely requires that it have that potential.⁶² The likelihood of widespread dissemination can be inferred from the medium employed. A consumer reporting firm provides a means of disseminating information as do newspapers, magazines, and public records. Judge Heaney, in his dissenting opinion, argued persuasively that the medium of the consumer reporting firm provides a sufficient likelihood of widespread dissemination to satisfy the publicity requirement of the public disclosure tort.⁶³ Considering the practices of the

56. Two cases cited by the court, *Munden v. Harris*, 153 Mo. App. 652, 134 S.W. 1076 (1911), and *Barber v. Time, Inc.*, 348 Mo. 1199, 159 S.W.2d 291 (1942), involved publication in a newspaper and magazine respectively, thus obviating the need for analysis of the publicity requirement.

57. 322 S.W.2d 892 (Mo. 1959).

58. 571 F.2d at 419.

59. 322 S.W.2d at 898. Prosser defined publicity as "communication to the public in general or to a large number of persons, as distinguished from one individual or a few." PROSSER ON TORTS § 97, at 641 (2d ed. 1955). The present Restatement definition of publicity is a refinement of Prosser's definition. "Publicity . . . means that the matter is made public, by communicating it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge." RESTATEMENT (SECOND) OF TORTS § 652D, Comment a at 384 (1977).

60. 322 S.W.2d at 893-95.

61. *Id.* at 898.

62. See RESTATEMENT (SECOND) OF TORTS § 652D, Comment a at 384 (1977) (tort of public disclosure requires "a communication that reaches, or is sure to reach, the public") (emphasis added); *Industrial Foundation of the South v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 683-84 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977).

63. 571 F.2d at 420 (dissenting opinion).

consumer reporting industry,⁶⁴ this is a much more realistic view than that of the majority. Disclosure of private information in credit reports does not end with its disclosure to one customer; information gathered on individuals is retained in the files of the reporting office for use in later reports made to any number of customers. While reporting firms are prohibited by law from giving credit reports to those who do not have a "legitimate" interest in them,⁶⁵ this restriction is difficult to enforce because of the vagueness of the term "legitimate business purpose."⁶⁶

In reaching its conservative result, the *Tureen* court may simply have been following the directive to federal courts exercising diversity jurisdiction to apply rather than expand state tort law. Nevertheless, the *Tureen* court had the conceptual framework at its disposal to expand the torts of intrusion and public disclosure of private facts to include the collection and dissemination of private information by consumer reporting firms, but refused to adopt the proffered interpretations. This unfortunate refusal denies individuals a much needed remedy against abusive practices of the consumer reporting industry and presents additional precedent for the narrow interpretation of publicity adopted in *Peacock*. State courts faced with a fact situation similar to the one presented in *Tureen* should consider *Tureen* in its proper jurisdictional posture and not feel constrained by it from expanding state tort law to provide a remedy.

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64. Credit and investigative reports are used extensively by creditors, insurance companies, landlords, employers and numerous departments of the federal government such as the Justice Department, the Civil Service Commission, and the Veterans Administration. Note, *Constitutional Right of Privacy and Investigative Consumer Reports: Little Brother Is Watching You*, *supra* note 5, at 811-12.

65. The Fair Credit Reporting Act prohibits furnishing a consumer report except with the consumer's permission or for specified legitimate purposes. The legitimate purposes enumerated in 15 U.S.C. § 1681b(3) (1976) are credit transactions, employment purposes, insurance underwriting, and the granting of government licenses or benefits. Section 1681b(3)(E), however, contains a catch-all for all purposes not specifically listed; it authorizes consumer reporting firms to give reports to anyone who "has a legitimate business need for the information in connection with a business transaction involving the consumer." *Id.* § 1681b(3)(E).

66. *Fair Credit Reporting Act: Hearings on S. 2360 Before the Subcomm. on Consumer Credit of Senate Comm. on Banking, Housing, and Urban Affairs*, 93d Cong., 1st Sess. 687 (1973) (statement of Albert Foer).