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ARTICLES

OF MOONS, THONGS, HOLDINGS AND DICTA: *STATE V. FLY* AND THE RULE OF LAW

THOMAS L. FOWLER*

"[I]n the long run adherence to rules furthers substantive justice to a greater extent than direct pursuit of just results would."[1]

The day after the North Carolina Court of Appeals' decision in *State v. Fly*,[2] newspapers across the state proclaimed that mooning, i.e., exposing one's buttocks to others, was now legal in North Carolina.[3] In Raleigh, a radio personality and several friends celebrated the ruling by mooning surprised highway motorists from atop the radio station's van as bemused police looked on.[4] And

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1. Michael C. Dorf, *Dicta and Article III*, 142 U. Pa. L. Rev. 1997, 2054 (1994).

2. 127 N.C. App. 286, 488 S.E.2d 614 (1997), *rev'd*, 348 N.C. 556, 501 S.E.2d 656 (1998).

3. Thomas Hackett, *N.C.'s Bottom Line: Mooning Not Indecent, Buttocks Are Not 'Private Parts'*, Raleigh News & Observer, Aug. 20, 1997, at A1.

4. *Radio Personality Moons Commuters*, Raleigh News & Observer, Aug. 21, 1997, at B3. According to the report, "'Flash,' the aptly named producer for G105's morning show, dropped his shorts atop the FM station's van about 8 a.m.

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along North Carolina's picturesque beaches, as they had all summer long, women continued to sport thong bathing suits and g-string bikinis.[5] The Court of Appeals had held that buttocks are not included within the term "private parts" as that term is used in the indecent exposure statute, thereby excluding both the mooner expressly and the thong wearer impliedly from prosecution for indecent exposure. If this conclusion was in error, however, and buttocks are private parts, then both the mooner and the sun-worshippers on the beach would be subject to prosecution. The state appealed the matter to the North Carolina Supreme Court.[6]

In *State v. Fly*[7] the North Carolina Supreme Court crafted an intricate opinion that in essence split the baby or at least the two groups of buttocks exposers. In a unanimous opinion, the Court held that the mooner was guilty of indecent exposure, but stated that the thong and g-string bikini wearer would not be.[8] While compelling practical or moral considerations may have favored such a result, the legal analysis employed in *Fly* to achieve this result appears to be largely rationalization and artifice. For instance, in discussing the issue that was deemed dispositive in both the majority and the dissenting opinions of the Court of Appeals, the Supreme Court determined: (1) that its review of the case was not limited to a consideration of whether buttocks are private parts;[9] (2) that resolution of that question was actually unnecessary to a resolution of the case;[10] (3) that the Court of

at Six Forks and Wake Forest roads during a live broadcast of the 'Bob and Madison Showgram.'" When asked, the Raleigh police said, "it wasn't their policy to arrest anyone for mooning even before Tuesday's ruling."

5. "[D]uring our torrid summer months . . . [o]ur beaches, lakes, and resort areas are often teeming with such scantily clad vacationers." State v. Fly, 348 N.C. 556, 561, 501 S.E.2d 656, 657 (1998). This point was first made in defendant's brief submitted to the Court of Appeals. Defendant argued by analogy that "on a daily basis during the summer months, the beaches of North Carolina are packed with scantily clad women. More specifically, women wearing thong bikinis. These are the bikinis with the bottoms that only have a tiny string to cover the buttocks and the string goes down the middle of the buttocks. Thereby, often making the string unable to even be seen." Defendant-Appellant's Brief at 11, *Fly*, 348 N.C. 556, 501 S.E.2d 656 (No. 472A97).

6. The State appealed as a matter of right because one of the Court of Appeals judges dissented. *Fly*, 348 N.C. 556, 558, 501 S.E.2d 656, 657 (1998);

7. 348 N.C. 556, 501 S.E.2d 656 (1998).

8. *Id.* at 561, 501 S.E.2d at 659.

9. *Id.* at 559, 501 S.E.2d at 658.

10. *Id.* at 561, 501 S.E.2d at 659.

Appeals misread the applicable case law and therefore misinterpreted the applicable statute,[11] but (4) that the Court of Appeals majority was nevertheless correct that "buttocks are not private parts within the meaning of the statute."[12] This latter statement is thus intended dictum which the Court included in the opinion apparently for the sole purpose to justify the Court's conclusion that the thong wearer is not guilty of indecent exposure—which was not an issue that was before this Court in this case.[13] Faced then with the difficulty of upholding the conviction of the mooner for exposing his buttocks in light of its statement that exposing the buttocks is not an indecent exposure, the Court discerned several alternative theories under which the mooner's conduct violated the indecent exposure statute: (1) that the mooner had exposed his anus which was a private part;[14] (2) that the mooner exposed his genitals even if no one present saw them;[15] and (3) that elements of the crime of indecent exposure include the specific intent to offend and the lack of consent of the parties viewing the exposure.[16] These theories had not been considered by the lower courts, and they strayed from both the facts of this case and the established elements of the crime of indecent exposure in North Carolina. Nevertheless, on the supposed strength of these new rationales and a disingenuous determination of legislative intent, the Supreme Court reversed the Court of Appeals and reinstated Mark Fly's conviction despite agreeing, albeit in dicta, with the holding of the Court of Appeals' majority that reversed the conviction.

Few may protest the specific result in this case,[17] and fewer still may mourn the chilling effect *Fly* may have on the practice of

11. *Id.* at 559-60, 501 S.E.2d at 658-59.

12. *Fly,* 348 N.C. at 561, 501 S.E.2d at 659.

13. "It is clearly not the function of appellate courts to issue opinions on abstract or theoretical questions. . . . Rather, appellate courts are limited to deciding 'actual controversies injuriously affecting the rights of some party to the litigation.'" Clinton v. Wake County Bd. of Educ., 108 N.C. App. 616, 620, 424 S.E.2d 691, 694 (1993), (quoting Kirkman v. Wilson, 328 N.C. 309, 312, 401 S.E.2d 359, 361 (1991)).

14. *Id.* at 561, 501 S.E.2d at 659.

15. *Id.*

16. *Id.* at 562, 501 S.E.2d at 560.

17. The circumstances of this case leave little doubt that Mark Fly's conduct was not simply a matter of harmless horsing around. The incident occurred at 7:30 a.m. and Mr. Fly had positioned himself so that Mrs. Glover, who was returning to her apartment, would turn a corner on a stairway and be confronted with his naked posterior at about her eye-level and about four feet away. Mrs.

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mooning[18] in North Carolina. But judges are not free to chose the best or the most "just" result in the cases that come before them.[19]

Glover had never met Mr. Fly prior to this incident. Mrs. Glover testified that she was very distressed and intimidated by the incident and that she "felt violated." Trial Transcript at 19, State v. Fly, 348 N.C. 556, 501 S.E.2d 656 (1998) (No. 472A97).

18. Some might defend the act of mooning as a legitimate, if extreme, method of communication that depends for its effectiveness on its shock value and/or offensiveness. Baring one's buttocks to show disrespect to one's foes has a long history in the annals of warfare. For instance, a Frenchman, Robert de Clari, who wrote a chronicle of his participation in the Fourth Crusade in the Middle Ages, reported an incident that occurred following an unsuccessful attack by crusaders: "When the Greeks saw them retreat, they climbed up on the walls, took down their pants and showed them their behinds." ROBERT DE CLARI, HISTORIENS ET CHRONIQUEURS DU MOYEN AGE 31 (1938). In a letter to the Raleigh News and Observer, 20 August 1997, John O. Coan of Raleigh related the following excerpt from the diary of his ancestor, Benjamin Elledge of Wilkes County, in 1776, describing the North Carolina militia expedition to the Cherokee Nation under the command of Brigadier General Rutherford: "Some of Our troops saw 7 or Eight Indians this day. One Indian flung up his Arse Clout & Smack't his arse at Our Men Tho took Care to be On a Mt too far for Bullitting." Although the historic authenticity may be in doubt, it might also be noted that in the recent film "Braveheart," which details the life of Scottish warrior William Wallace, Wallace instructed his forces to moon en masse the English army at the Battle of Stirling Bridge. Mooning has thus had a long history as symbolic speech. Although not an issue expressly raised in State v. Fly, the U.S. Supreme Court has long held that such nonverbal, expressive conduct is entitled to some First Amendment protection. *See, e.g.*, United States v. Eichman, 496 U.S. 310 (1990) (flag burning case); Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503 (1969) (students wearing black arm bands). This possibility may have indirectly influenced the N.C. Supreme Court's unusual method of resolving the case against Mark Fly. *See generally* Chris Joe, *Can We Express Ourselves Dancing Naked?*—Barnes v. Glen Theatre, Inc.—*The First Amendment and Freedom of Expression*, 46 SMU L. Rev. 263 (1992) (discussing a case that considered whether non-obscene nude dancing was expressive entertainment entitled to constitutional protection); Reena N. Glazer, *Women's Body Image and the Law*, 43 Duke L.J. 113 (1993) (discussing First Amendment and Equal Protection issues in laws prohibiting women exposing their breasts); Richard B. Kellam & Teri Scott Lovelace, *To Bare or Not to Bare: The Constitutionality of Local Ordinances Banning Nude Sunbathing*, 20 U. Rich. L. Rev. 589 (1986).

19. BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 141 (1921)

> A jurist is not to innovate at pleasure. He is not a knight-errant, roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to the primordial necessity of order in the social life.

Instead, judges, both trial and appellate, properly resolve cases by following a complex set of rules, the apprehension, interpretation and application of which comprise, in large part, the art of judging or judicial decisionmaking.[20] Consistent use of this complex set of rules is commonly referred to as the rule of law,[21] and adherence to the rule of law is the basis for the legitimacy, both real and perceived, of our legal system.[22] Predictability and consistency

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Id.

> It is . . . an established rule to abide by former precedents, stare decisis, where the same points come up again in litigation, as well to keep the scale of justice even and steady, and not liable to waver with every new judge's opinion . . . . [I]t is not in the breast of any subsequent judge to alter or swerve from [precedent] according to his private sentiments; he being sworn to determine, not according to his private judgment, but according to the known laws and customs of the land—not delegated to pronounce a new law, but to maintain and expound the old one.

McGill v. Town of Lumberton, 218 N.C. 586, 591, 11 S.E.2d 873, 876 (1940) (quoting HERBERT BROOM, LEGAL MAXIMS 147 (8th ed. 1911)). "[I]t is the function of courts to interpret rather than make law." Sides v. Duke Univ., 74 N.C. App. 331, 344, 328 S.E.2d 818, 827 (1985) *overruled on other grounds* by Kurtzman v. Applied Analytical Indus., 347 N.C. 329, 493 S.E.2d 420 (1997).

20. Among the vital aspects of the tradition of judicial self-restraint are "an abiding sense of judicial integrity, a close and necessary regard for the rules of procedure, considerations of equal treatment before the law, the deference shown to legislative enactments, . . . and stare decisis, the adherence to precedent." HENRY J. ABRAHAM, THE JUDICIAL PROCESS 345 (1986). "[I]t is indisputable that stare decisis is a basic self-governing principle within the Judicial Branch, which is entrusted with the sensitive and difficult task of fashioning and preserving a jurisprudential system that is not based upon 'an arbitrary discretion'." Patterson v. McClean Credit Union, 491 U.S. 164, 172 (1989).

21. Professor Karl Llewellyn in his book *The Bramble Bush*, summarizes these rules as follows:

> [A]ll our cases are decided, all our opinions are written, all our predictions, all our arguments are made, on four certain assumptions . . . : (1) The court must decide the dispute that is before it. . . . (2) The court can decide only the particular dispute which is before it. . . . (3) The court can decide the particular dispute only according to a general rule which covers a whole class of like disputes. . . . (4) Everything, everything, everything, big or small, a judge may say in an opinion, is to be read with primary reference to the particular dispute, the particular question before him.

KARL N. LLEWELLYN, THE BRAMBLE BUSH 40-41 (2d ed. 1951). *See also,* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. of Chi. L. Rev. 1175 (1989) (Justice Scalia's essay explores the "dichotomy between the 'general rule of law' and 'personal discretion to do justice'.").

22. The justifications for following precedent are: (1) the need for certainty and predictability in the law; (2) the propriety in insuring that similarly situated

matter.[23] A judge is duty bound to impose the result required by or, if no one result is required, a result consistent with the judge's consideration and application of the rule of law.

In *State v. Fly,* the Supreme Court appears to have selected a result based on its opinion of what the law should be rather than the result compelled or allowed by application of the rule of law. First, the decision in *Fly* was appealed to the Supreme Court on the basis of the dissent of one of the Court of Appeals judges. In such appeals of right based on a dissent, review by the Supreme Court is limited by Rule 16 of the Rules of Appellate Procedure to a consideration of the question "specifically set out in the dissenting opinion as the basis for that dissent." Yet *Fly* expressly avoided resolving the case on the issue which divided the Court of Appeals and stated that this avoidance was allowed by Rule 16.[24] *Fly*'s expansive reading of Rule 16's limitation undermines both the rather restrictive language of Rule 16 and the purpose of the rule as explained in previous cases. Second, *Fly* appears to rewrite the indecent exposure statute and the relevant case law in novel and illogical ways simply to justify the exemption of the thong wearers that may populate our beaches in the 1990's a result that cannot conceivably have been within the legislature's

litigants are treated equally; (3) the judicial efficiency achieved by not reopening every past decision; and (4) the appearance of justice and the avoidance of arbitrary decision making. Earl Maltz *The Nature of Precedent*, 66 N.C. L. Rev. 367, 368-372 (1988). *See also,* Paul W. Werner, *The Straits of Stare Decisis and the Utah Court of Appeals: Navigating the Scylla of Under-Application and the Charybdis of Over-Application*, 1994 BYU L. Rev. 633 (1994) (stating the public policies served by stare decisis as (i) reliance and stability of interests; (ii) judicial expedition and economy; and (iii) the "image of justice"); Frederick Schauer, *Precedent*, 39 Stan. L. Rev. 571 (1987). Justice Harlan summarized these matters as follows:

> Very weighty considerations underlie the principle that courts should not lightly overrule past decisions. Among these are the desirability that the law furnish a clear guide for the conduct of individuals, to enable them to plan their affairs with assurance against untoward surprise; the importance of furthering fair and expeditious adjudication by eliminating the need to relitigate every relevant proposition in every case; and the necessity of maintaining public faith in the judiciary as a source of impersonal and reasoned judgments.

Moragne v. States Marine Lines, Inc., 398 U.S. 375, 403 (1970).

23. "This Court has always attached great importance to the doctrine of stare decisis, both out of respect for the opinions of our predecessors and because it promotes stability in the law and uniformity in its application." Wiles v. Constr. Co., 295 N.C. 81, 85, 243 S.E.2d 756, 758 (1978).

24. *Fly*, 348 N.C.556, 501 S.E.2d 656 (1998).

contemplation when it passed the statute in 1971. As a result, the opinion raises more questions than it answers regarding the elements of the crime of indecent exposure and thus exposes the statute to challenge as too vague and uncertain to be enforced.[25] Third, the opinion undermines the judicial process itself by focusing on matters not properly before the court, on facts not in the record, and on rationales not apprehended by earlier precedent. Attorneys and trial judges must distinguish between holding and dictum contained in appellate cases in order to determine which statements are binding precedent and which are mere indications of how the Court will decide an issue in the future. The analysis and the language chosen by the Court in *Fly* obscure the normal guideposts that lower courts use to make this holding versus dictum determination. As a result, the lower courts will be encouraged to abandon the difficult determination of what the law is and instead substitute the determination of what the law will be based upon the various statements found in the opinion without regard to whether such statements are holding or dictum.[26]

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25. "It is elementary that a criminal statute must be construed strictly. . . . 'The forbidden act must come clearly within the prohibition of the statute, for the scope of a penal statute will not ordinarily be enlarged by construction to take in offenses not clearly described; and any doubt on this point will be resolved in favor of the defendant'." State v. Hill, 272 N.C. 439, 443, 158 S.E.2d 329, 332 (1968) (quoting State v. Heath, 199 N.C. 135, 153 S.E. 855 (1930)). *See also*, State v. Whitehurst, 212 N.C. 300, 193 S.E. 657 (1937); *In re* Burrus, 275 N.C. 517, 531, 169 S.E.2d 879, 888 (1969), *aff'd sub nom.* McKeiver v. Pennsylvania, 403 U.S. 528 (1971).

26. Not all believe this approach is wrong. Professor Caminker questions whether inferior courts should decide cases as if they were the courts of last resort, i.e., that "the judicial function is identical for courts of all levels . . . ." Caminker notes that inferior courts frequently "engage sub silentio in predictive reasoning concerning their superior court's future behavior in an effort to avoid subsequent appellate reversal." Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 Tex. L. Rev. 1, 5-6 (1994). Predicting what a higher court will do based on analysis (or absence of analysis) in dicta in that court's opinion can also blur into whether the court overruled the precedent sub silentio. *See* James Bopp, Jr., et al, *Does The United States Supreme Court Have a Constitutional Duty To Expressly Reconsider and Overrule* Roe v. Wade*?*, 1 Seton Hall Const. L.J. 55 (1990) (arguing that U.S. Supreme Court decisions subsequent to *Roe v. Wade* abandoned the key underpinning of the *Roe* decision—the existence of a "fundamental" right to abortion and by so doing, overruled *Roe* sub silentio). This blurring occurred in Planned Parenthood v. Casey, 947 F.2d 682 (3d Cir. 1991), *rev'd in part*, 505 U.S. 833 (1992), where the Third Circuit Court of Appeals either followed a prediction about what the Supreme Court would do with *Roe* in the future, or concluded

The rule of law suffers when all statements in an appellate opinion are deemed worthy of consideration only in direct proportion to their perceived usefulness in predicting future decisions.[27] By imposing a preferred result on an opinion which purports to apply the rule of law, *Fly* undermines the predictability, consistency and legitimacy of our courts. Yet stare decisis does not leave trial judges powerless when determining what parts of an ill-considered appellate opinion are entitled to binding precedential status. Trial judges must recognize their own duty to carefully review appellate opinions to distinguish between true holdings that must be followed and questionable rationales or explanations that may be regarded as non-binding dicta.

Section I of this Article reviews the facts of *State v. Fly*, North Carolina's law of indecent exposure prior to *Fly* and the Court of Appeals' decision. Section II analyzes the Supreme Court's opinion in *Fly* and the various rationales offered by the Court to justify its decision. Section III considers the plight of the trial judges in applying the principles, statements, and analysis announced in

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that the Supreme Court had already overruled *Roe* sub silentio. See discussion in EDWARD LAZARUS, CLOSED CHAMBERS 459-62 (1999).

27. Evaluating the perceived usefulness of a given statement in an opinion in predicting future decisions may be a difficult task. Ultimately such evaluation may rely on the identical factors involved in the holding/dictum analysis discussed in Section III. In this regard one appellate judge has observed,

> [W]hen the judicial process is viewed from the inside, nothing is clearer than that all decisions are not of equivalent value to the court which renders them. There are hidden factors of unreliability in judicial opinions, whether or not there is dissent or special concurrence. Many an opinion, fair upon its face and ringing in its phrases, fails by a wide margin to reflect accurately the state of mind of the court which delivered it. . . . [S]ome opinions get written because the case must be disposed of rather than because the judge is satisfied with the abiding truth of what he writes.

Walter V. Schaefer, *Precedent and Policy: Judicial Opinions and Decision Making*, in Views from the Bench: The Judiciary and Constitutional Politics 91(Mark W. Cannon et al. eds., 1985). And further:

> Although an opinion may be born only after deep travail and may be the result of a very modest degree of conviction, it is usually written in terms of ultimate certainty. . . . Perhaps opinions are written in that positive vein so that they may carry conviction, both within the court and within the profession; I suspect however, that the positive style is more apt to be due to the psychological fact that when the judge has made up his mind and begins to write an opinion, he becomes an advocate.

Id. at 93.

State v. Fly. Although trial judges must apply the rule of law, and therefore must abide by the "holding" in *State v. Fly*, this Article argues that trial judges have the same authority as appellate judges to determine what statements in *Fly* constitute "binding precedent." The conclusion makes clear that trial judges could and should construe most of the purported holdings in *Fly* as non-binding dictum because these dicta lack the soundness and clarity necessary to guide the lower courts in predicting how the Supreme Court will interpret and apply the indecent exposure statute in the future. If the trial judges do not exercise their authority to parse the language in *Fly*, efforts to follow the *Fly* rationales will result in inconsistent application of the indecent exposure law across the state.

SECTION I

A. *The evidence against Mark Fly*

In the early morning of 26 July 1995, Mark Fly mooned Barbara Glover.[28] At 7:30 a.m. she was returning to her home from a trip to the airport. As she walked up the steps to her condominium, she rounded a turn and looked up to see Mark Fly on the landing above her.[29] He was facing away from her, bent over at the waist with his shorts pulled down to his ankles.[30] He was about four feet from Mrs. Glover and appeared to wear no other clothing except a baseball cap.[31] When Mrs. Glover yelled, "What are you doing?", Mark Fly pulled his pants up and ran. Mrs. Glover ran after Fly and saw him ride away on a bicycle.[32] Mrs. Glover had not had any contact with Mark Fly prior to this incident and she testified that his actions in mooning her both distressed her and left her feeling violated.

The evidence against Fly at his trial consisted entirely of the testimony of Mrs. Glover. Mrs. Glover was asked by the trial judge: "Now, exactly what parts of his anatomy did you see or experience?" Mrs. Glover responded: "His buttocks, the crack of his buttocks."[33] The trial judge asked: "Anything else?" Mrs.

28. *Fly*, 348 N.C. at 557, 501 S.E.2d at 657.
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.*
33. *Fly*, 348 N.C. at 559, 501 S.E.2d at 658.

Glover responded: "No, sir."[34] There was no evidence that Mrs. Glover saw Mark Fly's genitals or his anus. There was no evidence that Mrs. Glover turned or looked away from Fly's nudity or avoided looking at Mark Fly in any way. There was also no evidence that any other person was present who witnessed these events or who could have witnessed these events if they had been looking.

B. North Carolina's law of indecent exposure in 1997

The indecent exposure statute, N.C. Gen. Stat. § 14-190.9,[35] was adopted in 1971, replacing N.C. Gen. Stat. § 14-190. N.C. Gen. Stat. § 14-190.9 provides that "[a]ny person who shall willfully expose the private parts of his or her person in any public place and in the presence of any other person or persons, of the opposite sex . . . shall be guilty of a . . . misdemeanor."[36] Subsection (b) of this statute[37] excludes from the statute the exposure of a mother's breast and nipple if exposed incidental to breast feeding. The elements of indecent exposure are summarized as the (1) willful exposure, (2) of private parts, (3) in a public place, (4) in the presence of at least one person of the opposite sex.[38]

(1) What is willful exposure: relevance of exposer's intent or effect on exposee?

It is clear that the exposure must be willful, and not accidental. Aside from the breast-feeding exception, there is no exception

34. Trial Transcript at 10, State v. Fly, 348 N.C. 556, 501 S.E.2d 656 (1998) (No. 472A97).

35. N.C. Gen. Stat. § 14-190.9 (1971).

36. In 1971 the statute provided for a fine not to exceed $500 and imprisonment for up to six months, or both. In 1993, the statute was amended to provide for punishment as a Class 2 misdemeanor.

37. This subsection was added in 1993.

38. State v. Streath, 73 N.C. App. 546, 552, 327 S.E.2d 240, 244 (1985); State v. Robert King, 285 N.C. 305, 204 S.E.2d 667 (1974); *compare* State v. Charlie King, 268 N.C. 711, 151 S.E.2d 566 (1966). This statement of the elements of indecent exposure was also set out by the Supreme Court in State v. Fly, 348 N.C. 556, 559, 501 S.E.2d 656, 659 (1998). The elements of the crime of indecent exposure vary from state to state. In many states the exposer must have had a lewd intent or the circumstances of the exposure must have been such that "affront or alarm" were likely. For a summary of the elements of other states' indecent exposure statutes see Jeffrey C. Narvil , *Revealing the Bare Uncertainties of Indecent Exposure*, 29 Colum. J.L. & Soc. Probs., 85, 92-103 (1995); *see also* Reena N. Glazer, *Women's Body Image and the Law*, 43 Duke L.J. 113, 130-36 (1993) (summary of states' indecent exposure laws).

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authorized for willful exposure incidental to a necessary activity. The language of the statute and the relevant case law make it clear that neither the motive for the exposure, such as lewd intent or intent to offend, nor the effect of the exposure, such as alarm or likely to cause affront, are elements of the crime of indecent exposure. In *State v. Robert King*,[39] the Court noted that N.C. Gen. Stat. § 14-190.9 does not use the term "obscene", "and for that matter does not even require the act of exposing one's private parts in public to be 'indecent'."[40] The Court also noted that "nothing whatsoever in the present or former indecent exposure statutes . . . in any way requires the viewers of the exposure of one's private parts to be unwilling observers."[41] In *Robert King*, the defendants were nude female dancers who performed before approximately seventy-five males, each of whom had paid five dollars to witness the performance. The Court of Appeals had held that N.C. Gen. Stat. § 14-190.9 was "simply a codification of the common law crime of exposure of one's private parts" and that as such the statute did not "contemplate willing viewers, but those who are offended and annoyed by the exposure."[42] The Supreme Court rejected this interpretation. "This proposition is without support in either the judicial or statutory development of the law of indecent exposure in this State."[43]

(2) What is a public place?

A public place is a place which "is public as distinguished from private, but not necessarily a place devoted solely to the uses of the public, a place that is visited by many persons and to which the neighboring public may have resort, a place which is accessible to the public and visited by many persons."[44] For instance, a

39. State v. Robert King, 285 N.C. 305, 312, 204 S.E.2d 667, 671 (1974).

40. The earlier indecent exposure statute, N.C. Gen. Stat. § 14-190, did expressly require the exposure to be "indecent." N.C. Gen. Stat. § 14-190 provided: "Any person who shall willfully make any indecent public exposure of the private parts of his or her person in any public place or highway shall be guilty of a misdemeanor." N.C. Gen. Stat. § 14-190 (1971).

41. State v. Robert King, 285 N.C. 305, 311, 204 S.E.2d 667 (1974).

42. *Id.* at 308-309, 204 S.E.2d at 671.

43. *Id.* at 309, 204 S.E.2d at 671. It should be noted that this analysis by the Supreme Court in *King* is clearly dicta. The Court actually resolved the case on the basis of a technical defect in the arrest warrants.

44. State v. Charlie King, 268 N.C. 711, 151 S.E.2d 566, 567 (1966). *See also* State v. Fusco, No. COA99-130, 1999 WL 1268231, at *2(N.C. App. Dec. 30, 1999) (citing the *King* definition of public place and noting that this definition indicates

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"mercantile establishment and the premises thereof is a public place during business hours when customers are coming and going."[45] The interior of an automobile when parked on a public street in such manner that the interior "could be seen by members of the passing public using the street" is also a public place.[46] A public park or national forest would appear to be a public place, as would private property if available to and visited by the public.[47] This was apparently the case in *State v. Robert King*, where the exposure occurred in the "Rathskeller," a Greensboro nightclub which had signs posted indicating in was a private club.[48] Nevertheless when the detectives paid the admission fee of five dollars to see the nude dancing, they were not told that the Rathskeller was a private club or that they were becoming members by paying the five dollars, or that by paying the five dollars they were entitled to anything other than admission on that particular evening.[49] They were not given a membership card or any other indicia of membership.[50]

that the *use* of the property, as opposed to its ownership, is the key criterion. *Fusco* held that a creek embankment—where the exposure occurred—was a public place because it was being used by the public, children played on the creek bed frequently, nothing prevented any person from walking through the complaining witness' backyard to get to the creek, and there were no signs of a "No Trespassing" nature posted anywhere along the creek. *Fusco* also approved of the court's instructing the jury that: "A public place is a place which is viewable from any location open to the view of the public at large.").

45. *Charlie King*, 268 N.C. at 711, 151 S.E.2d at 567.

46. State v. Lowery, 268 N.C. 162, 150 S.E.2d 23 (1966).

47. *See* Freewood Assocs., Ltd. v. Davie County Zoning Bd. of Adjustment, 28 N.C. App. 717, 720, 222 S.E.2d 910 (1976) (Proposed use of private property as a nudist camp was considered to be "unlawful and in violation of [N.C. Gen. Stat. §] 14-190.9, commonly referred to as the indecent exposure statute."); State v. Lowery, 268 N.C. 162, 150 S.E.2d 23, 24. ("Defendant's principal contention is that the court should have granted his motion for nonsuit at the conclusion of the State's evidence, principally on the ground that this was not a public place. Intentional exposure of private parts while sitting in an automobile on a public street in such manner that they could be seen by members of the passing public using the street, and were seen by a passerby, constitutes the common law offense of indecent exposure."). *See also*, Joel E. Smith, Annotation, *What Constitutes "Public Place" Within Meaning of Statutes Prohibiting Commission of Sexual Act in Public Place*, 96 A.L.R.3d 692 (1979).

48. *Robert King*, 285 N.C. at 306, 204 S.E.2d at 668.

49. *Id.*

50. *Id.*

Fowler: Of Moons, Thongs, Holdings and Dicta: State v. Fly and the Rule o

(3) What are private parts?

Use of the term "private parts" in indecent exposure statutes had its genesis in the common law offense of indecent exposure. Although it is clear that the common law definition included a person's genitals, there has been substantial disagreement over what other body parts were included. Many states have resolved the matter by expressly identifying in the statute the body parts that should not be exposed.[51] For those states that continue to use the term "private parts,"[52] questions regularly arise as to whether the buttocks, the female breast, pubic hair or parts of the buttocks or female breast constitute a private part. Although courts do occasionally still refer to a definition that private parts are those "which instinctive modesty, human decency, or self-respect requires shall be customarily kept covered in the presence of others,"[53] this would appear to be a clear invitation to have widely varying interpretations of the prohibited conduct by those charged with enforcing the prohibition.[54]

North Carolina does have case law which has interpreted its use of the term "private parts". In *State v. Jones*,[55] the court stated that "[t]he term 'private parts' appears to be generally

51. "More than half of American jurisdictions specifically define exposure to include the genitals or sex organs. Seven cite exposure of the anus or buttocks as criminal under varying circumstances. Six states include the female breasts." Narvil, *supra*, note 38. *Compare* Glazer, *supra*, note 38, at 131 (1993) ("The overwhelming majority of states restrict penalties for public exposure to 'lewd' acts or to exposure of the genitalia. Approximately twenty states specifically restrict their public exposure laws to genitalia. Of these, only New Mexico prohibits mere exposure of the genitalia without lewd intent. Other state statutes require the actor to have been reckless, to have had the intent of causing affront or alarm, or to have had the purpose of arousing or gratifying sexual desire. . . . [S]tatutes that use the more ambiguous 'private parts' or 'sex organs' language prohibit only acts done with some intent to create offense or alarm. Something more than mere exposure is required to criminalize the action."). *See also*, A.C. Barnett, Annotation: *Criminal Offense Predicated Upon Indecent Exposure*, 94 A.L.R.2d 1353 (1964).

52. "Twenty-four statutes cast exposure not in terms of genitals, buttocks, or breasts, but rather 'person,' 'private parts,' 'intimate parts,' or simply an exposure 'of the body.'" Narvil, *supra*, note 38 at 93-94.

53. Narvil, *supra*, note 38, at 92.

54. "While most persons possessing even a passing familiarity with mainstream American society would recognize that statutes restricting exposure of one's 'private' or 'intimate' parts would likely encompass the genitals, one might not hold the same assurance with regard to other parts of the body." *Id.* at 94.

55. State v. Jones, 7 N.C. App. 166, 167, 171 S.E.2d 468, 468-469 (1970).

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acceptable legal parlance in referring to male or female genitalia" and that genitalia are "the organs of the reproductive system; especially: the external genital organs."[56] *Jones* also notes that Webster's Third New International Dictionary includes the external excretory organ in the definition of private parts or privy parts.[57] Case law clearly establishes that male,[58] and female genitalia,[59] are private parts subject to the indecent exposure statute. In addition, *State v. Tenore*[60]arguably holds that the adult female breast is a private part subject to the statute. In *Tenore* the court held a local ordinance against indecent exposure that defined private parts as including "not only male and female genitals but . . . also . . . the breasts of a physically developed female," was preempted by N.C. Gen. Stat. § 14-190.9 and its precursor N.C. Gen. Stat. § 14-190 because "the state-wide statute in effect at the time the ordinance in question was adopted dealt specifically with the identical conduct with which this defendant is charged as a violation of the county ordinance."[61] The conduct involved in this case was public exposure of an adult female breast.[62] No North Carolina case, prior to *Fly*, had considered whether the buttocks were private parts.[63]

56. *Id.* at 167, 171 S.E.2d at 468-469 (quoting Webster's Third New International Dictionary (Unabridged) (1968)).

57. *Id.*

58. *Lowery*, 268 N.C. at 162, 150 S.E.2d at 24; *Charlie King*, 268 N.C. 711, 151 S.E.2d 566.

59. *Robert King*, 285 N.C. at 312, 204 S.E.2d at 672.

60. State v. Tenore, 280 N.C. 238, 185 S.E.2d 644 (1972).

61. *Id.* at 248, 204 S.E.2d at 651.

62. *But see, Robert King*, 285 N.C. at 312, 204 S.E.2d at 672. Where in considering whether four females involved "willfully exhibited their private parts to an audience of some seventy-five males in a public place" in violation of N.C. Gen. Stat. § 14-190.9, the Court ignored the uncontradicted evidence that the women danced topless and focused exclusively on the evidence that the women danced completely nude and spread their legs and showed the lips of their vaginas.

63. Several cases from other jurisdictions touched on the issue. In Hart v. Virginia, 441 S.E.2d 706 (Va. Ct. App. 1994), the Court of Appeals of Virginia held that the term "private parts" as used in Virginia's indecent exposure statute did include the buttocks. Interestingly, there was a dissent in *Hart* that concluded the buttocks were not private parts as the term was defined at common law and that such common law definition was the generally accepted meaning. In Duvallon v. District of Columbia, 515 A.2d 724 (D.C. 1986), the District of Columbia Circuit held that the term "person" as used in the District's indecent exposure statute did not include the buttocks and again there was a dissent which argued for such inclusion. In Massachusetts v. Arthur, 650 N.E.2d

(4) Is any nexus required between the exposure and the presence of other persons?

At common law the offense of indecent exposure did not necessarily require proof that any other person actually witnessed the exposure.[64] North Carolina case law never clearly followed this approach, although this could arguably have been the holding in *State v. Roper*,[65] where the defendant was charged with indecent exposure of his person on a public highway. The defendant argued that the indictment was invalid because it failed to allege that the exposure was "in the presence of divers persons or of any person."[66] The Court held that such allegation was unnecessary because "it was probable from the circumstances, that the exposure could have been seen by the public."[67] In *State v. Pepper*,[68] however, the Court clarified what was required. In *Pepper,* the defendant was indicted for common nuisance for using profane language in a public place. The Supreme Court held that

> when the nuisance charged is an offense to the sense of sight, it must be charged and proved that it was exposed to the view of divers persons. And it follows that when the nuisance charged is an offence to the sense of hearing, it must be charged and proved that the profane swearing, which constitutes the offense, was

787, 790 (Mass. 1995), the Supreme Judicial Court of Massachusetts reversed defendant's conviction of indecent exposure based on his exposure of pubic hair, noting that the offense of indecent exposure has been defined as the willful and intentional exposure of the private parts of one's body but that "[i]n truly circular fashion, it has been said that 'private parts,' the exposure of which constitutes the offense, are those parts of the body 'which instinctive modesty, human decency or self-respect require shall be kept covered in the presence of others.'" In Wagenseller v. Scottsdale Mem'l Hosp., 714 P.2d 412, 415 (Ariz. Ct. App. 1984) *vacated on other grounds*, an employee alleged she was fired against public policy for refusing to participate in the criminal conduct of "mooning." The Arizona appellate court stated "[w]hile we can readily characterize the "mooning" . . . as tasteless behavior," it refused to hold that such an act violated the indecent exposure statute—although this conclusion was probably based on a requirement in the statute that the exposure be likely to offend or alarm those present.

64. Apparently it was sufficient if the exposure was lewd and occurred in a public place. Narvil, *supra*, note 38, at 89-90, (citing Iowa v. Baugess, 76 N.W. 508 (Iowa 1898)). *See also* Iowa v. Martin, 101 N.W. 637, 638 (Iowa 1904).

65. 18 N.C. (1 Dev. & Bat. Eq.) 208 (1835).

66. *Id.* at 209.

67. *Id.*

68. 68 N.C. 259, (1873).

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heard by divers persons. The general allegation "ad commune nocumentum,"[69] is not sufficient.[70]

This approach appears to have been adopted by both N.C. Gen. Stat. § 14-190.9, its predecessor, N.C. Gen. Stat. § 14-190, and the case law interpreting these statutes. The rule appears to be that it is not enough to show that the willful exposure occurred in a public place where the public might have been. Instead the actual presence of people who either saw the exposure or who could have seen the exposure had they not avoided looking must be proven. "It is not essential to the crime of indecent exposure that someone shall have seen the exposure provided it was intentionally made in a public place and persons were present who could have seen if they had looked."[71] The requirement of N.C. Gen. Stat. § 14-190.9 that the exposure occur "in the presence" of a person of the opposite sex appears to require some inquiry into the ability of that person to have witnessed the exposure.

C. *The Court of Appeals decision in State v. Fly*[72]

The evidence against Mark Fly was undisputed. Mr. Fly willfully exposed his buttocks in a public place in the presence of Barbara Glover, a person of the opposite sex.[73] If "presence" requires a nexus, that nexus existed because, from a distance of only four feet, she testified she actually saw his buttocks.[74] She never turned away or averted her gaze from Fly—indeed, she chased after Fly as he ran from her and pulled up his shorts.[75] There was no evidence that either Mrs. Glover or Mr. Fly were ever positioned so that Mrs. Glover could have seen more of Mr. Fly than she actually saw. She testified that she saw only his buttocks and

69. "Ad commune nocumentum: To the common nuisance." BLACK'S LAW DICTIONARY (1968).

70. *Pepper*, 68 N.C. at 262-263.

71. *Charlie King*, 268 N.C. at 712, 151 S.E.2d at 567 (citing 33 Am. Jur. 19). Although this statement is dicta because the witness testified that she saw defendant's penis, *see* State v. Streath, 73 N.C. App. 546, 552, 327 S.E.2d 240, 244 (1985) ("Defendant contends that the prosecuting witness admitted she had her eyes closed at one point, and therefore no willful exposure took place. The prosecuting witness testified elsewhere that she definitely saw his private parts, however.").

72. 127 N.C. App 286, 488 S.E.2d 614 (1997).

73. *Id.* at 287, 488 S.E.2d at 615.

74. *Id.*

75. *Id.*

the "crack" of his buttocks,[76] and there was no evidence that anyone else was present.

After the State's evidence, Fly moved to dismiss on the grounds that buttocks were not private parts as defined in N.C. Gen. Stat. § 14-190.9.[77] Fly's attorney cited *State v. Jones*[78] and its conclusion that female breasts were not private parts because Webster's Dictionary defines private parts as the external genitalia and excretory organs, and argued:

> She testified that she saw this person's buttocks. Not his penis, but his buttocks, Your Honor. We contend that the penis would be a reproductive organ or genitalia. With regard to excretory organs, we contend that the buttocks is not an organ. It's just flesh that covers certain organs, Your Honor, such as the anus.[79]

The State responded that the buttocks "is a private part" and that "the buttocks cover the excretory organ of all people."[80] The State did not argue that Fly's anus was actually exposed or that Mrs. Glover could have seen Fly's anus or genitals if she had looked, presumably because there was no evidence to support these propositions. The State also did not argue that it was irrelevant what Mrs. Glover saw or could have seen because exposure of a private part and the presence of a person of the opposite sex, with no nexus or connection between the two was all that was required. Presumably the State did not argue this because it interpreted the law to require a nexus. The trial court denied defendant's motion and the jury convicted Mark Fly of indecent exposure.[81]

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76. See *supra*, note 33. Later in the trial transcript (at page 13) the following appears during the cross-examination of Mrs. Glover by Fly's attorney, Karen Eady:

> Q: "So when you first approached the landing, all you saw was . . ."
> A: "His fanny."
> Q: ". . . his rear and that was it?"
> A: "Yes."

77. *Fly*, 127 N.C. App at 287, 488 S.E.2d at 615.

78. 7 N.C. App. 166, 171 S.E.2d 468 (1970).

79. Trial transcript at p. 22. *Fly,* 127 N.C. App. 286, 488 S.E.2d 614.

80. Trial transcript at 24-25. *Fly*, 127 N.C. App. 286, 488 S.E.2d 614.

81. The judge instructed the jury in essential conformity with the *N.C. Pattern Jury Instructions*, Section 238.17:

> [To find the defendant guilty of indecent exposure] the State must prove four things to you beyond a reasonable doubt. First, that the Defendant willfully exposed a private part of his body; second, that the exposure occurred in a public place—that is a place to which the public has access and is visited by many persons; third, that the exposure was in the

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Fly appealed the trial court's denial of his motion to dismiss. Fly's argument was that dismissal was required because there was not substantial evidence of his guilt on every element of the crime charged, specifically the element that he had exposed his private parts to Mrs. Glover.[82] Defendant argued in its brief that buttocks were not private parts as used in N.C. Gen. Stat. § 14-190.9 and further that:

> [T]here is no disputing that Mr. Fly exposed his buttocks to Ms. Glover. However, he did not turn around and expose his penis—a genital organ or a 'private part.' He ran away from her with his back towards her the entire time. She never had an opportunity to see his 'private parts.' As she explicitly stated, all she saw was his 'fanny.'[83]

In its brief the State offered two arguments. First, that the anus is a private part and that Mrs. Glover's testimony that Fly was three steps above her, bent over from the waist and that she saw the "crack of [his] buttocks" was "sufficient evidence for the fact finder to conclude that defendant's excretory organ was exposed."[84] Alternatively, the State argued that a reasonable fact finder could "conclude that the buttocks, as the flesh covering the anus, are part of the excretory organ and therefore a private part."[85] The State did not argue that Fly had exposed his genital organs in Mrs. Glover's presence.

A majority of the Court of Appeals reversed the conviction, holding that buttocks are not private parts as that term is used in the indecent exposure statute.[86] The Court of Appeals based this conclusion on *State v. Jones*,[87] which held that based on N.C. Gen. Stat. § 14-190 and the definition of genital organs as found in the

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> presence of at least one person of the opposite sex; and, fourth, that the Defendant acted willfully.

After the jury retired, the judge asked if the attorneys had any corrections or additions to the charge. Defendant's counsel, Ms. Eady, responded: "I might ask the Court to give the Jury the definition of private parts." The judge, however, declined, stating: "I'm going to wait and see if they come back for any further instruction on that."

82. Defendant-Appellant's Brief at 6-7, *Fly*, 127 N.C. App. 286, 488 S.E.2d 614.

83. Defendant-Appellant's Brief at 10-11, *Fly*, 127 N.C. App. 286, 488 S.E.2d 614.

84. Brief for State at 5, *Fly*, 127 N.C. App. 286, 488 S.E.2d 614.

85. Brief for State at 5, *Fly* 127 N.C. App. 286, 488 S.E.2d 614.

86. *Fly*, 127 N.C. App. at 288, 488 S.E.2d at 615.

87. 7 N.C. App. 166, 171 S.E.2d 468 (1970).

American Heritage College Dictionary, a woman's breasts were not private parts. The Court acknowledged that Mark Fly's actions were indecent and offensive but that those were not elements of the crime of indecent exposure and the courts are not free to expand what constitutes a crime beyond the definition clearly provided in the statute.[88]

The majority opinion did not expressly address the issue of whether the anus is a private part. The most obvious explanation is that the Court had rejected both of the State's arguments and had concluded that there was no evidence that excretory organs had been exposed, and that therefore the issue of whether the anus is a private part was not before it. This interpretation is also consistent with the analysis found in the case relied upon by the majority, *State v. Jones*.[89] In *Jones*, the Court acknowledged that definitions of the term private parts included the external genital *and* excretory organs.[90] There is no reason to believe that the *Fly* majority interpreted *Jones* to mean that private parts included only genital organs and not excretory organs.

The *Fly* majority did address the relevance of what Mrs. Glover saw or could have seen. The majority held that there was "no evidence that the defendant exposed his genital organs."[91] The evidence in this case indicated that Mark Fly had pulled his shorts down to his knees and that he was not wearing a shirt or any underwear.[92] Logically, his genital organs must have been uncovered. But the majority concluded that exposure, as used in the indecent exposure statute, required a nexus to the person present. Fly's genitals were not "exposed" because Mrs. Glover did not see and could not have seen them.

Court of Appeals Judge Walker dissented from the majority's opinion. Judge Walker disagreed with the majority in only one regard—that N.C. Gen. Stat. § 14-190.9 should be reasonably

88. "It is the legislature that is to define crimes and ordain punishment and the courts are not permitted to extend the application of the statute 'by implication or equitable construction' to include acts not clearly within the prohibition." *Fly*, 127 N.C. App. at 289, 488 S.E.2d at 616 (citing State v. Hill, 272 N.C. 439, 443, 158 S.E.2d 329, 332 (1968)).

89. *Jones*, 7 N.C. App. at 167, 171 S.E.2d at 468-69 (1970).

90. The issue in *Jones* was simply whether female breasts were genital organs, and therefore private parts. *Jones* never considered whether breasts were excretory organs or suggested that excretory organs were not private parts. *Id.*

91. *Fly*, 127 N.C. App. at 289, 488 S.E.2d at 616.

92. *Id.* at 287, 488 S.E.2d at 615.

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interpreted to include buttocks within the meaning of "private parts."[93] However, it seems reasonable to conclude that as to other issues such as, whether there was evidence that the anus was exposed, whether the buttocks are extensions of the anus, etc. that the judges agreed. Indeed, as to these matters the Court was unanimous. The State appealed to the North Carolina Supreme Court.

SECTION II

A. *The Supreme Court decision in State v. Fly*

The State appealed the Court of Appeals decision in *Fly*, pursuant to N.C. Gen. Stat. § 7A-30(2) which provides for an appeal of right from any Court of Appeals decision in which there is a dissent. In such cases Rule 16(b) of the North Carolina Rules of Appellate Procedure[94] limits the scope of review by the Supreme Court to "a consideration of those questions which are . . . specifically set out in the dissenting opinion as the basis for that dissent."[95] This language in Rule 16(b) appeared to limit the State to arguing, as the dissent had, that buttocks were private parts. But the State sought to expand the issues it could argue before the Supreme Court. The State sought to repeat one argument apparently rejected by all three judges on the Court of Appeals and to raise a new argument that had not been presented to the trial court or the Court of Appeals. In its new brief before the Supreme Court, the State argued: (a) that buttocks were private parts within the meaning of the statute; (b) that the excretory organ, the anus, is a private part within the meaning of the statute and that defendant had either actually exposed his anus or that the buttocks are actually a part of this excretory organ (i.e., "the flesh covering the anus"); and (c) that the genital organs, e.g., the penis and scrotum, are private parts within the meaning of the statute and that the evidence supported an inference that defendant had "exposed" his genitals in Mrs. Glover's presence even if she had not seen, and could not have seen, defendant's front. To properly present arguments (b) and (c) to the Supreme Court, the State petitioned the Supreme Court for writ of certiorari, as is expressly

93. *Id.* at 290-91, 488 S.E.2d at 617 (Walker, J., dissenting).
94. N.C. R. App. P. 16(b).
95. *Id.*

authorized by Rule 16(b),[96] to consider these additional issues that were not specifically set out in the Court of Appeals dissent.

The Supreme Court denied the State's petition for writ of certiorari on the grounds that Rule 16(b) allowed the Court to resolve the case based upon arguments and theories that were not the basis of the dissent, such as, theories (b) and (c) above, so that the writ of certiorari was unnecessary.[97] The Court then proceeded to reverse the Court of Appeals' decision solely on its determination that under either theory (b) or (c), the evidence supported a finding that Fly had exposed his private parts in Mrs. Glover's presence thus violating N.C. Gen. Stat. § 14-190.9. The Court stated that it was unnecessary to resolve the question raised by theory (a), i.e., whether or not buttocks were private parts.[98]

Based on this resolution of the case, it was unnecessary for the Supreme Court to address the analysis employed by the Court of Appeals' majority opinion in determining that buttocks were not private parts. Nevertheless, the Supreme Court addressed both; concluding that despite misreading *Jones* and misinterpreting N.C. Gen. Stat. § 14-190.9, the Court of Appeals had still correctly concluded that buttocks are not private parts within the meaning of the statute.

Both the express language of Rule 16(b) and the Supreme Court's previous interpretations of the reasons for Rule 16(b) indicate that the Court should have limited its review in *Fly* to the single issue on which the Court of Appeals panel did not agree, whether or not buttocks were private parts. The Court's discussion of *State v. Jones*, N.C. Gen. Stat. § 14-190.9, legislative intent, the popularity of thongs and g-string bikinis, culminating in its conclusion that buttocks are not private parts, is acknowledged obiter dictum and dictum of dubious analytical authority. The actual holding in the case, that the facts of this case could support a jury finding that the defendant exposed either his anus or his genitals in Mrs. Glover's presence is confused by the Court's imprecision, over-inclusiveness and misrepresentations of the significant facts of the case. *State v. Fly* presents a challenge for those charged with deciphering the rule of law therein.

96. The last sentence in Rule 16(b) provides: "Other questions in the case may properly be presented to the Supreme Court through a petition for discretionary review . . . or by a petition for writ of certiorari. . . ." *Id.*

97. *Fly*, 348 N.C. at 559, 501 S.E.2d at 658.

98. *Id.* at 561, 501 S.E.2d at 659.

B. *The Scope of Review Under Rule 16(b):*[99] *Should Unanimity Block Review?*

N.C. Gen. Stat. § Section 7A-30(2) provides that parties to a case decided by the Court of Appeals have a right to subsequent review by the Supreme Court if "there is a dissent."[100] This language could be interpreted to allow an appeal of right to the Supreme Court of all properly preserved issues in the case as there is no express limitation on the issues that can be appealed. Nevertheless, such a broad reading of this language would appear inconsistent with the purposes of the two-tier appellate court system.[101] In context, the more logical interpretation is that the appeal of right should be limited to the issue or issues on which the Court of Appeals panel disagreed.[102]

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99. N.C. App. P. 16(b).

100. N.C. Gen. Stat. § 7A-30(2) (1967). This language has not changed since the adoption of N.C. Gen. Stat. § 7A-30 in 1967. This statute also provides for an appeal of right from a decision of the Court of Appeals even when the three Court of Appeals judges agree on the disposition of a case if the decision "directly involves a substantial question arising under" either the United States or the North Carolina constitutions N.C. Gen. Stat. § 7A-30(1).

101. The principle behind North Carolina's two tier appellate court system is that individual litigants should have the right to appellate review of their case in order to correct trial errors but that the North Carolina Supreme Court's finite capacity to hear cases must be rationed and is properly utilized in cases where the subject matter or legal issues in the case have an importance beyond that of the individual litigants' interest in correcting trial error. *See* the American Bar Association's *Standards Relating to Court Organization*, Section 1.13 (1990) (the two basic functions of appellate courts, error correction and law development, are advanced by placing the primary responsibility for error correction with the intermediate appellate court (through granting the litigants an appeal of right to the intermediate appellate court) and placing the primary responsibility for law development with the Supreme Court (by allowing the Supreme Court to selectively review cases based on their special significance)). *See also* State v. Colson, 274 N.C. 295, 304, 163 S.E.2d 376, 382 (1968) ("In establishing the North Carolina Court of Appeals, defining its jurisdiction, and providing a system of appeals, the Courts Commission was guided, inter alia, by the basic principle that there should be one trial on the merits and one appeal on the law, as of right, in every case. The Commission sought to avoid double appeals as of right, except in the most unusual cases, the importance of which may be said to justify a second review.").

102. In Hendrix v. Alsop, 278 N.C. 549, 180 S.E.2d 802 (1971), the Supreme Court considered whether an appeal of right based on a dissent allowed review by the Supreme Court of all matters or issues in the case, as might be argued based on the language of the statute. *Hendrix* stated that N.C. Gen. Stat. § 7A-30(2) required a review only "of questions on which there was a division in the

However, in the 1980 case, *Williams v. Williams*,[103] the Supreme Court squarely stated that when considering an appeal of right pursuant to N.C. Gen. Stat. § 7A-30(2), it was "not limited, in reviewing a decision of the Court of Appeals, to consideration of only such matters as may be mentioned by the dissenting judge in the Court of Appeals' opinion."[104] *Williams* adopted the expansive reading of N.C. Gen. Stat. § Section 7A-30(2) which read that the existence of a dissent is simply a condition precedent that establishes the right to appeal all issues in the case that have been otherwise properly preserved and presented for review.[105] The *Williams* approach was consistent with a practice of the Court of Appeals' judges throughout the 1970's and early 1980's. During this time, it was not uncommon for dissenting Court of Appeals' judges to simply note their dissent to an opinion without giving any explanation or specifying any basis for their disagreement with the majority.[106] Clearly, in such cases, it is not possible for the Supreme Court to limit its review of the case to the express point of disagreement between the dissenter and the majority, when the dissenting judge simply states: "I dissent."

The North Carolina Supreme Court is, however, authorized to prescribe rules of practice and procedure for all litigation in the appellate division.[107] If there is a conflict with the statutes, the rules of appellate procedure promulgated by the Supreme Court will prevail.[108] Thus even without the legislature amending the

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intermediate appellate court" although the facts of *Hendrix* involved "claims" rather than "questions." *Id.* at 554, 180 S.E.2d at 806.

103. 299 N.C. 174, 261 S.E.2d 849 (1980).

104. *Id.* at 190, 261 S.E.2d at 860.

105. *Id.*

106. There are many examples in the North Carolina Court of Appeals Reports. *See e.g.*, Raleigh-Durham Airport Authority v. Stewart, 9 N.C. App. 505, 176 S.E.2d 912 (1970); Braswell v. Purser, 16 N.C. App. 14, 190 S.E.2d 857 (1972); Yount v. Lowe, 24 N.C. App. 48, 209 S.E.2d 867 (1974); Gen. Electric Co., Outdoor Power Equip. Operations v. Pennell, 31 N.C. App. 510, 229 S.E.2d 713 (1976); Coble v. Coble, 44 N.C. App. 327, 261 S.E.2d 34 (1979); Carrington v. Townes, 53 N.C. App. 649, 281 S.E.2d 765 (1981).

107. N.C. Const. art. IV, § 13, cl. 2, ("The Supreme Court shall have exclusive authority to make rules of procedure and practice for the Appellate Division."); N.C. Gen. Stat. § 7A-33; N.C. R. App. P.

108. Duke Power Co. v. Winebarger, 300 N.C. 57, 69, 265 S.E.2d 227, 234 (1980); State v. Furmage, 250 N.C. 616, 624, 109 S.E.2d 563, 569 (1959) ("It has been held that the exclusive power to establish its own rules of practice and procedure is vested in the Supreme Court by Article I, Section 8, and Article IV, Section 12, and that the General Assembly has no power to modify the rules so

language of N.C. Gen. Stat. § 7A-30(2) or the Supreme Court reversing or modifying *Williams*, the case that interpreted N.C. Gen. Stat. § 7A-30(2) as not limiting the scope of review, the Supreme Court possessed the power to alter N.C. Gen. Stat. § 7A-30(2) by appellate rule. In 1983 the Supreme Court did so by amending Rule 16 of the Rules of Appellate Procedure, entitled "Scope of Review of Decisions of Court of Appeals." The amendment provided that in cases where the only grounds for the appeal of right is a dissent in the Court of Appeals, review by the Supreme Court is limited to the questions "specifically set out in the dissenting opinion as the basis for that dissent."[109] Although other questions may be presented to and considered by the Supreme Court through a petition for discretionary review,[110] the language of this amendment to Rule 16 appeared to clearly limit the review to the expressed grounds upon which the dissenter disagreed with the majority's holding. Matters upon which the Court of Appeals panel were in agreement would thus not be before the Supreme Court in appeals of right based solely upon a dissent.

This conclusion was affirmed by the Supreme Court in the first case that applied Rule 16(b) in 1984. In *C.C. Walker Grading & Hauling, Inc. v. S.R.F. Management Corp.*,[111] the trial court's order granting summary judgment for defendant was upheld by a two judge majority of the Court of Appeals. The third judge on the panel noted his dissent but wrote no dissenting opinion. Based on the dissent the plaintiff appealed as a matter of right. The Supreme Court dismissed the appeal holding that Rule 16(b) required that the dissent specify its basis.[112] The Court stated that review by the Supreme Court in such cases was never intended for claims on which the Court of Appeals had rendered "unanimous decisions." Further, "[w]here an appeal of right is taken to this Court based solely on a dissent in the Court of Appeals and the dissenter does not set out the issues upon which he bases his disagreement with the majority, the appellant has no

established. . . ."); *See* discussion in Jane Wylie Saunders, *Appellate Rule 16(b) and* C.C. Walker Grading & Hauling, Inc. v. S.R.F. Management Corp.: *New Requirements for Appeals of Right*, 63 N.C. L. Rev. 1074 (1985).

109. N.C. R. App. P. 16(b).

110. *Id.*

111. 311 N.C. 170, 316 S.E.2d 298 (1984).

112. Despite this holding, the Supreme Court heard the matter (and reversed the Court of Appeals) by certifying certain issues for discretionary review on its own motion. *Id.* at 176, 316 S.E.2d at 301.

issue properly before this Court."[113] Such appeals are subject to dismissal because application of this procedural amendment to Rule 16 "precludes further review by appeal of right."[114] From 1984 until 1996 the case law consistently interpreted Rule 16(b) to restrict the Supreme Court's review under N.C. Gen. Stat. § 7A-30(2) to the issue or issues expressly raised by the dissent as the basis for its disagreement with the majority.[115]

In 1996, in *State v. Kaley*,[116] the Supreme Court decided that Rule 16(b) should not be so narrowly interpreted. In *Kaley*, the Court charged the jury on acting in concert in a second-degree

113. *Id.*

114. *Id.* This was also the result in State v. Bowen, 312 N.C. 79, 320 S.E.2d 405 (1984), where Chief Judge Vaughn (later Justice Vaughn) had dissented without an opinion. In another 1984 case the Court appeared to confirm its intention to narrowly limit the appeals of right available for cases in which there was a dissent. In Harris v. Maready, 311 N.C. 536, 319 S.E.2d 912 (1984), the plaintiff appealed pursuant to N.C. Gen. Stat. § 7A-30(2) because the Court of Appeals' decision included two opinions which were labeled concurrences in part and dissents in part. The defendants argued that the two concurring opinions were mislabeled as dissents. The Supreme Court agreed, noting that all three Court of Appeals judges agreed that the plaintiff's actions against both defendants should have been dismissed but differed only as to why the dismissal was proper. Because all three judges agreed that the case should have been dismissed, the decision was not one in which there was a dissent, and there was no right of appeal pursuant to N.C. Gen. Stat. § 7A-30 (2).

115. Blumenthal v. Lynch, Sec. of Revenue, 315 N.C. 571, 577-78, 340 S.E.2d 358, 361-362 (1986) ("Although plaintiff is clearly entitled to bring an appeal by the terms of N.C. Gen. Stat. § 7A-30(2), only the issue raised in the dissent is properly before this Court for review. . . . This Court's appellate review is properly limited to the single issue addressed in the dissent, and we strongly disapprove of and discourage attempts by appellate counsel to bring additional issues before this Court without its appropriate order allowing counsel's motion to allow review of additional issues. Nevertheless, on rare occasions, when, as here, issues of importance . . . require a decision in the public interest, this Court will exercise its inherent residual power or its authority under Rule 2 of the North Carolina Rules of Appellate Procedure and address those issues though they are not properly raised on appeal."). *See also,* Clifford v. River Bend Plantation, Inc., 312 N.C. 460, 463, 323 S.E.2d 23, 25 (1984); Penley v. Penley, 314 N.C. 1, 10, 332 S.E.2d 51, 157 (1985); State v. Hooper, 318 N.C. 680, 681-82, 351 S.E.2d 286, 287 (1987); State v. Kimbrell, 320 N.C. 762, 767, 360 S.E.2d 691, 693 (1987); Smith v. N.C. Farm Bureau Mutual Ins. Co., 321 N.C. 60, 63, 361 S.E.2d 571, 573 (1987); Murrow v. Daniels, 321 N.C. 494, 496, 364 S.E.2d 392, 394 (1988); Triangle Leasing Co. v. McMahon, 327 N.C. 224, 228, 393 S.E.2d 854, 857 (1990); Brooks v. Hackney, 329 N.C. 166, 174, 404 S.E.2d 854, 859 (1991); Shadkhoo v. Shilo East Farms, Inc., 328 N.C. 47, 399 S.E.2d 319 (1991); Roberts v. Madison County Realtors Assn., 344 N.C. 394, 398, 474 S.E.2d 783, 786 (1996).

116. 343 N.C. 107, 468 S.E.2d 44 (1996).

murder trial which resulted in an involuntary manslaughter conviction. The evidence showed that defendant rode in the car with another man to buy crack cocaine.[117] The automobile pulled to the curb and the victim went to the vehicle on the passenger side and leaned in.[118] Defendant either held the victim or the victim held defendant while the driver began to drive away.[119] As the automobile picked up speed, the victim ran or was dragged until she fell and the automobile ran over her and killed her.[120] The majority opinion of the Court of Appeals held that it was error to charge the jury on acting in concert, because there was no evidence the two men were acting together pursuant to a common plan or purpose to harm or kill the victim when they drove away causing the victim's death.[121]

In his dissent, Judge Cozort of the Court of Appeals, did not disagree with this conclusion. Rather, Judge Cozort reasoned that the defendant and the driver were acting in concert in attempting the "drive-up" purchase of illegal drugs, that death was a natural and sometimes probable consequence of such an attempt, and that therefore it was proper for the trial court to instruct the jury that it could find him guilty of involuntary manslaughter through acting in concert.[122] The Court of Appeals majority explained that it disagreed with the dissent, because the trial court did not instruct the jury on the existence of a common plan or purpose to commit the crime of purchasing crack cocaine, and that the involuntary manslaughter was a natural or probable consequence of that crime. The defendant was "not even charged with a drug-related crime."[123]

The panel of Court of Appeals' judges that heard *Kaley* appeared not to disagree that the evidence did not show that the occupants of the car acted in concert when the driver drove the car away while the victim was in close contact with the defendant. Under the language of Rule 16(b) and the relevant case law, this issue was thus not before the Supreme Court on the N.C. Gen. Stat. § 7A-30(2) appeal. Yet the Supreme Court held that the Court of Appeals erred in this conclusion and that "[w]hen the two

117. State v. Kaley, 117 N.C. App. 420, 421 451 S.E.2d 6, 7 (1994).
118. *Id.*
119. *Id.*
120. *Id.*
121. *Id.* at 422, 451 S.E.2d at 8.
122. *Id.* at 423, 300 S.E.2d at 9.
123. *Kaley,* 117 N.C. App. at 422, 300 S.E.2d at 8.

men drove away without paying for the cocaine, it can be concluded that they planned to drive away without paying for the drugs [and] [t]o drive away when a person is standing next to the automobile in such close proximity that the automobile may hit or catch and drag her can be found to be culpable negligence. This evidence supported the court's charge on involuntary manslaughter."[124]

The defendant in *Kaley* expressly argued that Rule 16(b) limited the State's right of appeal to the matters which are the basis of the dissent in the Court of Appeals and that therefore the State was limited on appeal to arguing that the attempted purchase of the cocaine was the concerted action which would support the charge. The Court disagreed. "The dissent was based on the premise that there was evidence to support a charge of acting in concert. The State can argue in this Court any evidence that supports this premise. It is not limited to arguing the reasons in the dissent as to why there was evidence to support the charge."[125]

Kaley thus contradicted the long-held understanding of Rule 16(b), which was that the Supreme Court's review of an appeal of right, was limited to the *issue* explicitly discussed by the dissenting judge, rather than a broadly defined legal question or premise. *Kaley* thus dispensed with the only logical justification for Rule 16(b) which is that appeals of right should not lie from issues upon which the Court of Appeals' panel unanimously agreed. Review of such unanimous matters was of course available to *Kaley* through discretionary review or by Rule 2's suspension of the appellate rules. Thus it is not clear why *Kaley* chose to reinterpret Rule 16(b) instead of suspending the Rules[126] or allowing discretionary review on its own motion in order to consider the issue. In any event, although *Kaley* confused the clarity of the Rule 16(b) limitation, the Court did justify its approach by noting that it was reversing the Court of Appeals on the precise issue upon which the trial court and the Court of Appeals had decided the case.[127] *Kaley* did not claim that Rule 16(b) allowed the Court to consider

124. State v. Kaley, 343 N.C. at 110, 468 S.E.2d at 46.

125. *Id.*

126. For instance, in both Jackson v. Housing Auth. of High Point, 316 N.C. 259, 262, 341 S.E.2d 523, 525 (1986), and Blumental v. Lynch, Sec. of Revenue, 315 N.C. 571, 578, 340 S.E.2d 358, 362 (1986), the Court exercised its authority under Rule 2 to hear issues that were not otherwise before the Court under Rule 16(b). N.C. R. App. P. 2, 16(b).

127. "We reverse the Court of Appeals on the issue upon which it decided the case." *Kaley,* 343 N.C. at 110, 468 S.E.2d at 46.

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and resolve a case on issues never considered or addressed in the trial court or Court of Appeals. In *State v. Fly* however, the Supreme Court, citing *Kaley* as its precedent, did make this claim.

As previously discussed, in its appeal to the Supreme Court in *Fly*, the State petitioned for writ of certiorari, as is expressly authorized by Rule 16(b),[128] to consider additional issues that were not specifically set out as the basis for the dissent: that defendant had either actually exposed his anus or that the buttocks are actually a part of this excretory organ and that the genital organs, including the penis and scrotum, are private parts within the meaning of the statute and that the evidence supported an inference that defendant had "exposed" his genitals in Mrs. Glover's presence even if she had not seen, and could not have seen, defendant's front.[129] The Supreme Court denied the State's petition for writ of certiorari on the grounds that Rule 16(b) allowed the Court to resolve the case based upon arguments and theories that were not the basis of the dissent, such as, the two theories stated above, so that the writ of certiorari was unnecessary.[130] The Supreme Court explained that *Kaley* allowed its conclusion:

> Initially, we address whether the State can present an argument before this Court that was not the basis of the dissent below. In State v. Kaley, . . . we said the 'State can argue in this Court any evidence that supports [the dissent's] premise. It is not limited to arguing the reasons in the dissent as to why there was evidence to support the charge . . .' Thus, because the dissent in this case was based on the premise that there was sufficient evidence to support the charge of indecent exposure, the State should not be limited to arguing solely that buttocks are private parts. Accordingly, the State is free here to argue any reasoning it wishes in support of the proposition that the evidence was sufficient to support defendant's conviction, as that is the issue on appeal before this Court.

128. The last sentence in Rule 16(b) provides: "Other questions in the case may properly be presented to the Supreme Court through a petition for discretionary review . . . or by a petition for writ of certiorari." N.C. R. App. P. 16(b).

129. In its brief, the State argued that Mrs. Glover "could have seen defendant's genitals if she had looked" but the evidence was clear that Mrs. Glover did look, she made no effort to avert her gaze, indeed she chased after Mr. Fly, but still never saw his genital organs. Brief for State at 24-25, *Fly,* 127 N.C. App. 286, 488 S.E.2d 614. In its majority opinion, the Court of Appeals stated: "In this case there is no evidence that the defendant exposed his genital organs . . ." *Fly,* 127 N.C. App. at 289, 488 S.E.2d at 616. The dissent nowhere disagreed with this statement.

130. *Fly*, 348 N.C. at 559, 501 S.E.2d at 658.

Since no writ of certiorari is necessary to permit the State to make such arguments, its petition for writ of certiorari is hereby denied. (citations omitted).[131]

In *Kaley* and *Fly*, the Supreme Court has ignored or devalued not only the language of and the purpose behind Rule 16(b) but also the case law that focused on this language and explained the purpose behind Rule 16(b). In light of *Kaley* and *Fly*, it is no longer clear that the Court will follow the ruling that an unexplained dissent confers no right to appeal under N.C. Gen. Stat. § 7A-30(2).[132] It appears that in the wake of these two cases, the Supreme Court is willing to resolve these types of cases on the basis of arguments and theories that were never addressed by the lower courts.[133]

For litigants whose cases have been resolved by a divided panel of the Court of Appeals, the question remains as to whether they have the right to the expanded scope of review as applied in *Kaley* and *Fly*, or if they should always seek discretionary review of any issues that were not expressly discussed in the dissent but that could be considered reviewable as a part of the N.C. Gen. Stat. § 7A-30(2) appeal of right. Questions remain about the long-term impact of the *Kaley* and *Fly* analysis. The Court will reconsider its approach to this issue. It has been noted that individual justices of the Supreme Court "have voiced their opinions that

131. *Id.* at 558-59, 501 S.E.2d at 658.

132. *Walker* was a summary judgment case that indicated the purpose of Rule 16(b). Since this was a summary judgement case, the dissenting judge's unexplained dissent clearly implicated the broad premise or question as to whether summary judgment was proper. Nevertheless, *Walker* expressly held that that broad premise was not before the Court under a N.C. Gen. Stat. § 7A-30(2) appeal of right. *Fly* held that the appeal of right includes any argument addressing the broad premise with no limitation to the points of disagreement actually expressed in the dissent. This removes the basis for the *Walker* holding. After *Fly*, a dissent need not be explained if all possible arguments are available regardless of whether or not they appeared in the dissent.

133. *Compare* Weil v. Herring, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934), in which the Supreme Court refused to consider one of appellant's arguments stating that its review of the record disclosed "that the cause was not tried upon that theory, and the law does not permit parties to swap horses between courts in order to get a better mount in the Supreme Court." *See also* Tallent v. Blake, 57 N.C. App. 249, 252, 291 S.E.2d 336, 339 (1982) ("[W]e cannot review the case as the parties might have tried it; rather, we must review the case as tried below, as reflected in the record on appeal."); State v. Sharpe, 344 N.C. 190, 473 S.E.2d 3 (1996). In cases relying on N.C. Gen. Stat. § 7A-30(2), expanding the theories that can be argued beyond those that were the express basis for the dissent, might also be viewed as a prohibited horse swap.

they would like to see the automatic right of appeal based on dissent eliminated by the General Assembly."[134] In the meantime, however, if the Supreme Court denies the motion for discretionary review, the appellant's attorney may still seek to make the additional arguments as a part of the appeal of right, citing *Kaley* and *Fly* as authority.[135]

C. *The Thong Dicta: Straw Men, Judicial Notice And Statutory Interpretation*

As discussed above, because the Supreme Court concluded that it could and would resolve the case on different grounds, it was unnecessary for the Court to either address the analysis employed by the Court of Appeals' majority opinion in determining that buttocks were not private parts or to determine whether or not buttocks were private parts. Nevertheless, the Supreme Court did both.

In *Fly*, the Supreme Court stated that the Court of Appeals "based its holding on a misreading of *State v. Jones*."[136] The Supreme Court then stated that *Jones* concluded that the phrase "private parts" "included only the genital organs" and therefore, apparently, not the excretory organs.[137] This was clearly not the holding in either *Jones* or the Court of Appeals' opinion in *Fly*, and nowhere in either opinion is there any statement, even in dicta, that suggests such a conclusion. The issue in *Jones* was whether the female breast was a "private part."[138] *Jones* cited

134. "By forcing the Supreme Court to hear all cases in which there is a dissent, it is believed that the court is forced to expend its limited time and resources hearing cases that do not involve novel or important claims. *Consequently, the court would prefer to hear these cases on a discretionary basis.*" *North Carolina Trial and Appeal* (American Inns of Court Civil Procedure Series), WestGroup (1998), Appellate Jurisdiction, at 11-3 (emphasis added).

135. *Fly* clearly states that the appellant is "free . . . to argue any reasoning it wishes" to support the "proposition" that the Court finds is the issue before it. *Fly,* 348 N.C. at 559, 501 S.E.2d at 658. This presumably means that no permission from the Court is required. If the parties are free to fashion any argument that addresses the "premise" of the sufficiency of the evidence to support the charges, then in *State v. Fly*, the Supreme Court would presumably have considered a contention raised for the first time in defendant's brief to the Supreme Court that the State's evidence failed to show that Mrs. Glover was a person of the opposite sex, which is an element of the crime of indecent exposure.

136. *Fly,* 348 N.C. at 559, 501 S.E.2d at 658, (citing *Jones*, 7 N.C. App. 166, 171 S.E.2d 468).

137. *Fly* at 560, 501 S.E.2d at 658.

138. *Jones*, 7 N.C. App. at 167, 171 S.E.2d at 469.

Webster's Third New International Dictionary for a definition of private parts as "the external genital and excretory organs."[139] *Jones* then concluded that the female breast was not a genital organ. It seems rather obvious that the *Jones* court thought it unnecessary to state its conclusion that the female breast was also not an excretory organ. There is simply no basis whatsoever to claim that *Jones* excluded excretory organs from the definition of private parts.[140]

The issue in the Court of Appeals' *Fly* decision was whether the buttocks were "private parts." The Court of Appeals did not cite *Jones* for the proposition that excretory organs were not private parts, as the Supreme Court stated in *Fly*. It is perhaps possible to speculate that a logical but unstated basis for the Court of Appeals' holding was a conclusion that private parts "included only the genital organs," but a more likely explanation is that the Court of Appeals concluded that there was no evidence at all that an excretory organ had been exposed and therefore no need to address whether private parts included excretory organs. In its brief to the Court of Appeals, the State noted that *Jones* had included in the definition of private parts "the external genital and excretory organs," and argued that there was evidence sufficient to find that the defendant's anus was exposed or that the buttocks, "as the flesh covering the anus, are a part of the excretory organ and therefore a private part."[141] In light of the lack of any specific language in the Court of Appeals' *Fly* opinion stating that private parts do not include the excretory organs, and in light of the specific arguments in the state's brief that the Court of Appeals' failed to acknowledge in its opinion, the least likely interpretation of the Court of Appeals' holding is that it misinterpreted the clear language of *State v. Jones* to reach a conclusion that

139. *Id.* (quoting Webster's Third New International Dictionary (Unabridged) (1968) defines private parts as "the external genital and excretory organs.").

140. Inexplicably, in spite of *Jones'* citation of Webster's dictionary for the definition of private parts as including both external genital and excretory organs, the Supreme Court in *Fly* stated that "[t]he definition applied by the court in *Jones* is too narrow to be historically correct and complete" and cited The American Heritage Dictionary of the English Language 1442 (3d ed. 1992) for the definition of "private parts" as "[t]he external organs of sex and excretion." *Fly*, 348 N.C. at 560, 501 S.E.2d at 658. *Fly* then purports to "correct" *Jones* by concluding "that in common law and as used in former N.C.G.S. § 14-190, the phrase 'private parts' included both the external organs of sex and of excretion." *Id.*

141. State's Brief at 5, *Jones* 7 N.C. App. 166, 171 S.E.2d 468.

exposure of the anus was not prohibited even when there was no evidence that the anus was exposed.

Having concluded in its opinion that the phrase "private parts" as defined both by the common law and former N.C. Gen. Stat. § 14-190 included both the external organs of sex and excretion, the Supreme Court then also rejected the Court of Appeals' conclusion that the legislature's use of the phrase "private parts" in N.C. Gen. Stat. § 14-190.9 indicated satisfaction with the judicial definitions of the phrase.[142] The Supreme Court noted that in the Act which repealed N.C. Gen. Stat. § 14-190 and enacted N.C. Gen. Stat. § 14-190.9, the General Assembly expressed its intent that "[e]very word, clause, sentence, paragraph, section, or other part of this act shall be interpreted in such manner as to be as expansive as the Constitution of the United States and the Constitution of North Carolina permit."[143] *Fly* indicates that this express and unequivocal language helps clarify what is meant by "private parts" but does not elaborate.[144] In reality this language cannot be applied to help define the phrase "private parts." For instance, if the state and federal constitutions would permit a state to criminalize the willful exposure in a public place of the buttocks, the female or male breast, any part of the leg above the knee, or any part of the human body,[145] would that mean that the

142. In footnote 1, the Court of Appeals noted that the retention of the phrase "private parts" in section 14-190.9 "is particularly significant in the face of this Court's decision in Jones because it reflects a satisfaction with that Court's definition of 'private parts' as a person's 'genital organs.'" *Fly*, 127 N.C. App. at 288, 488, S.E.2d at 615. *See* Anderson v. Baccus, 109 N.C. App. 16, 22, 426 S.E.2d 105, 108 (1993) ("where [legislature] chooses not to amend a statutory provision that has been interpreted in a specific . . . way by our courts, we may assume that it is satisfied with that interpretation"), aff'd in part and rev'd in part on other grounds, 335 N.C. 526, 439 S.E.2d 136 (1994).

143. *Fly*, 348 N.C. at 560, 501 S.E.2d at 659, (quoting Act of June 17, 1971, ch. 591, sec. 2, 1971 N.C. Sess. Laws 519 (adding new section 14-190.9 prohibiting indecent exposure and repealing N.C. Gen. Stat. § 14-190)).

144. *Fly* does note that the General Assembly subsequently amended N.C. Gen. Stat. § 14-190.9 to expressly exempt breast feeding in public from prosecution for indecent exposure. This would suggest that exposure of the female breast would otherwise be indecent exposure under N.C. Gen. Stat. § 14-190.9. *Fly* 348 N.C. at 560, 501 S.E.2d at 659.

145. The U.S. Supreme Court appears to have acknowledged the authority of the states to make public nudity a crime. *See* Barnes v. Glen Theater, Inc., 501 U.S. 560, 567 (1991), In *Barnes*, the Court stated that Indiana's public indecency law was "justified despite its incidental limitations on some expressive activity. The public indecency statute is clearly within the constitutional power of the State and furthers substantial governmental interests." The Indiana statute

General Assembly had thereby redefined the phrase "private parts" to include each of the parts previously mentioned, and to also include all parts of the human body? This is what a literal reading of "[e]very word, clause, sentence . . . ." would mean.[146] It is doubtful that the General Assembly intended to define or redefine "private parts" by this reference, but if it did it is impossible to determine what redefinition was intended.

The Supreme Court in *Fly*, nevertheless, suggested that the definition of "private parts" as used in the indecent exposure law, is expanded by adoption of N.C. Gen. Stat. § 14-190.9 and the accompanying legislation. There would seem to be little doubt that the General Assembly could expressly state that buttocks are private parts of which willful public exposure is criminal and that such a law would not be unconstitutional simply because buttocks were included. It could be excepted that the Supreme Court, if it felt compelled to answer the question which it already stated was unnecessary to resolve the case, would conclude that the "expansive"[147] definition of "private parts," as used in N.C. Gen. Stat. § 14-190.9, must include the buttocks. However, that would be wrong. In *Fly* the Supreme Court concluded that:

> given the posture of this case, we think it would be wise to note our agreement with the conclusion of the majority below that buttocks are not private parts within the meaning of the statute. To hold that buttocks are private parts would make criminals of all North Carolinians who appear in public wearing "thong" or "g-string" bikinis or other such skimpy attire during our torrid summer months. Our beaches, lakes, and resort areas are often teeming with such scantily clad vacationers. We simply do not believe that our legislature sought to discourage a practice so commonly

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prohibited a person from knowingly and intentionally appearing in a public place "in a state of nudity" and defined nudity as "the showing of the human male or female genitals, pubic area, or buttocks with less than a fully opaque covering, the showing of the female breast with less than a fully opaque covering of any part of the nipple, or the showing of covered male genitals in a discernibly turgid state." Ind. Code § 35-45-4-1 (1988). Also, in *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986), the U.S. Supreme Court upheld a Georgia statute that prohibited sodomy practiced in private between consenting adults that was enacted solely on "the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable."

146. *See supra*, note 144.

147. The Court notes its conclusion that the phrase "private parts," as used in N.C. Gen. Stat. § 14-190.9, must be read "in light of the legislature's expressed preference for an 'expansive' interpretation." *Fly*, 348 N.C. at 561, 501 S.E.2d at 659.

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> engaged in by so many of our people when it enacted N.C. Gen. Stat. § Section 14-190.9. To make such attire criminal by an *overly* expansive reading of the term "private parts" was not, we are convinced, the intent of our legislature. The difference, however, between defendant's conduct and someone wearing a bikini is that the former is a clear-cut violation of recognized boundaries of decency, which the statute was intended to address, whereas the latter is a matter of taste, which we do not believe our legislators intended to make criminal.[148]

This is not textbook statutory interpretation.[149] For instance, was it proper for the Court to take judicial notice of the "fact" that North Carolina's resort areas are often teeming with scantily clad vacationers?[150] Even if it was proper, and thongs and g-string

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148. *Fly*, 348 N.C. at 561, 501 S.E.2d at 659.

149. "In matters of statutory construction, [the court's primary] task is to ensure that the purpose of the legislature, the legislative intent, is accomplished." Electric Supply Co. v. Swain Electrical Co., 328 N.C. 651, 656, 403 S.E.2d 291, 294 (1991) (citing Hunt v. Reinsurance Facility, 302 N.C. 274, 288, 275 S.E.2d 399, 405 (1981)). "Legislative purpose is first ascertained from the plain words of the statute." *Electric Supply Co.*, 302 N.C. at 656, 403 S.E.2d at 294 (citing Burgess v. Your House of Raleigh, 326 N.C. 205, 209, 388 S.E.2d 134, 136 (1990)). "If, after analyzing the text, structure, and policy of the statute, the court is still in doubt as to legislative intent, the court will also examine the history of the legislation in question." *Electric Supply Co.*, 328 N.C. at 656, 403 S.E.2d at 294 (citing Media, Inc. v. McDowell County, 304 N.C. 427, 430-431, 284 S.E.2d 457, 461 (1981)).

150. State v. Scoggin, 236 N.C. 1, 16, 72 S.E.2d 97, 107 (1952) ("Judges are not required by law to be more ignorant than all other men."); In Re Spivey, 345 N.C. 404, 414, 480 S.E.2d 693, 698-99 (1997) (citing N.C. Gen. Stat. § 8C-1, Rule 201(b) (1992)) ("court may take judicial notice of a fact if it is not subject to reasonable dispute in that it is generally known within the territorial jurisdiction of the trial court."); State v. Canady, 110 N.C. App. 763, 765, 431 S.E.2d 500, 501 (1993); Smith v. Kinston, 249 N.C. 160, 166, 105 S.E.2d 648, 653 (1958) ("that 'Hurricane Hazel' was of great and violent proportions, wreaking destruction upon buildings, houses, and trees throughout the area in which it occurred" is a fact of which the Court may properly take judicial notice.); *But see* Wood v. Stevens & Co., 297 N.C. 636, 640-41, 256 S.E.2d 692, 696 (1979) (that "byssinosis is an irritation of the pulmonary air passages" is not a proper subject of judicial notice.); State v. Hardy, 293 N.C. 105, 114, 235 S.E.2d 828, 834 (1977) ("The percentage of women in a given county is not properly the subject of judicial notice."); Hughes v. Vestal, 264 N.C. 500, 506, 142 S.E.2d 361, 366 (1965) ("A matter is the proper subject of judicial notice only if it is 'known,' well established and authoritatively settled. Matters of which a court will take judicial notice are necessarily uniform or fixed and do not depend on uncertain testimony. A disputable matter cannot be classified as common knowledge and will not be judicially recognized."); Swain v. Tillett, 269 N.C. 46, 56, 152 S.E.2d 297, 305 (1967) ("Although we are not prepared to take judicial notice of the

bikinis have indeed become commonplace in 1998, this "fact" could not, as the Court suggests have been within the contemplation of the General Assembly when it passed the indecent exposure statute in 1971. And even if such attire had been more popular in the 1960's and early 1970's, the General Assembly might well have determined, nevertheless, that buttocks were private parts that should not be publicly exposed.[151] The Court's analysis in the language cited above simply jettisons the normal methods for determining legislative intent.[152] This is particularly dismaying in light of the *Fly* Court's conclusion in the same paragraph that the

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habits of deer, we think any person having this special knowledge may testify concerning their characteristics and reactions just as to any other fact within his knowledge."); *accord* State v. Speller, 230 N.C. 345, 349, 53 S.E.2d 294, 296 (1949) (quoting the trial court's findings) ("The court takes judicial notice of the fact that thousands and thousands of taxpayers in the United States not only do not file and pay their taxes but cheat and defraud the Government in respect to the payment of income taxes—not only small tax payers but tax payers who are due to pay income taxes in the hundreds of thousands of dollars. In the face of such common knowledge it would be a rash presumption to assume that any man has paid all the taxes assessed against him for the preceding year.").

151. The Court does not specify the words in N.C. Gen. Stat. § 14-190.9 that indicate the legislative intent not to interfere with matters of taste, nor does it specify the ambiguity in the words of N.C. Gen. Stat. § 14-190.9 that would allow it to interpret the words. This appears to be an example of judges seeking to enforce the "unexpressed intent" of the legislature rather than the law actually promulgated by the legislature. As Justice Antonin Scalia notes in his 1997 book, *A Matter of Interpretation*, the real danger with such a practice is that "under the guise or even the self-delusion of pursuing unexpressed legislative intents, . . . judges will in fact pursue their own objectives and desires, extending their lawmaking proclivities from the common law to the statutory field. When you are told to decide, not on the basis of what the legislature said, but on the basis of what it *meant*, and are assured that there is no necessary connection between the two, your best shot at figuring out what the legislature meant is to ask yourself what a wise and intelligent person *should* have meant; and that will surely bring you to the conclusion that the law means what you think it *ought* to mean—which is precisely how judges decide things under the common law." ANTONIN SCALIA, A MATTER OF INTERPRETATION 17-18 (1997). Of course, unlike the common law where judges do properly make the law, statutory law is not properly subject to judicial legislation. *Id.* at 7-29.

152. "Statutory interpretation properly begins with an examination of the plain words of the statute." Three Guys Real Estate v. Harnett County, 345 N.C. 468, 472, 480 S.E.2d 681, 683 (1997). Justice Oliver Wendell Holmes was quoted approvingly by Justice Felix Frankfurter as saying: "Only a day or two ago—when counsel talked of the intention of the legislature, I was indiscreet enough to say I don't care what their intention was. I only want to know what the words mean." Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 538 (1947).

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General Assembly intended an "expansive" interpretation of the phrase "private parts" as used in N.C. Gen. Stat. § 14-190.9. Rather than be guided by the language of the statute and its own analysis of legislative history, the Court concluded that times have changed and thongs are okay.[153] This is not statutory interpretation but judicial legislation.[154]

D. *Specific Intent, Consent, Offensiveness, Nexus Between Presence And Exposure: Judicial Legislation Of New Crime Of Indecent Exposure?*

Having addressed an issue that was not before it, the propriety of wearing thongs and g-string bikinis, the Supreme Court then turned to the issues upon which it would decide Mark Fly's

153. Justice Scalia is, again, a powerful critic of the school of statutory "interpretation" that allows a judge to consider "not only what the statute means abstractly . . . but also what it ought to mean in terms of the needs and goals of . . . present day society. . . . It is simply not compatible with democratic theory that laws mean whatever they ought to mean, and that unelected [federal] judges decide what that is." Scalia, *supra* note 151, at 22.

154. Judges do have a limited lawmaking function but it is very different from that of the legislature. Courts make law by "gradually giving meaning" to ambiguous or deliberately vague statutes or the common law (which applies to areas not addressed by statutes) on a case-by-case basis as specific lawsuits are brought before them. Dallin H. Oaks, Justice, Supreme Court of Utah, *When Judges Legislate,* Views from the Bench: The Judiciary and Constitutional Politics, at 148 (Mark W. Cannon and David M. O'Brien eds., Chatham House Publishers 1985). Judges legislate only interstitially—filling in the gaps discovered in the statutes and the common law and otherwise taking the statutes and common law as they find them. Felix Frankfurter, Justice, United States Supreme Court, *Some Reflections on the Reading of Statutes*, Views from the Bench: The Judiciary and Constitutional Politics, at 186 (Mark W. Cannon and David M. O'Brien eds., Chatham House Publishers 1985). *See also* Southern Pacific Co. v. Jensen, 244 U.S. 205, 221 (1916) (Justice Holmes explained that judge "do and must legislate" but only "interstitially; they are confined from molar to molecular motion."). "Unlike the legislator, whose lawmaking knows no bounds, the judge stays close to his house of the law in the bounds of stare decisis. He invariably takes precedent as his starting point; he is constrained to arrive at a decision in the context of ancestral judicial experience: the given decisions, or lacking these, the given dicta, or lacking these, the given clues. Even if his search of the past yields nothing, so that he confronts a truly unprecedented case, he still arrives at a decision in the context of judicial reasoning with recognizable ties to the past; by its kinship thereto it not only establishes the unprecedented case as a precedent for the future, but integrates it in the often rewoven but always unbroken line with the past." Roger J. Traynor, Justice, Supreme Court of California, *The Courts: Interweavers in the Reformation of Law*, The Traynor Reader, at 123 (1987).

fate. The Court stated that based on the evidence presented, a jury could have reasonably found that Mr. Fly exposed "either his anus, his genitals, or both."[155] The problem for the Court with this conclusion was that Mrs. Glover had clearly testified that she saw neither Mr. Fly's anus nor his genitals. The Court's solution to this problem was to note that the crime of indecent exposure does not require that someone actually see the exposure. However, the Court cited *State v. King*[156] to acknowledge that the crime still requires "persons [who] were present who could have seen if they had looked."[157] Yet a problem remained in this regard because the evidence was clear that no person other than Mrs. Glover was present and Mrs. Glover saw as much of Mr. Fly's anatomy as she was able to see. Mrs. Glover made no effort to avert her gaze and indeed chased after Mr. Fly as he pulled up his pants and ran. Thus, there were no persons present "who could have seen if they had looked."

The Court had two solutions for this problem. The Court noted the *fact* "that Mrs. Glover did not crane her neck or otherwise change her position in an attempt to see more of defendant's anatomy than he had already thrust before her."[158] This is a brash mischaracterization of the facts. There was simply no evidence in the transcript that Mrs. Glover could have craned her neck or otherwise changed her position and thereby have viewed more of Mr. Fly. The Court's second solution was to claim, somewhat inconsistently, that the exposure of the private part did not need to be "to" the member of the opposite sex but only "in the presence of" the member of the opposite sex."[159] Presumably this meant that although Mr. Fly did not expose his genitals *to* Mrs. Glover and she never saw them, it was sufficient that the genitals were "exposed" and Mrs. Glover was "present," regardless of what she saw or could have seen. This proposition would negate the nexus requirement as stated in *State v. King* and *State v. Pepper*, which were previously discussed.

To complicate its analysis even further, the Court ended its opinion in *Fly* by mentioning several new factors that the Court apparently deemed important to its holding. Earlier in its opinion

155. *Fly*, 348 N.C. at 561, 501 S.E.2d at 659.

156. *Charlie King*, 268 N.C. at 712, 151 S.E.2d at 567 (quoting 33 Am. Jur. Lewdness, Indecency and Obscenity § 7, at 19 (1941)).

157. *Fly*, 348 N.C. at 561, 501 S.E.2d at 659.

158. *Id.*

159. *Id.*

the Court had set out the elements of the offense of indecent exposure: "(1) the willful exposure, (2) of private parts of one's person, (3) in a public place, (4) in the presence of one or more persons of the opposite sex."[160] Despite clear conflict with this description of the elements of the offense, the Court indicated other aspects of the crime it deemed significant: (a) Mrs. Glover's lack of consent to the exposure;[161] (b) the indecent nature of Mr. Fly's act;[162] (c) the fact that Mr. Fly's exposure was not "incidental to a necessary activity,"[163] and (d) Mr. Fly's specific intent to shock or harass.[164] As was discussed in Section I, prior to *Fly* none of these matters had been viewed as factors in establishing the crime of indecent exposure.

The Court concluded its opinion by restating the offense of which Mark Fly was guilty:

> Even in a society where all boundaries of common decency seem frequently under assault, it is simply unacceptable for a person to harass others by willfully exposing in their presence "those private parts of the person which instinctive modesty, human decency, or common propriety require shall be customarily kept covered in the presence of others."[165]

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160. *Id.* at 559, 501 S.E.2d at 658.

161. "The statute does not go to what the victim saw but to what defendant exposed in her presence *without her consent*." *Id.* at 561, 501 S.E.2d at 659. (emphasis added).

162. "Defendant's exposure was indecent within the meaning of the statute and is among the acts the legislature intended to proscribe." *Id.*

163. "Furthermore, the willfulness of defendant's act distinguishes the exposure of his private parts from situations in which such exposure is unintended and *incidental to a necessary activity*." *Fly*, 348 N.C. at 562, 501 S.E.2d 659-660 (emphasis added).

164. "Here, defendant willfully exposed his private parts in the presence of a member of the opposite sex, apparently for the shock value of the act and its hoped-for effect on Ms. Glover. He succeeded in that endeavor." *Id.* at 562, 501 S.E.2d at 660.

165. *Id.* (citing State v. Galbreath, 69 Wash. 2d 664, 668, 419 P.2d 800, 803 (1966)). The case that produced this language was different from the facts of *Fly*. In *Galbreath*, the indecent exposure statute required that the exposure be indecent or obscene. The defendant appealed on the basis that the terms indecent and obscene were unconstitutionally vague. There was no question that defendant had exposed his genitals to a fifteen year old girl and defendant did not assert that genitals were not included in the indecent exposure statute. Thus the quotation used in *Fly* actually was intended to mean only that the male sexual genitals were clearly private parts the exhibition of which was generally considered lewd. The quotation was never intended as a guide as to what parts of the body, other than the genitals, were private parts.

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That certain actions may be socially or otherwise unacceptable[166] does not require that they also violate the criminal indecent exposure statute adopted by our General Assembly.[167] Certainly attempting to define private parts by reference to "instinctive modesty, human decency, or common propriety," instead of by the relevant case law, legislation and legislative history, invites confusion and more litigation over the meaning of private parts.[168] Whereas the Court of Appeals' opinion established a clear rule, the Supreme Court's opinion permits many conclusions as to what can be exposed and whether the actors' states of mind are relevant considerations.

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166. This moralistic pronouncement contrasts with the observation of Judge Morris (later Chief Judge) in *Jones*, 7 N.C. App. at 169-170, 171 S.E.2d at 470;

> We are of the opinion, and so hold, that the exposure by a female of her breasts to the public view in a public place is not an offense under [N.C. Gen. Stat. §] 14-190. Neither the legislature, by its enactment of laws, nor the courts, by interpretation thereof, can make a man a gentleman nor a woman a lady, this molding must come from other elements of society.

167. Such actions might constitute a common law breach of the peace or public nuisance. This possibility was suggested in the Court of Appeals' opinion in *Fly*. "Although the issue is not presented in this case, the defendant's conduct may well be in violation of the common law crimes of breach of the peace and/or the creation of a public nuisance." *Fly*, 127 N.C. App. at 289, 488 S.E.2d at 616, n. 3. *See* State v. Everhardt, 203 N.C. 610, 617, 166 S.E. 738, 741-42 (1932) (common law public nuisance); State v. Mobley, 240 N.C. 476, 482, 83 S.E.2d 100, 104 (1954) (common law breach of the peace); JOHN SNYDER, NORTH CAROLINA ELEMENTS OF CRIMINAL OFFENSES 207 (5th ed. 1994) (exposure of a person's buttocks "probably constitutes a breach of peace or public nuisance")." *See also* State v. Chrisp, 85 N.C. 528, 529, 2 S.E. 70, 71 (1881) ("the defendant did curse and swear in a loud voice, and did utter the profane words set out in the indictment; and did then and there and for the space of five minutes continue to utter and frequently repeat the said words in the presence and hearing of the said citizens then and there being, and passing and repassing to their great annoyance, &c., and the common nuisance, &c." and it was held a public nuisance.)

168. "Most Americans are well aware of the profound shift in recreational and street fashion which has altered traditional Anglo-American notions of modesty. 'Instinctive modesty,' 'human decency' and 'common propriety' surely would have mandated the covering of larger areas of the human (particularly female) body a century ago than today. In addition to perceptible changes in modesty within contemporary American society, history and social science findings dispute notions of an 'instinctive' modesty." Narvil, supra note 38, at 85, 92.

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SECTION III

A. *Issues for the Trial Court after State v. Fly*[169]

A defendant is charged with indecent exposure. The evidence is that the defendant was hiking alone at a state park. At the edge of a field, he stopped, looked around, and seeing no one relieved himself as he faced into the woods with his back to the field. As he zipped up his fly, he turned and saw that two female hikers had emerged from the woods at the other side of the field about 30 yards away. They were unaware that defendant had been urinating, they never saw his genitals and indeed could not have seen his penis as he never had it exposed except when he was turned toward the woods. A male park ranger, however, observed the entire event from the edge of the woods (although he too never saw and could not have seen defendant's penis). The ranger approached the defendant and asked defendant if he had been urinating. Defendant admitted that he had been but that he thought that no one was nearby and that no one would see him.

At the charge conference the defendant requests special instructions[170] that the state must prove that defendant had the specific intent to offend or harass, that his exposure was indecent, that to be "present" the women had to have either actually seen or been able to see his exposed penis, and that the exposure was not incidental to a necessary activity. The state objects to each of these instructions and requests that the court instruct the jury that the persons of the opposite sex are present, as the term is used in the statute, so long as they are within the same public place at the time of the exposure even if they neither saw, nor could have seen defendant's exposed penis, or were even aware that defendant had exposed himself.

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169. *Fly*, 348 N.C. 556, 501 S.E.2d 656.

170. "Where an instruction is requested by a party and the instruction is supported by the evidence and is a correct statement of the law, it is error for the trial court not to instruct in substantial conformity with the requested instruction." State v. Singletary, 344 N.C. 95, 104, 472 S.E.2d 895, 902 (1996) (citing State v. Farmer, 336 N.C. 172, 424 S.E.2d 120 (1993)); "When a party properly tenders a written request for a special instruction which is correct in itself and supported by the evidence, the failure of the court to give the instruction, at least in substance, is reversible error." Metric Constructors v. Hawker Siddeley Power Eng., 121 N.C. App. 530, 537, 468 S.E.2d 435, 439 (1996) (citing Indiana Lumberman's Mut. Ins. Co. v. Champion, 80 N.C. App. 370, 379, 343 S.E.2d 15, 20-21 (1986)).

In a second example, two male defendants are charged with indecent exposure. The evidence is that during an organized running event called a "hash" run in Duke Forest, three female "hashers" mooned a group of hashers as the group of runners turned a corner along the hash trail. Later during the run, two of the runners who had been mooned found themselves in front of the other runners, including the female hashers. The two male runners then mooned the running group in the same manner that they had been mooned. In each case the act of mooning involved the mooner bending over at the waist, facing away from moonee, and pulling down the back of the shorts to reveal the buttocks with the front part of the shorts remaining up and covering the entire front. All participants testified that the mooning was consensual and unoffensive.[171]

At the close of the state's evidence the defendants move to dismiss,[172] arguing that the state has failed to produce substantial evidence showing that defendants had the specific intent to offend or harass or that the persons of the opposite sex who were present during the exposure did not consent to the exposure, and that, in any event, buttocks are not private parts within the statutory definition.

In a third example, a female defendant is charged with indecent exposure. The evidence is that the defendant and her boyfriend were sunbathing at an isolated area of Hammocks Beach State Park on the North Carolina coast. The female was wearing a thong bathing suit and for a brief time period was sunbathing topless.

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171. According to Paul Naylor, the founder of the Tar Heel Hash House Harriers, the oldest hashing club in North Carolina (circa 1981), the "hashers" meet regularly to follow a running course marked by a club member (dubbed the "hare") with sporadic flour dollops along city streets, parks, sewer lines and railroad tracks. There are several hashing clubs in North Carolina and many hundreds more throughout the United States and the world. According to Naylor there are regular national and international meetings of the various hashing groups and the hashing culture has adopted mooning as an accepted part of hashing tradition. Interview with Paul Naylor, Founder of the Tar Heel Hash House Harriers, in Durham, North Carolina, (Jan. 10, 2000).

172. In ruling on a motion to dismiss, the trial court must determine whether there is substantial evidence of each element of the offense charged and that the defendant is the perpetrator. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. The term substantial evidence simply means "that the evidence must be existing and real, not just seeming or imaginary." State v. McAvoy, 331 N.C. 583, 589, 417 S.E.2d 489, 493 (1992) (internal citations omitted).

At the close of the state's evidence the defendants move to dismiss, arguing that the state has failed to produce substantial evidence of each element of the crime because neither buttocks nor breasts are private parts within the statutory definition, and that, in any event, exposing non-genital body parts for the purpose of sunbathing is a matter of taste to which the indecent exposure statute is not applicable.[173]

In each of these cases the defense attorney hands up to the judge the Supreme Court's *Fly* opinion and points out the language that supports their motions. The assistant district attorney responds that the language in *Fly* cited by defendant is dicta, that *Fly* did not actually change the elements of the crime of indecent exposure, and that the *Fly* dicta does not free the trial court to stray from the pre-*Fly* precedent that established the elements of the crime of indecent exposure. The defense responds that *Fly* did alter the elements of the crime but that, in any event, the trial court must follow the explicit rationales set out by the Supreme Court as determinative in the *Fly* matter. The assistant district attorney responds that it is only the holding, and not the rationales, in Supreme Court opinions that are binding on the lower courts, and that in *Fly* the holding reaffirmed the established elements of indecent exposure and decided that buttocks were private parts within the meaning of the statute, despite the statements in *Fly* to the contrary. At this point the court takes a recess.

The judge might resolve these issues in three ways. First, the judge could evaluate the evidence and the parties, decide what the "just" or "best" result is, and then choose the language in *Fly* that best fits the chosen result. Legal analysis and justification would thus be an after-the-fact rationalization of a decision already reached. Second, the judge might look first to all the statements contained in the *Fly* opinion to guide his or her decision, but then the judge would value or devalue all such statements along a con-

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173. There are other defenses available for the nude female sunbather, e.g., nude sunbathing as protected symbolic speech, topless sunbathing by women as an equal protection issue. For a review and analysis of these issues see Richard B. Kellam & Teri Scott Lovelace, *To Bare or Not To Bare: The Constitutionality of Local Ordiances Banning Nude Sunbathing*, 20 U. R. L. Rev. 589 (1986); Glazer, *supra* note 38. If the thong wearer/indecent exposure issue ever properly reached the North Carolina Supreme Court, it is expected that these defenses would be fully explored and argued, and that the Court might select a different rationale to explain its resolution of the issue rather than the one chosen in *Fly*, i.e., that buttocks are not private parts.

tinuum as they appeared to the judge to be logical, particularly convincing, compelling or predictive of appellate court behavior. Third, a judge may feel constrained to follow precedent, if it exists, and to reach only that decision which is dictated or allowed by such precedent. According to this approach, the judge is not free to consider and value any statements in an appellate opinion but must first determine whether the statement is a part of the holding of the case or if it is dictum. The judge is bound to follow the former but is free to disregard the latter if he or she finds it unconvincing. This third alternative is, of course, the one mandated by the rule of law and adherence to stare decisis; that is, that like cases should be decided alike.[174]

174. There is, of course, a fourth explanation as to how a judge reaches a decision in a case—one that asserts that the legal doctrine judges so patiently labor to make sense of are essentially peripheral. "[W]hat is really going on when lawyers, scholars and judges undertake to do legal analysis[?] In one view, practicing lawyers representing a client learn and manipulate doctrine to obtain a desired outcome, the judge hearing such a case decides, in effect, whether the doctrine permits or requires that outcome, and scholars assess the judge's decision to determine whether the doctrine was analyzed appropriately. Conventional scholarship thus purports to describe what is actually happening when a case is decided. The other view claims that something entirely different is going on in the course of deciding cases. Critical legal scholarship suggests that, although lawyers, judges, and conventional scholars may believe that they are examining the implications of given doctrines, in fact their focus on doctrine obscures from them social and political choices about how the world is and ought to be organized —choices they are actually in the process of making when they engage in conventional legal analysis. Critical legal scholarship thus purports to describe the ongoing process by which our choices are obscured from ourselves. The intent is not to blame anyone for engaging in traditional analysis but to bring to the surface and to address openly a set of questions that doctrinal analysis renders invisible. Conventional scholarship is misguided, in this view, because by asking the wrong questions it contributes to the process of obfuscation." Jane B. Baron, *Self-Criticism*, 60 Temp. L. Q. 39, 44 (1987). No doubt there is opportunity for and actual obfuscation in the judicial application of the holding/dictum distinction. As Professor Dorf noted in the quotation which began this article, such opportunity and obfuscation are reduced, however, when the holding/dictum distinction is consistently understood and consistently applied. Dorf, *supra* note 1, at 2054.

B. *The process of judicial decisionmaking: the holding/dictum distinction*

Stare decisis requires that like cases be decided alike and that the lower courts abide by the decisions of the higher courts.[175] Trial judges thus must locate "like cases" by first determining the important characteristics of the case before them and then searching for those characteristics in the appellate opinions.[176] Once a "like case" is located[177] the trial judge must distinguish the holding of the case from its dictum. Without this determination the judge is not free to consider and follow any language found in an appellate opinion that appears relevant. Instead the judge is obliged to determine the holding of the opinion in order to apply it to the matter before the court, if on point. Only if such application fails to resolve all issues before the court may the court consider the relevance and value of any dicta found in the opinion. As important and as basic as this aspect of judging is, however, the process of distinguishing holding from dictum can be obscure.[178]

175. The Supreme Court can overrule its precedents, Rabon v. Hospital, 269 N.C. 1, 20, 152 S.E.2d 485, 489 (1967) ("This Court has never overruled its decisions lightly. No court has been more faithful to stare decisis. . . . [Nevertheless,] '[t]here is no virtue in sinning against light or in persisting in palpable error, for nothing is settled until it is settled right.'"), but lower courts are not empowered to overrule the precedents of the Supreme Court. Cannon v. Miller, 313 N.C. 324, 327 S.E.2d 888 (1985) (Supreme Court vacated a Court of Appeals decision which purported to abolish the long-established causes of action for Alienation of Affections and Criminal Conversation. The Supreme Court noted that it appeared "that the panel of Judges of the Court of Appeals to which this case was assigned . . . acted under a misapprehension of its authority to overrule decisions of the Supreme Court of North Carolina and its responsibility to follow those decisions, until otherwise ordered by the Supreme Court."). Lower courts must always follow a higher court's precedents. One commentator calls this vertical stare decisis. Dorf, *supra* note 1, at 2024-2025 (horizontal stare decisis is a court following its own precedents).

176. A similar case may not qualify as a "like case" if it is distinguishable on its facts from the matter before the judge.

177. Unless there are no "like cases," and thus no applicable precedent or relevant, considered dicta, (and no applicable statutes) the judge is not free to resolve the case before her by simply selecting the outcome that appears to be the best or most "just."

178. "[N]o universal agreement exists as to how to measure the scope of judicial holdings. Consequently, neither is there agreement as to how to distinguish between holdings and dicta. . . . [A]n examination of the kinds of statements that courts label dicta reveals gross inconsistencies. Taking our cue from Moliere, we would find a consensus for the judgment that everything that is not holding is dictum and everything that is not dictum is holding, but little in

The dictum/holding distinction is best understood in the context of the rule that a court is to resolve only the narrow issue that is presented by the litigation actually before it. There are several justifications for this rule. First, it is the narrow issue presented by the litigation that is fully briefed and argued by the parties, and fully considered by the court. Other issues have, presumably, not received such complete analysis and consideration and therefore should not be conclusively decided by the court.[179] Second, allowing a court to resolve an issue not actually before the court deprives future litigants, whose case legitimately raises the specific issue, of their day in court. Those litigants should have the opportunity to fully brief and argue the issue, and the court should have the opportunity to fully consider the arguments and the issue. Finally, and perhaps most significantly, it appears that a court lacks the authority (i.e., jurisdiction) to resolve any issues beyond those necessary to decide the specific case before the court. In other words, a court would have no authority to enact an authoritative general rule to govern parties and situations that

the way of a substantive definition of either term." Dorf, *supra* note 1, at 2003-2004. "Rather than being a simple, easily defined monolith, the doctrine of stare decisis is a complex, multifaceted phenomenon whose diverse components reflect a variety of values. Such phenomena typically defy full and accurate description." Earl Maltz, *The Nature of Precedent*, 66 N.C. L. Rev. 367, 393 (1988). The problems with defining dictum and holding are clearly and masterfully summarized in a 1952 Stanford Law Review note: "Dictum is one of the commonest yet least discussed of legal concepts. Every lawyer thinks he knows what it means, yet few lawyers think much more about it. Non-thinking and overuse combine to make for fuzziness. The very haze is useful though. The principle of stare decisis is constricting. A statement of the law that conflicts with the view of a judge or an attorney may be decisive unless it can be avoided. Labeling the statement a dictum is one simple means of evasion. Few desire to endanger such a useful tool by subjecting it to the destructive light of analysis. A vague smokescreen is often a better weapon in the courtroom than a precise argument that the court may understand and therefore reject." Note, *Dictum Revisited*, 4 Stan. L. Rev. 509 (1951-52).

179. One commentator calls this the accuracy issue: "Dicta are less carefully considered than holdings, and, therefore, less likely to be accurate statements of the law." Dorf, *supra* note 1, at 2000. In 1821, Chief Justice John Marshall observed that one reason dicta should have no precedential value is because "[t]he question actually before the Court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated." Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 399-400 (1821).

were not before the court.[180] The act of a court which exceeds its jurisdiction is a nullity and may generally be disregarded.[181]

For these reasons the holding of a case (i.e., the part of the case that is binding on lower courts in future cases) is inextricably linked to the unique facts of the case. It is clear that any statements, explanations, rationales or observations that are not directly related, or necessary, to the outcome of the particular dispute that was before the appellate court, no matter how scholarly, insightful or wise, do not constitute binding precedent, as the court arguably lacks jurisdiction to pronounce any rule on such "hypothetical" issues. But does this mean that statements or rationales that are "directly related" or "necessary," to the outcome of a particular case constitute binding precedent? Arguably not.[182] Many commentators propose that the holding in a case consists only of the facts of the case and the outcome.[183] All else,

180. "[A] basic principle of common law adjudication is that a judge is empowered to decide the case before the court and only the case before the court. A judge has no authority at common law to enact an authoritative general rule to govern parties and situations that were not before the court. The judge in Case 1 could not decide how Case 3 must be decided, however broadly she may craft a rule to explain the decision in Case 1." STEVEN J. BURTON, AN INTRODUCTION TO LAW AND LEGAL REASONING 36 (1985). Professor Dorf calls this the legitimacy justification for the holding/dictum distinction. Dorf, *supra* note 1, at 2000-2001 (1994).

181. In *In the Matter of Lynette H.*, 323 N.C. 598, 374 S.E.2d 272 (1988), a commitment case, the trial court found the respondent not to be mentally ill and therefore not commitable under the statute, but the trial court also held that the applicable statute was unconstitutional. The Court of Appeals affirmed the trial court. The Supreme Court vacated the Court of Appeals' opinion noting that once the trial court found the respondent not to be mentally ill the matter was concluded and there was no jurisdiction to consider the constitutionality of the applicable statute. *See also* State v. Hart, 116 N.C. 976, 977-78, 20 S.E. 1014, 1016 (1895) ("If it had appeared from the record that the defendant had asked the court to give this instruction and the court had refused to do so, it would have presented an interesting question. But this question is not presented as we have seen, and we can see no good reason why we should review the many decisions we have upon this line, and we will not discuss the matter further, as whatever we might say would be but a *dictum*, and we think, as a general rule, *dicta* are not profitable to the courts or to the profession.") (emphasis in the original)

182. The author of an insightful note in the 1952 Stanford Law Review observed: "Definitions of dictum abound in the reports. What have the courts said? The traditional view is that a dictum is a statement in an opinion not necessary to the decision of the case. This means nothing. The only statement in an appellate opinion strictly necessary to the decision of the case is the order of the court." Note, *Dictum Revisited*, 4 Stan. L. Rev. 509 (1951-52).

183. A court:

including any explanation, reasoning, justification or rationale, is dicta.[184] According to this analysis, explanation, reasoning, justification or rationale, even if it is directly related or necessary to the result (and even though it may be well worth considering, applying and following; that is, it may be powerful and convincing dicta); it is dicta nonetheless and is not binding precedent.

Senior United States Circuit Judge of the U.S. Court of Appeals for the Third Circuit, Ruggero J. Aldisert, states that "[a] judicial precedent attaches a specific legal consequence to a detailed set of facts in an adjudged case or judicial decision, which is then considered as furnishing the rule for the determination of a subsequent case involving identical or similar material facts and arising in the same court or a lower court in the judicial hierarchy."[185] Judge Aldisert notes that *stare decisis* means to stand by what the court *did* and not what it *said*:

> "[A] case is important only for what it decides: for 'the what,' not for 'the why,' and not for 'the how.' . . . Strictly speaking, the later court is not bound by the statement of reasons, or dictis, set forth in the rationale. We know this because a decision may still be

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> is not bound by the statement of the rule of law made by the prior judge even in the controlling case. The statement is mere dictum, and this means that the judge in the present case may find irrelevant the existence or absence of facts which prior judges thought important. It is not what the prior judge intended that is of any importance; rather it is what the present judge, attempting to see the law as a fairly consistent whole, thinks should be the determining classification.

EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING 2-3 (1942).

184. "[T]he reason which the judge gives for his decision is never the binding part of the precedent." Arthur L. Goodhart, *Determining the Ratio Decidendi of a Case*, 40 Yale L. J. 161, 162 (1930-31). "Orthodox American jurisprudence interprets stare decisis as 'keeping to the former *decisions*' (stare *decisis*) and not as 'keeping to the *reasoning* of former decisions' (stare *rationibus decidendis*), nor as 'keeping to the *dicta* of former decisions' (stare *dictis*). A court reaches a decision when it attaches a specific legal consequence to a definite, detailed set of facts. Thus, the reasoning of the court, as well as its hypothetical statements, are mere dicta and do not constitute binding authority in subsequent situations. Consequently, the precedent of a case resides in the rule of law emerging from the court's decision: a specific legal consequence attaching to a detailed set of facts." Paul W. Werner, *The Straits of Stare Decisis and the Utah Court of Appeals: Navigating the Scylla of Under-Application and the Charybdis of Over-Application*, 1994 B.Y.U. L. Rev., 633, 643-44 (1994) (emphasis added).

185. Ruggero J. Aldisert, *Precedent: What It Is and What It Isn't; When Do We Kiss It and When Do We Kill It?*, 17 Pepp. L. Rev. 605, 606 (1990) (quoting Allegheny County General Hospital v. NLRB, 608 F.2d 965, 969-70 (3d Cir. 1979)).

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vital although the original reasons for supporting it may have changed drastically or been proved terribly fallacious."[186]

This explanation[187] of the dicta/holding distinction has been criticized as permitting manipulation of the standard for subjective purposes.[188] For instance, the facts of a subsequent similar case will never be "identical" with the earlier case, and it would appear that a judge could avoid the binding effect of the earlier case's holding simply by finding in the new case a "material fact" not present in the earlier case or the absence in the new case of a "material fact" that was present in the earlier case.[189] Because the materiality of a given fact to the court's decision will be discerned largely from the explanation or rationale provided by the court, which statements themselves are non-binding dicta according to the definition, the determination that a previous holding is binding on a subsequent case may permit, or at least disguise, a subjective approach.[190] Several commentators have observed that this dicta/holding distinction may allow a judge to decide not to follow any language in an earlier case and then to justify the decision by calling the language dictum.[191] Nevertheless, even if the dicta/holding distinction may not be consistently applied by vari-

186. Ruggero J. Aldisert, *supra* note 185, at 607.

187. It is interesting to note that appellate opinions that dismiss a statement in an earlier opinion as a dictum do so only in a dictum, the explanation is always unnecessary to the holding. *See* Dorf, *supra* note 1, at 2067. ("[C]ourts could not effectively adopt the facts-plus-outcome approach. In order to establish the proposition that holdings consist of nothing but outcomes, a judge would have to state the proposition in the course of deciding a case. But then that very statement would not be part of the outcome of the case, and thus, by its own terms, could be discarded as dictum in a later case.").

188. "I defend a view of the holding/dictum distinction that attributes special significance to the *rationales* of prior cases, rather than just their *facts* and *outcomes*. . . . [A] too-narrow view of holdings often serves as a means by which judges evade precedents that cannot fairly be distinguished." Dorf, *supra* note 1, at 1998-99.

189. "As any law student knows, virtually any judicial decision can be analogized to or distinguished from any other fact pattern." Maltz, *supra* note 178, at 371.

190. "[A]ttachment of the label dicta to past statements has been used as a means of avoiding the consequences of all kinds of legal pronouncements." Dorf, *supra* note 1, at 2005.

191. *Id. See also* Note, *Dictum Revisited*, 4 Stan. L. Rev. 509, 517 (1952) ("Once a court has decided that a statement of the law is wrong and will therefore not be followed, it has no psychological need to inquire whether or not stare decisis applies. To say that stare decisis does not apply is pure rationalization—additional support for a judgment already made on other

ous courts and may permit a degree of disingenuousness, the distinction is at the heart of the judicial process and can be more consistently applied if judges understand the analysis and its importance.

The analysis in the following section is based on the conclusion that the binding decision of a case consists of the facts contained in the record of the case and the decision, i.e., the legal consequences that the court attached to the facts in the record.[192] The applicability of the holding to a subsequent case depends on a comparison of the material facts in each case, and the statements, explanations, rationales or observations of the court that decided the first case can be useful in making this comparison. Such statements, explanations, rationales or observations will help determine whether the holding is binding on the later case but they are not themselves precedent, they are dicta. Their value in determining what facts are material, and in suggesting rules to resolve an issue in the event that the court concludes there is no binding precedent, will depend on the judge's evaluation of the soundness, thoughtfulness and consistency of the statements themselves in the context of the case that engendered their creation.[193] Such statements are properly devalued if they are not

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grounds. To any extent that wrongness is the primary meaning of dictum, the word only disguises the true basis of decision.")

192. As stated in *Moose v. Comm'r*, 172 N.C. 419, 433, 90 S.E. 441, 448-49 (1916);

> The doctrine of stare decisis contemplates only such points as are actually involved and determined in a case, and not what is said by the Court or judge outside of the record or on points not necessarily involved therein. Such expressions, being obiter dicta, do not become precedents. It is a maxim not to be disregarded, that general expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit where the very point is presented for decision.

193. "[A]lthough the dicta of our Supreme Court are entitled to due consideration, such dicta are not binding on this court." Napowsa v. Langston, 95 N.C. App. 14, 25, 381 S.E.2d 882, 888 (1989); "We, therefore, adhere and follow the rule laid down by way of dictum in Whitehurst v. Gotwalt . . . not under the doctrine of stare decisis, but by reason of its soundness." Ryan v. Trust Co., 235 N.C. 585, 590, 70 S.E.2d 853, 857 (1952); "[D]icta should not influence the decision in this case unless it logically assists in answering the question we are now called upon to decide." Muncie v. Insurance Co., 253 N.C. 74, 79, 116 S.E.2d 474, 478 (1960). *See also* Debnam v. N.C. Dept. of Correction, 334 N.C. 380, 386, 432 S.E.2d 324, 329 (1993) (Dictum in U.S. Supreme Court case addressed "a fact situation precisely like that" before the North Carolina

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directly related or necessary to the decision in the case, if they announce a new rule that is applicable to a range of cases beyond the facts of the specific case being decided, if there is error in their statement of the facts or the law, or if there is error in the logic or analysis offered to support the statement.[194]

Supreme Court. The Court stated: "Although we recognize that statements in the nature of obiter dictum are not binding authority, we nevertheless find the reasoning of [the U.S. Supreme Court case] on the issue before us compelling and follow that reasoning in this case.").

194. Several North Carolina cases appear to be consistent with this approach. In the following cases the North Carolina Supreme Court indicated that the trial court erred in following a dictum in an appellate opinion: *Muncie,* 253 N.C. at 78, 116 S.E.2d at 476. ("The learned trial judge presumably based his rulings and charge on MacClure v. Casualty Co. . . . It must be conceded that the language there used supports his honor's rulings. There can be, we think, no question that the Court in that case reached the correct result, but it is, we think, apparent from the facts as there stated that the Court used language not necessary to support its conclusion."); Trustees of Rowan Tech. v. Hammond Assoc., 313 N.C. 230, 242, 328 S.E.2d 274, 281 (1985) (Trial court followed language in Supreme Court opinion; Supreme Court held that such language was "unnecessary to the decision," was obiter dictum and was not well-founded); State v. Cronin, 299 N.C. 229, 238, 262 S.E.2d 277, 283 (1980) (In an older case, *State v. Phifer*, the Supreme Court in defining the offense of false pretense included the language "without compensation." Thereafter, in many cases the Supreme Court quoted Phifer and used the words "without compensation." The trial court denied defendant's objection that his indictment for false pretense did not include the phrase "without compensation." On appeal the Supreme Court acknowledged the confusing and contradictory language in several relevant opinions on this matter but held that the Phifer language as obiter dictum and did not add a new element to the crime.); Pickett v. Wilmington & W.R. Co., 117 N.C. 616, 23 S.E. 264 (1895) (Defendant's request for special instructions based on language in an earlier Supreme Court case was denied by the trial court; Supreme Court held that the language was dictum and trial court did not err in refusing the special instructions.); Hollingsworth v. Skelding, 142 N.C. 246, 247-48, 55 S.E. 212, 213 (1906) (The trial court gave jury instructions based "verbatim from the opinion of Faircloth, C. J., in *Daniel v. R. R.* . . . An examination of the case discloses that it is a mere dictum, a generalization, not necessary at all to the decision of the case. As a proposition of law it is not supported by authority, but on the contrary is against the teachings of the text-writers as well as the judgments of the Courts. It does not, therefore, meet with our approval."); State v. Jordan, 216 N.C. 356, 5 S.E.2d 156 (1939) (Based on the failure of the trial court to instruct the jury in conformance with the clear language in an earlier case the defendant appealed. The Supreme Court held that the clear language was dictum nonetheless and that the trial court had not erred. The Supreme Court concluded that the language was dictum by looking to the "records and briefs" in the case to determine that that particular issue was not properly before the court in the earlier case.); Cox v. Freight Lines, 236 N.C. 72, 80-81, 72 S.E.2d 25, 31 (1952) (The trial court denied a party's request for special instructions based on clear

C. *The holding/dictum distinction applied to State v. Fly*

Are buttocks private parts? If the holding of a case is the specific legal consequence attached to the detailed set of facts as set out in the record, then the binding precedent of *State v. Fly* is that exposing one's buttocks to a person of the opposite sex is indecent exposure as defined by statute.[195] In other words, the holding is that buttocks are private parts and that mooning can be indecent exposure. The ultimate source for the "detailed set of facts" must be the court record rather than the restatements or summaries of the facts contained in the appellate opinion.[196] The court has authority to rule only on the specific factual situation in the case before it and the court cannot expand this authority by altering or misrepresenting the facts in the court record. In *Fly*, there was no evidence in the record that Mr. Fly exposed his anus or that Mrs. Glover saw or could have seen Mr. Fly's exposed anus or genitals. The Supreme Court's explanation of its decision is dicta, however

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language in two cases. On appeal the Supreme Court acknowledged that the "the statements in the opinions . . . fully support the action of the trial judge in refusing the requests for special instructions and in charging the jury as he did." Nevertheless the Supreme Court found that the statements were not "sound law" and that therefore the trial court erred in refusing the special instructions. Thus it was the trial court's duty not to simply follow the clear language in a Supreme Court opinion, but to determine whether the relevant statement was the holding or mere dicta, and if the latter, to determine whether the dicta was sound law.). *Compare* Rhyne v. Lipscombe, 122 N.C. 650, 29 S.E. 57 (1898) (Supreme Court held that no appeal lay from statutorily created court directly to the Supreme Court despite acknowledging that many appeals from these courts had been taken directly to the Supreme Court and that the Supreme Court had both heard and resolved the matters appealed from. These earlier cases did not establish the correctness of such direct appeals because the issue had never been properly raised or appealed in any of the cases and was therefore never properly before the court).

195. *Fly*, 348 N.C. 556, 501 S.E.2d 656.

196. The appellate record must be the ultimate source for the facts upon which a decision is based. *See* Scott v. Battle, 85 N.C. 184, 189 (1881) (the Court rejected on point language from an earlier case because a key fact in the record of the case "seems not to have been observed by the court, at least there is no mention made of that circumstance in the opinion. So far as we can see, the point passed sub silentio . . . and regarding the decision to be inconsistent alike with precedent and principle, we do not feel at liberty to follow it."); State v. Jordan, 216 N.C. 356, 5 S.E.2d 156 (1939) (The Court looked to the "records and briefs" in the earlier case to determine that that particular issue was not properly before the court in the earlier case and that therefore the court's pronouncement thereon was dictum.).

because of its misrepresentation of the record facts the lower courts may chose to discount its value all together.[197]

The definition of a case's holding adopted by this Article (i.e., the holding is the specific legal consequence that attaches to the record facts of the case), renders all explanations or rationales, although still worthy of being considered and followed if appropriate, non-binding dicta. The analysis that follows addresses considerations in evaluating the worth of the dicta in *Fly*. Even if a broader definition of a case's holding is adopted,[198] so as to include explanations or rationales that are directly related or necessary to the decision, similar considerations will guide a determination of whether a rationale is necessary to the decision and therefore binding.

Is there any change in the elements of the crime of indecent exposure as established by statute and interpreted by case law: (a) is there any requirement that the defendant intend to offend? (b) is there any requirement that the person present not have consented to the exposure? (c) is there any requirement that the exposure be indecent? (d) is there any nexus required between the exposure and the presence of other persons? The Supreme Court has the power to change the common law, interpret statutes and to overrule precedent but it does not appear that the Supreme Court intended to accomplish any of these in *State v. Fly*. As previously noted, in *Fly* the Supreme Court cited, with apparent approval, the elements of the offense as provided by N.C. Gen. Stat. § 14-190.9. These elements contain no requirement of an intent to offend, lack of consent of witnesses or that the exposure be indecent. Additionally, *Fly* did not mention the case law which addresses these

197. At least one famous judge is praised for his use of misstated or omitted facts. In *Cardozo: A Study in Reputation*, Judge Richard A. Posner states that in the famous case of *Palsgraf v. Long Island R. Co.*, 162 N.E. 99 (N.Y. 1928), Judge Cardozo omitted, misstated and made up facts in the opinion but that the result was a more powerful, focused and effective holding. RICHARD A. POSNER, JUDGE, CARDOZO: A STUDY IN REPUTATION 42-43 (1990).

198. There are those who support a broader definition of a case's holding. In a concurring in part, dissenting in part opinion, Justice Kennedy (joined by Chief Justice Rehnquist and Justices White and Scalia) stated: "As a general rule, the principle of stare decisis directs us to adhere not only to the holdings of our prior cases, but also to their explications of the governing rule of law. Since the majority does not state its intent to overrule [the holding from an earlier decision], I find its refusal to apply the reasoning of that decision quite confusing." Allegheny County v. Greater Pittsburgh ACLU, 492 U.S. 573, 668 (1989).

issues, and therefore undertook no analysis of whether such case law contained precedential value regarding either the common law or statutory crimes of indecent exposure and thus the necessity of overruling a holding or disregarding relevant dicta.[199] Because Mr. Fly's conduct fell well within the elements of the crime of indecent exposure as set out in *Fly*, the Court's observations that Mr. Fly intended to offend, that his exposure was indecent, and that Mrs. Glover did not consent, were not directly related and were unnecessary to the decision in the case.

Regarding the nexus issue, *Fly* acknowledged the holding in *State v. King*[200] that the crime of indecent exposure does not require that someone actually saw the exposure, but it does require that persons were present "who could have seen if they had looked."[201] *Fly* then indicates that Mrs. Glover could have seen Mr. Fly's exposure if she had craned her neck or otherwise changed her position in an attempt to see more. Although this analysis is objectionable because it misrepresents the facts, it also appears to be a clear indication that *Fly* did not intend to overrule

199. Professor Dorf states that "[a] lower court will occasionally hold that a decision of a higher court has been effectively overruled sub silentio by subsequent decisions of that same higher court." Dorf, *supra* note 1, at 2025, n. 104. The converse should also be true, that is, that a lower court can determine that despite language in an opinion the higher court did not intend to overrule sub silentio an earlier decision. *Compare* State v. Cronin, 299 N.C. 229, 262 S.E.2d 277 (1980) (the Supreme Court determined that despite clear language in earlier opinions, such language was dictum and did not add a new element to the subject crime); Williams and Wife v. Lanier et al., 44 N.C. 30, 36-37 (1852) (The Court notes that an earlier decision "passes over the point sub silentio; and we are left to conjecture, whether it was because the Court did not think it an open question, or because it was overlooked." The Court concludes it was probably the latter and that the earlier statement is thus dictum.); Patterson v. McCormick, 177 N.C. 448, 481, 99 S.E. 401, 405 (1919) (quoting with approval Corpus Juris: "If it appears from the report of the case that it (the point) was not taken or inquired into at all, there is no ground for presuming that it was duly considered, and the authority of the case is proportionately weakened."); *Anonymous*, 2 N.C. 171, 172 (1795) ("Sometimes a practice may prevail for a length of time, upon the strength of a precedent passing sub silentio, which, when it comes to be examined, may be found very erroneous."). *But see* State v. Lynch, 334 N.C. 402, 410, 432 S.E.2d 349, 352-53 (1993)("Here, however, we are forced to acknowledge that in *Gibson* we overruled, sub silentio, our recent precedent established in *Garner*. Thus, we now face conflicting lines of authority in our recent decisions, one represented by *Garner* and the other by *Gibson*. Both lines cannot stand; we must declare to which line we will adhere.").

200. *Charlie King*, 268 N.C. 711, 151 S.E.2d 566.

201. *Fly*, 348 N.C. at 561, 501 S.E.2d at 659.

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the nexus requirement established by *King*. The Court apparently intended to apply the indecent exposure law as it had theretofore existed rather than reinterpreting the statute or altering the established elements of the crime. The Court's observation that "[t]he statute does not go to what the victim saw but to what defendant exposed in her presence without her consent" appears to be gratuitous and unnecessary to the decision.[202]

Is a person who willfully exposes his private parts nevertheless innocent of indecent exposure if the exposure was "incidental to a necessary activity?" This language in *Fly* assumes a fact that was not a part of the factual situation before the court in *Fly*. It thus proposed a rule to govern a situation that was not yet before the court. The language is therefore dictum and the lower courts are not bound by the statement but may consider the worth of the statement if necessary to resolve a case that comes before them.

Are the female breasts private parts within the statutory definition? No statement in *Fly* directly addressed this question and the matter is clearly not contained within the record facts of *Fly*. Yet *Fly* stated clearly that the General Assembly's use of the term "private parts" in N.C. Gen. Stat. § 14-190.9 was intended to be more expansive than the term was used in N.C. Gen. Stat. § 14-190 as interpreted by *State v. Jones*.[203] *Jones* held that female breasts were not private parts within the meaning of N.C. Gen. Stat. § 14-190 and *Fly* stated that by enacting N.C. Gen. Stat. § 190.9 the legislature was "quickly react[ing]" to the *Jones* decision. *Fly*'s clear implication is that by stating that "[e]very word, clause, sentence, paragraph, section, or other part of this act shall

202. In the first case to cite *Fly*, State v. Fusco, No. COA99-130, 1999 WL 1268231, at *2 (N.C. App. Dec. 30, 1999), there were two female witnesses and the defendant was charged with two counts of indecent exposure. One of the witnesses did not testify and the defendant argued such testimony was required. The Court of Appeals held that the witness did not need to testify because it was not necessary to establish what the witness actually saw. The State needed only "to show that defendant was exposing himself and that [the witness] was present during this exposure and could have seen had she looked." This conclusion is consistent with the nexus requirement in *Charlie King*. *Fusco* also may establish that the "presence" necessary under the indecent exposure statute does not require that the witness be nearby to the exposer or even in the public place occupied by the exposer. In *Fusco* the witnesses were in their house looking out the window at the defendant who was on a creek embankment adjacent to their backyard, the defendant's location was a public place because of its "viewability."

203. 7 N.C. App. 166, 171 S.E.2d 468.

be interpreted" as expansively as constitutionally possible, and by subsequently amending N.C. Gen. Stat. § 14-190.9 to exclude the exposure of a breast that occurs during breast feeding, the legislature intended to include the female breast as a private part as that term is used in N.C. Gen. Stat. § 14-190.9. Whether or not this analysis is necessary to the holding in *Fly* obviously depends on what the holding in *Fly* is. As noted above, the author contends that *Fly* held that buttocks are private parts, in which case this analysis is unnecessary to the holding. This analysis is only necessary if we accept *Fly*'s assertion that the Court of Appeals based its decision in *Fly* on its conclusion that *Jones* held that the anus was not a private part, and that the evidence against *Fly* showed that he exposed his anus. Neither assertion appears legitimate and *Fly*'s analysis of the legislative intent in adopting N.C. Gen. Stat. § 190.9 goes beyond the matters before the court and is thus dicta.

This statutory analysis as dicta must also be discounted because of the analysis itself. As previously discussed in Section II, the Court's conclusion that the legislature intended a new and expansive definition of private parts in N.C. Gen. Stat. § 190.9, is subsequently contradicted, if not ignored, by the Court's conclusion that buttocks are not private parts within the meaning of N.C. Gen. Stat. § 190.9 because so many people appear in public wearing thongs that the Court simply cannot believe the legislature meant to discourage thong wearing. Thus despite asserting that "private parts" must be interpreted as expansively as the constitution allows, the Court excluded buttocks from the definition because such inclusion would be "an *overly* expansive reading of the term 'private parts.'" If the issue ever is squarely presented to the Supreme Court, it is expected the Court will reconsider this analysis.

Does exposure of the buttocks not violate the indecent exposure statute so long as the person is wearing a thong bathing suit? This was not an issue before the Court and the conclusion is clearly dictum. However, it is also clear that the Court realized it was dictum but nevertheless chose to address and resolve the issue. This is an intended or judicial dictum which is sometimes accorded more stature than ordinary dicta.[204] Presumably this is

204. "Judicial dicta are conclusions that have been briefed, argued, and given full consideration even though admittedly unnecessary to decision. A judicial dictum may have great weight. A Wisconsin court has stated it thus: 'When a

because when the appellate court acknowledges that a conclusion is unnecessary to the case but nevertheless chooses to state the conclusion, then the court must have carefully considered the conclusion and must deem it important. Thus an intended or judicial dictum may generally represent a rule that the court is indicating it will follow if the case that raises the issue ever comes before it. Nevertheless, it is clearly dictum and is not binding on the lower courts or the Supreme Court itself. A court that chooses to follow intended dictum is following it because it is well-reasoned or compelling, not because it is a binding precedent. The problem in *Fly* is that the judicial dictum that the thong-wearer cannot be guilty of indecent exposure is arguably not well-reasoned or compelling. If the lower courts doubt the legal and logical basis for the Supreme Court's judicial dictum, the lower court need not follow the dictum. Even intended dictum, when not firmly grounded in the law, may not be a good predictor of the future decisions of the court which announced the dictum.[205]

Is the exposure of various parts of the body not a violation of the indecent exposure statute when it is matter of taste with no

court of last resort intentionally takes up, discusses, and decides a question germane to, though not necessarily decisive of, the controversy, such decision is not a *dictum* but is a judicial act of the court which it will thereafter recognize as a binding decision.' In other words a judicial dictum is a dictum that is followed. It is unnecessary to attempt further distinction between judicial and obiter dictum. Indeed it is impossible." Note, *Dictum Revisited*, 4 Stan. L. R. 509, 513-14 (1952) (quoting Chase v. American Cartage Co., 186 N.W. 598, 599 (Wis. 1922)). *See Barber v. Powell*, 222 N.C. 133, 137, 22 S.E.2d 214, 216 (1942) (Court rejected parties' contention that a dictum was an intended or judicial dictum or that if so it should be considered as authoritative: "[I]t could hardly be supposed that contrary to the usual course and practice of the Court, a general advisory pronouncement in excess of the boundaries of the case was intended by the deliverance therein."); *compare* State v. Paramore, 146 N.C. 604, 607, 60 S.E. 502, 503 (1908) (Court refers to the clear, on-point statement of Chief Justice Ruffin in an earlier case and states: "It is true that he was there speaking for himself, but a *dictum* emanating from him is of itself entitled to the greatest consideration and is at least very persuasive authority . . . .").

205. But of course it may be an excellent predictor. In *State v. Robinson*, 342 N.C. 74, 87-88, 463 S.E.2d 218, 226 (1995), the Court noted that in an earlier case it had "speculated by obiter dictum" that the *Enmund* issue (applicable in some felony-murder cases) need not be submitted at the capital sentencing hearing when the defendant had been convicted of premeditated murder. Faced with that specific issue in *Robinson*, the Court concluded "that our theoretical speculation in [the earlier case] is consistent with *Enmund* and its progeny" and was therefore adopted.)

intent to harass? This assertion in *Fly* is an example of a rule or rationale that is broader than what is necessary to resolve the case before the court. This overbreadth, i.e., justifying a decision on a general principle that will of necessity include many factual situations other than the one before the court, renders the broad rule dictum.[206]

SECTION IV: CONCLUSION

Appellate opinions typically contain analysis and rationales that explain the decision reached in the opinion. This practice should not be discouraged by the conclusion that the binding precedent or holding of an opinion consists only of the record facts and the decision of the court, and not the analysis or rationales. Such formal explanation serves several important purposes.[207]

206. One oft-cited example of this approach is Chief Justice Rehnquist's plurality opinion in *Webster v. Reprod. Health Services*, 492 U.S. 490, 520 (1989). In his opinion the Chief Justice finds no need to overrule *Roe v. Wade*, 410 U.S. 113 (1973), and the "constitutional framework for judging state regulation of abortion during the entire term of pregnancy" that *Roe* "sought to establish," because the actual holding of *Roe* was simply that "the Texas statute unconstitutionally infringed on the right to an abortion derived from the Due Process Clause." Conflict with the framework proposed by *Roe*—announcing principles broader than necessary to resolve the actual issue before the court in *Roe*—did not require overruling *Roe* as there was no conflict with the narrow holding of *Roe* as determined by the Chief Justice. Another example, according to Judge Aldisert, is the "Miranda Rule" promulgated by the Supreme Court in Miranda v. Arizona, 384 U.S. 436 (1966). Instead of restricting its decision to the narrow facts presented by Miranda the Court adopted a broad legal principle that applied to all those in custody. "Miranda was a drastic departure from the common-law tradition of incremental and gradual accretion of an original narrow rule. It was the exact opposite. We saw a broad structure erected in one case that has been subsequently subject to do-it-yourself remodeling." Aldisert, *supra* note 186, at 610-12 (1990). *See also* State v. Blankenship, 337 N.C. 543, 562, 447 S.E.2d 727, 738 (1994), where Chief Justice Exum noted, but rejected as dicta, the clear language in an earlier case, *State v. Erlewine*, 328 N.C. 626, 403 S.E.2d 280 (1991), defining acting in concert. Despite the fact that the definition could logically have been the basis for the decision in *Erlewine*, *Blankenship* stated that the definition was "overly broad" and was not necessary for a resolution of the specific facts before the *Erlewine* court. Furthermore, in support of its claim that *Erlewine*'s broad reading of the doctrine of concerted action was dicta, Chief Justice Exum stated that adopting such a reading "would have been a departure from settled law and would have merited some discussion." Interestingly, *Blankenship* itself (and possibly its rationale that the *Erlewine* language was dicta) was overruled in State v. Barnes, 345 N.C. 184, 481 S.E.2d 44 (1997).

207. For a comprehensive review of the importance of judicial opinions, see Martha J. Dragich, *Will The Federal Courts of Appeal Perish If They Publish? Or*

Sound analysis and considered rationales contribute mightily to the appearance that justice is not arbitrary or subject to the whims of individual judges but is guided by consistently applied principles. Opinions that consisted simply of the record facts and the decision of the court would undermine this appearance that the courts are applying the law in a fair, consistent and impartial manner.[208]

The analysis and rationales found in appellate decisions can also be very helpful for citizens, attorneys and judges who are considering whether a precedent extends or should be extended to a new factual situation. As discussed earlier, the materiality of a given fact to a court's decision will often be evaluated in light of the explanation or rationale provided by the court in making the decision. Rationales help translate the holding into an analogy or rule that can be applied to the new case. Finally, even if the explanations or rationales are non-binding dicta, a subsequent court can find them sound, convincing, and worth following. Indeed, if the dictum is found to be sound, convincing, and worth following (and if no binding precedent is located that would require a different result), the subsequent court can follow it without any formal determination that it is a dictum and not a holding. Such explanation and rationale have a major impact on the development of the law even if it is not considered binding.

To accomplish these goals, however, the explanation and rationales contained in the appellate cases must be sound and convincing, it must follow the rules, it must be well-considered and it must make sense. Rationales in an opinion that do not fol-

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Does The Declining Use of Opinions To Explain And Justify Judicial Decisions Pose A Greater Threat? 44 Am. U. L. R. 757, 776 (1995) (quoting In re Rules of the U.S. Court of Appeals for the Tenth Circuit, 955 F.2d 36, 38 (10th Cir. 1992) Professor Dragich notes: "Judge Hollway of the Tenth Circuit cautions that 'the basic purpose for stating reasons within an opinion or order must never be forgotten—that the decision must be able to withstand the scrutiny of analysis . . . as to its soundness . . . and as to its consistency with our precedents.' The rule of law requires that all grounds for a decision be displayed in the judicial opinion, so that the justificatory argument can be subject to public disagreement, dissent, and correction.").

208. "Central to [the legal and judicial] culture is the notion that any judicial decision must be justified by the giving of reasons. A justice who refuses to explain her decisions might not thereby commit an impeachable offense, but she would lose the respect of the legal community, which, in the long run, would undermine her ability to translate her views into law. For the judiciary, giving reasons justifies the exercise of governmental authority, much as elections justify its exercise by the political branches." Dorf, *supra* note 1, at 2029.

low the rules will undermine the appearance of justice and will not help subsequent courts to interpret and apply precedent.[209] It should be clear that the court that wrote the appellate opinion containing the explanations and rationales is not, and should not be, the sole judge of whether those rationales followed the rules, were well-considered and made sense.[210] That court's holding is properly binding on the lower courts but the explanations and rationales employed in reaching that decision are subject to review and critique by the lower courts.[211] In this the lower courts

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209. "A deliberate or solemn decision of a court or judge, made after argument on a question of law fairly arising in a case, and necessary to its determination, is an authority, or binding precedent, in the same court or in other courts of equal or lower rank, in subsequent cases, where 'the very point' is again in controversy; but the degree of authority belonging to such a precedent depends, on necessity, on its agreement with the spirit of the times or the judgment of subsequent tribunals upon its correctness as a statement of the existing or actual law, and the compulsion or exigency of the doctrine is, in the last analysis, moral and intellectual, rather than arbitrary or inflexible." Spitzer v. Comm'rs., 188 N.C. 30, 32, 123 S.E. 636, 638 (1924).

210. The results and rationale of appellate opinions are also subject to review and criticism by the press, politicians and the general public. *See generally* Paul D. Carrington, *Judicial Independence and Democratic Accountability in Highest State Courts*, 61 Law & Contemp. Probs., Summer 1998, at 79, 86-87. (In analyzing why three California Supreme Court Justices were voted out of office in a 1986 retention election, Professor Carrington stated that the California Supreme Court:

> had forsaken even the pretense of an institution engaged in the interpretation of authoritative legal texts or traditions enacted by the people or their representatives whose votes they would need to retain their offices. Given their accountability to the electorate under the California constitution, the Justices were guilty of poor political judgment. The consequence of that poor judgment was to make their court a political toy and seriously diminish its legitimacy as a sober and disinterested interpreter of the state's legal texts. While a valiant effort was made to support the retention of the court, it was not possible to defend its decisions as exercises of technical, professional judgment.

Id., at 86-87.

211. *Compare* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1177 (1989):

> Let us not quibble about the theoretical scope of a 'holding'; the modern reality, at least, is that when the Supreme Court of the federal system, or of one of the state systems, decides a case, not merely the *outcome* of that decision, but the mode of analysis that it applies will thereafter be followed by the lower courts within that system, and even by that supreme court itself. And by making the *mode of analysis* relatively principled or relatively fact-specific, the courts can either establish general rules or leave ample discretion for the future. . . . Of course, in a

should apply the same analysis as the appellate court in distinguishing holding from dictum, determining material facts and evaluating the soundness of dictum.[212] The only difference in the

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system in which prior decisions are authoritative, no opinion can leave *total* discretion to later judges. It is all a matter of degree. At least the very facts of the particular case are covered for the future. But sticking close to those facts, not relying upon overarching generalizations, and thereby leaving considerable room for future judges is thought to be the genius of the common law system. The law grows and develops, the theory goes, not through the pronouncement of general principles, but case-by-case, deliberately, incrementally, one-step-at-a-time. Today we decide that these nine facts sustain recovery. Whether only eight of them will do so—or whether the addition of a tenth will change the outcome—are questions for another day.

212. An inferior court should follow a superior court's holding even if the inferior court disagrees with the holding. State v. Sanderson, 60 N.C. App. 604, 300 S.E.2d 9 (1983) (Court follows the holding in an earlier case based on stare decisis although the court explains in detail why that holding was a mistake. Yet allowing inferior courts to narrowly interpret a superior court's holding (as record facts and decision instead of reasons and rationale), to distinguish a case on its facts, to determine whether a case intended to overrule sub silentio prior case law, etc., can provide cover for an inferior court that refuses to follow what should be a binding precedent). *See generally* Ken Kress, *Legal Indeterminacy*, 77 Cal. L. Rev. 283, 285-298 (1989) (discusses critical legal studies and the argument that the technique of distinguishing cases can serve as a means to avoid or to minimize the scope of judicial pronouncements); *see also* Ken Greenawalt, *Reflections on Holding and Dictum*, 39 Journal of Legal Education 431,432 (1989) ("The terminology of 'holding' and 'dictum' is not merely, or even mainly, a set of terms that misportrays reality and conceals the true bases on which later courts reach decisions."). Clearly the rule of law requires that trial courts act in good faith to apply the holding/dictum distinction and that this application be subject to appellate review. Inferior court judges who either expressly refuse to follow binding precedent or misuse the holding/dictum distinction to avoid a precedent they dislike may subject themselves to disciplinary proceedings. As reported in *Good Judging and Good Judgment*, Justice Anthony Kline, a judge on California's intermediate appellate court, after noting his disagreement in several dissenting and concurring opinions with a California Supreme Court holding, dissented in another case presenting the same issue and stated that he could "not as a matter of conscience apply the rule" adopted by the Supreme Court. Stephen C. Yeazell, *Good Judging and Good Judgement*, Court Review: The Journal of the American Judges Association, Fall 1998. Professor Yeazell states that if Justice Kline felt strongly on the issue "a law review article or speech would provide other outlets for his disagreement with his high court" or that he could recuse himself from the case in which the issue is raised. Yeazell continues: "What Justice Kline is not entitled to do is to continue to vote in cases while announcing that he will refuse to follow a recent, authoritative ruling of his state's highest court. A dissent written under these circumstances is not merely a signal of intellectual disagreement with the high

process is that the lower courts cannot overrule a precedent of a higher court.[213] The lower court's determinations of what constitutes binding precedent, material facts and sound dicta will all be subject to review by the appellate courts where any error can be corrected.[214]

The lower courts thus have a duty to analyze and critique the explanations and rationales found in appellate opinions. Judge

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court. It is a refusal to adhere to the constraints of judging. A judge possesses legitimate power only by virtue of submitting to the discipline of law. Without the willingness to recognize such boundaries, a judge should not wield the power of the office." The California Commission on Judicial Performance, the state body charged with enforcing judicial discipline, has charged Justice Kline with "conduct prejudicial to the administration of justice" and "willful misconduct," and removal from office is a possibility. *Id. See also Judge Faces Discipline: Commission Charge over Justice's Opinion Unleashes Firestorm of Protest*, California State Bar Journal, August 1998. Justice Kline expressly acknowledged his refusal to follow the binding precedent of his superior court. *See also* Steven Lubet, *Judicial Discipline and Judicial Independence*, 61 Law & Contemp. Probs. 59, 65-67 (1998). It is expected that good faith application of the holding/dictum distinction by a trial court, even if later determined to be in error, would not subject the judge to disciplinary action. *See* In Re Tucker, 348 N.C. 677, 682-83, 501 S.E.2d 67, 71 (1998) (district court judge granted prayer for judgment continued in DWI case despite case law that established lack of authority to do so; when the case law was brought to the attention of the judge, he conceded he did not have authority to continue prayer for judgment in a DWI case, he recognized that he had been mistaken about his authority and that he would no longer continue prayer for judgment in order to dismiss a DWI case. The Supreme Court noted that although a judge is expected to be faithful to the law and maintain professional competence in it, "judges may not be disciplined for errors of judgment or errors of law." The judge's "conduct was the result of a mistaken, but honest, interpretation of the law and respondent's authority under the statute. It did not involve 'more than an error of judgment or a mere lack of diligence,' . . . and, as such, does not merit censure.").

213. One commentator explains that when the second court disavows the reasoning of the first court but adopts its own rationale that would still produce the same result in the first case, the second court is not overruling the first court. "I would limit the term 'overruling' to situations in which the new principles show that the earlier result was mistaken or leave the status of the earlier result unclear." Ken Greenawalt, *Reflections on Holding and Dictum*, 39 J. Legal Educ. 431, 432 (1989).

214. The *final* word on what the actual holding in *State v. Fly* is, will of course, be the Supreme Court's. The Supreme Court is the court of last resort, although not because it is always right. Rather it is always right because it is the court of last resort. This observation is borrowed from a similar comment regarding the United States Supreme Court made by Justice Scalia. Antonin Scalia, in a speech at Memorial Hall, University of North Carolina at Chapel Hill, (Mar. 16, 1999).

made law is designed to change slowly and incrementally, even laboriously. Like cases are decided alike but the rules are only extended when cases with new facts arise and then only to include those new facts and no others. Pronouncement of forward looking, general rules is not allowed or if it nonetheless occurs it is subject to being derided as dicta. To accomplish this gradual development of the law the trial judges must not rest once on-point language has been located in an appellate opinion. The judge must critically review the statement or rationale in the context of the specific case resolved by the appellate opinion and the judge should consider the holding/dictum distinction. The judge may, of course, follow a statement in an appellate opinion because it is binding precedent or because it is well-reasoned dictum—but the judge should consider the basis for his or her decision to follow the statement. Legislatures are empowered to enact general, forward looking rules but courts are not. To curb the appellate courts' urge to legislate general rules, stare decisis must be applied by both the highest court and the lower courts. Such application serves to keep the appellate courts focused on the rule of law to the great benefit of our judicial system.

Writing appellate opinions is a complicated and demanding occupation. Appellate judges have always been and will always be criticized both for not sufficiently explaining the basis for their decision and for expounding too much on the area of the law in question. It is a balance to be made in each opinion and second-guessing the balance selected by the appellate judges is easy to do but accomplishes little. What is important, however, is the realization that our legal system relies on our lower courts, particularly the trial courts, to narrow, limit and qualify the occasional excesses of the appellate courts. The intricate rationale crafted by the Supreme Court to justify its decision in *State v. Fly* appears to be unsound, a case of Homer nodding.[215] The Court appeared to want it both ways. Although the justices felt that Fly strongly deserved his conviction, they did not want to hold that buttocks were private parts. Having chosen this contradictory result the Court may then have been obliged to take some liberties with the

215. In *Darden v. Timberlake*, 139 N.C. 181, 165, 51 S.E. 895, 896 (1905), the Supreme Court noted problem language in an earlier opinion by Justice Merrimon: "It was an evident inadvertence upon the part of that able and usually accurate Judge. It is a case of 'Homer nodding,' which sometimes happens to the best of judges."

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precise issues it would admit to resolving and with its factual and legal analyses.

The excesses of a case like *Fly,* with its apparent abandonment of the rule of law and all the attendant consequences, are properly reigned in by the application of the rule of law by the lower courts. The language in *Fly* must be parsed, and where the Court departed from the rule of law, the lower courts can get the law back on track by narrowly construing the case's holding and considering the explanations and rationales as non-binding dicta that is to be discounted to the extent such language in the Court's opinion indicates a departure from the rule of law.

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