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## The Emperor's New Clothes: But the Emperor Has Nothing On: G.S. 110-90.2's Invisible Protection of Children and Vexatious Impact on Citizens

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# THE EMPEROR'S NEW CLOTHES: "BUT THE EMPEROR HAS NOTHING ON!"† G.S. 110-90.2'S INVISIBLE PROTECTION OF CHILDREN AND VEXATIOUS IMPACT ON CITIZENS

GRADY JESSUP‡

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† Hans Christian Andersen, *The Emperor's New Clothes* (1837). The Emperor was approached by weavers, purveyors of fine clothing of the most beautiful colors and elaborate patterns. The Emperor thought to himself, "had I such a suit, I might at once find out what men in my realms are fit for their office, and also be able to distinguish the wise from the foolish." Similarly, the North Carolina General Assembly, by enacting section 110-90.2, adjudges the character of an individual, except character is not so easily ascertained.

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## INTRODUCTION

North Carolina General Statutes section 110-90.2 requires a criminal record check for all child care providers. The legislature, recognizing the importance of the early years of life to a child's development, has declared that the State should protect children in child care facilities. The legislature seeks to protect children by ensuring that child care facilities provide a safe and healthy environment where children are cared for by persons of good moral character.<sup>1</sup> This paper will be limited in scope to two primary concerns: (1) whether the mandatory criminal record check best promotes the State's interest in having persons of good moral character care for children; and (2) whether the statute adequately safeguards the substantive and procedural rights of child care providers affected by the statute.

In Part I, the paper addresses the broad purposes and implications of the statute, including the mandated procedures concerning owners and operators of daycare centers and childcare providers. The legislative history giving rise to the statute is reviewed, and the responsibilities delegated to the Department of Health and Human Services, Child Development Division (hereinafter "the Department") are evaluated. The statutory provisions requiring the Department to ensure that the criminal history of all child care providers is checked are reviewed. Additionally, a review of the criminal record check procedures concerning a child care provider's fitness to have responsibility for the safety and well-being of children based upon the local, state

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1. N.C. GEN. STAT. § 110-85 (1999). Legislative intent and purpose. Recognizing the importance of the early years of life to a child's development, the General Assembly hereby declares its intent with respect to the early care and education of children:

(1) The State should protect children in child care facilities by ensuring that these facilities provide a physically safe and healthy environment where the developmental needs of these children are met and where these children are cared for by qualified persons of good moral character.

(3) Achieving this level of protection and early education requires the following elements: mandatory licensing of child care facilities; pro-motion of higher quality child care through the development of enhanced standards which operators may comply with on a voluntary basis; and a program of education to help operators improve their programs and to deepen public understanding of child care needs and issues.

and national check will be conducted. The related importance of clearly defined procedures regarding the registration of persons substantiated as having abused or neglected a child will also be explored.

Part II sets forth recommendations for strengthening the enforcement provisions of the statute, and for determining qualifications based on the criminal history check prior to an individual being employed as a child care provider or being granted a license as an owner or operator.

Part III includes recommendations for a cross-check of the Abuse and Neglect Registry in this state, as well as mandatory searches of established registries in other jurisdictions.

Part IV addresses the statute's implications concerning the rights, privileges and responsibilities of child care providers, including owners, operators, and employees of daycare centers. The enumerated statutory offenses are examined for the purpose of ascertaining whether all the enumerated offenses are relevant to good moral character.

Part IV(a) analyzes the application of the Ex Post Facto Clause to owners/operators, employees and nonregistered home care providers, and Part IV(b) discusses potential Bill of Attainder violations that may result from strict enforcement of the statute. This discussion includes a historical analysis of the Bill of Attainder Clause and relevant United States Supreme Court decisions such as *United States v. Lovett*<sup>2</sup> and *Nixon v. Adm'r of Gen. Serv's*<sup>3</sup>.

Part V will include an analysis of the Due Process and Equal Protection Clause. In particular, this part will evaluate whether the statute and rules promulgated pursuant to the statute violate substantive due process, and whether the statute violates procedural due process and the Equal Protection Clause under the United States and North Carolina Constitutions.

Finally, Part VI contains conclusions.

## I. PURPOSES

The State has a legitimate interest in the safety and welfare of children. This interest is manifested by the enactment of legislation intended to ensure that qualified persons of good moral character provide child care in facilities licensed pursuant to policies, procedures and standards established by the State.<sup>4</sup> Legislation enacted in

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2. *United States v. Lovett*, 328 U.S. 303 (1946).

3. *Nixon v. Adm'r of Gen. Serv's*, 433 U.S. 425 (1977).

4. To carry out the legislative intent, the Legislative Study Commission on Child Care was established. The Commission studies the substantive issues regarding the protection of children, ensuring a safe environment, and provision of care by qualified persons of good moral character.

1997 expresses the legislature's intent to achieve a clearly defined standard of care for all children under its jurisdiction by establishing mandatory licensing of child care facilities.<sup>5</sup> Additionally, the legislature seeks to promote higher quality child care through the development of enhanced standards, which owners and operators of child care facilities may comply with on a voluntary basis.<sup>6</sup> Finally, the legislature reflects the lawmakers' interest in child care program enhancement by providing assistance for owners and operators to improve their programs, and by providing mechanisms to better inform the public of child care needs and issues.<sup>7</sup> The legislature included a provision for the appointment of a twenty-member commission to study the substantive issues related to the physical safety, healthy environment and developmental needs of children.<sup>8</sup>

The statute applies only to those children participating in "child care" as that term is narrowly defined in the statute. A child is participating in child care if the child is in

[a] program or arrangement where three or more children less than 13 years old, who do not reside where the care is provided, receive care on a regular basis of at least once per week for more than four hours but less than twenty-four hours per day from persons other than their guardians or full-time custodians, or from persons not related to them by birth, marriage, or adoption.<sup>9</sup>

There are ten categories of children receiving care that do not come within the purview of the statute.<sup>10</sup>

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The commission consists of 20 members. Ten members are to be appointed by the Speaker of the House of Representatives, seven of whom shall be members of the House of Representatives at the time of their appointment, and three of whom shall be members of the general public interested in child care. Ten members will also be appointed by the President Pro Tempore of the Senate, seven of whom are to be members of the Senate at the time of their appointment, and three of whom shall be members of the general public. The Commission has the powers and duties to develop policies, procedures and establish standards pursuant to N.C. Gen. Stat. § 110-88.

5. N.C. GEN. STAT. § 110-85(1) (1999).

6. N.C. GEN. STAT. § 110-85(3) (1999).

7. *Id.*

8. *Id.* See also Editor's note referring to session laws 1997-506, s.28.2.

9. N.C. GEN. STAT. § 110-86(2) (1999).

10. *Id.* According to section 110-86(2), child care does not include:

- a. Arrangements operated in the home of any child receiving care if all of the children in care are related to each other and no more than two additional children are in care;
- b. Recreational programs operated for less than four consecutive months in a year;
- c. Specialized activities or instruction such as athletics, dance, art, music lessons, horse-back riding, gymnastics, or organized clubs for children, such as Boy Scouts, Girl Scouts, 4-H groups, or boys and girls clubs;
- d. Drop-in or short-term care provided while parents participate in activities that are not employment related and where the parents are on the premises or otherwise easily accessible, such as drop-in or short-term care provided in health spas, bowling alleys, shopping malls, resort hotels, or churches;
- e. Public schools;

The location where the child care is provided is considered a child care facility under the statute, and may include a child care center or a family care home.<sup>11</sup> The day-to-day authority for the operation of a child care facility is reposed in the lead teacher, whose duty it is to plan and implement the daily program of activities for a group of children in a child care facility.<sup>12</sup> A child care administrator is responsible for the operation of a child care facility and is on-site on a regular basis, while the operator includes the owner, director, or other person having primary responsibility for the operation of a child care facility subject to licensing.<sup>13</sup>

The legislative commission (hereinafter "the Commission") is empowered to develop policies and procedures for issuance of a license to any child care facility that complies with applicable standards required by the statute. The Commission has broad powers that encompass rule making, the authority to require submission of compliance reports, safety inspections before and after licensing, issuance of provisional licenses, and the imposition of sanctions when abuse and neglect are substantiated.<sup>14</sup> The Secretary of the Department of Health and Human Services is the chief administrative officer, whose powers

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- f. Nonpublic schools described in Part 2 of Article 39 of Chapter 115C of the General Statutes that are accredited by the Southern Association of Colleges and Schools and that operate a child care facility as defined in subdivision (3) of this section for less than six and one-half hours per day either on or off the school site;
  - g. Bible schools conducted during vacation periods;
  - h. Care provided by facilities licensed under Article 2 of Chapter 122C of the General Statutes;
  - i. Cooperative arrangements among parents to provide care for their own children as a convenience rather than for employment; and
  - j. Any child care program or arrangement consisting of two or more separate components, each of which operates for four hours or less per day with different children attending each component.

11. N.C. GEN. STAT. § 110-86(3) (1999). The term "child care facility" includes child care centers, family child care homes, and any other child care arrangement not excluded by section 110.86(2), that provides child care, regardless of the time of day, wherever operated, and whether or not operated for profit. In addition, "[a] child care center is an arrangement where, at any one time, there are three or more preschool-age children or nine or more school age children receiving care" and a family child care home is "[a] child care arrangement located in a residence where, at any one time, more than two children, but less than nine children, receive child care."

12. N.C. GEN. STAT. § 110-86(5a) (1999). "Lead teacher" is an individual who is responsible for planning and implementing the daily program of activities for a group of children in a child care facility.

13. N.C. GEN. STAT. § 110-86(2a), (7) (1999). The child care administrator and the operator arguably can be the same individual. However, the child care administrator is required by statute to be on site on a regular basis. Statutorily, "on site on a regular basis" is not defined. Therefore, the administrator would appear to have considerable flexibility concerning when and how often he is required by statute to be on site. By implication, it would appear that the statute imposed the duty of meeting the license requirements upon the operator, while the administrative day-to-day operation of the child care facility is left to the control of the child care administrator.

14. N.C. GEN. STAT. § 110-88 (1999).

and duties are delegated under the policies and rules of the Commission.<sup>15</sup> It is the Secretary's duty to ensure that the Commission's policies and rules are given effect.<sup>16</sup> Administrative personnel may be employed to implement the legislative edict.<sup>17</sup> The Secretary is also charged with promoting and coordinating educational programs and materials for operators of child care facilities, and using the resources of other state and local agencies and educational institutions where appropriate.<sup>18</sup> However, the appropriation of revenue to fulfill such purposes is conspicuously absent. Moreover, the statute is silent concerning the concomitant grant of authority to the Secretary over other state departments and units of local governments from which she may receive services.

Consequently, it would appear that without a clear legislative mandate, state departments, units of local government, state and local agencies, and educational institutions may cooperate with the Secretary where convenient, but are not bound to do so. Because the resources are not directly controlled by the Department, this is a highly inefficient way of ensuring that the policies and rules of the Commission are carried out. This concern is even more pronounced where the Department has the responsibility of enforcing the Commission's rules as applied to nonregistered home care providers.

"Nonregistered day care home" means an arrangement whereby day care is provided in a home that is not subject to registration or licensure pursuant to section 110-86(2) or section 110-106.<sup>19</sup> The Commission's rules only apply to nonregistered day care homes that voluntarily choose to participate in the state subsidized day care program.<sup>20</sup> Where nonregistered day care homes choose to participate, the Department is responsible for ensuring that the nonregistered day care providers comply with the criminal record check requirements applicable to such providers.<sup>21</sup>

The criminal record check procedure is the same for all providers of child care, including providers employed by child care facilities, child

15. N.C. GEN. STAT. § 110-90 (1999).

16. N.C. GEN. STAT. § 110-92 (1999). (Providing that when requested by an operator of a child care center or by the Secretary, "it shall be the duty of local and district health departments, building inspector, fire prevention inspector, or fireman employed by local government, or any fireman having jurisdiction, or other officials or personnel of local government to visit and inspect a child care center . . .").

17. N.C. GEN. STAT. § 110-90(3) (1999).

18. N.C. GEN. STAT. § 110-90(7) (1999).

19. N.C. ADMIN. CODE tit. 10 r. 46G.0109 (June 2000). For those arrangements where day care is provided that is not subject to registration or licensure pursuant to section 110-86(2) see *supra* note 10. Pursuant to section 110-106, certain religion-sponsored child care facilities also are not subject to the registration or licensure provisions.

20. *Id.*

21. N.C. ADMIN. CODE tit. 10, r. 3U.2701(d), (h) (June 2000).

care homes, and foster homes. The criminal record checks are conducted in conformance with rules established by the Commission. The Division of Child Development [hereinafter "the Division"] is responsible for ensuring that each prospective child care provider's criminal history is checked.<sup>22</sup> The rules require that the child care provider, at the time of her application, submit to a criminal record check.<sup>23</sup> An employee of a child care facility may begin working while she awaits the processing of her criminal record check. The documentation pertinent to the criminal record check is required to be submitted to her employer within five (5) working days after beginning work.<sup>24</sup> Every employer must give notice to each new employee that the employee must acknowledge under penalty of perjury if she has been convicted of a crime other than a minor traffic violation.<sup>25</sup> Every employee is required to acknowledge on a signed statement forwarded to the Division that if she has been convicted of a crime specified in section 110-90.2, her employment is conditional pending approval by the Division.<sup>26</sup> The employer has three (3) working days after receipt of the pertinent documents to mail the local criminal history check, authority for release of information, and fingerprint card(s) to the Division.<sup>27</sup>

The information gathered through the criminal record check procedure is considered by the Division in making a determination concerning the child care provider's fitness to have responsibility for the safety and well-being of children. If the child care provider has been convicted of a crime, she **may** submit mitigating information to the Division. Mitigating information concerning the conviction **could** be used by the Division in making the determination of the prospective child care provider's qualification. The Division **may** consider, in making its decision, the following: the length of time since the conviction; the nature of the crime; the circumstances surrounding the commission of the offense; evidence of rehabilitation; the number of prior offenses; and the age of the individual at the time of occurrence.<sup>28</sup> The Division's decision to qualify an individual with a conviction, based

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22. N.C. ADMIN. CODE tit. 10, r. 3U.0102(11) (Sept. 2001 Supp.). ("Division" means the Division of Child Development within the Department of Health and Human Services.)

23. N.C. ADMIN. CODE tit. 10, r. 3U.2701 (June 2000). This rule provides that a prospective child care provider must submit "a certified criminal history check from the clerk of Superior Court's office in the county or counties where the individual has resided during the previous 12 months," as well as "a signed Authority for Release of Information" form and a "completed fingerprint card." N.C. Admin. Code tit. 10, r. 3U.2701(a)(1)-(3) (June 2000) (Sept. 2001 Supp.).

24. N.C. ADMIN. CODE tit. 10, r. 3U.2702(a) (June 2000).

25. N.C. ADMIN. CODE tit. 10, r. 3U.2701(b) (June 2000) (Sept. 2001 Supp.).

26. *Id.*

27. N.C. ADMIN. CODE tit. 10, r. 3U.2702(c) (June 2000).

28. N.C. ADMIN. CODE tit. 10, r. 3U.2701(c) (June 2000) (Sept. 2001 Supp.).



upon mitigating information, could place the children at risk. A formal procedure needs to be established by the Division to assess the veracity and merit of any mitigating information submitted to ensure the safety and well-being of the children.<sup>29</sup> A prospective child care provider who refuses to complete the criminal record check procedure provides reasonable cause to deny issuance of a permit.<sup>30</sup> The term "permit" is not defined. However, "license" is defined as a permit issued by the Secretary to any child care facility which meets the statutory standards established under this Article.<sup>31</sup> Under circumstances where the applicant is not a "child care facility," refusing to complete the criminal record check provides reasonable cause to determine that the prospective child care provider is unfit to have responsibility for the care of children.<sup>32</sup>

A qualified child care provider will be notified in writing that she is deemed fit to have responsibility for the safety and well-being of children based on her criminal history. Ostensibly, the Division has the discretion to qualify an individual as a child care provider, notwithstanding a criminal conviction, except as provided in section 110-91(8).<sup>33</sup> Similarly, a disqualified employee will also be notified, and a criminal history that disqualifies an employee is reasonable cause for the child care facility to deny continued employment.<sup>34</sup>

In addition to its role in the initial approval or disapproval of child care providers for employment, the Department has ongoing oversight over the operation of the child care facilities. Following the issuance of a license or temporary license to operate, the Department has the authority to conduct inspections of child care facilities. Inspections consist of the initial inspection visit (which cannot occur until the child care facility administrator receives prior notice of the initial inspection visit), and planned visits to all facilities, including announced and unannounced visits (which are normally confidential). A visit without notice can take place where there is probable cause to believe an

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29. A formal procedure would comport with the paramount interest of protecting the children, and the significant interest in ensuring that any prospective child care provider is treated fairly and not disqualified arbitrarily.

30. N.C. ADMIN. CODE tit. 10, r. 3U.2701(d) (June 2000) (Sept. 2001 Supp.).

31. N.C. GEN. STAT. § 110.86 (6) (1999).

32. N.C. GEN. STAT. § 110-90.2(c) (1999).

33. N.C. GEN. STAT. § 110-91(8) (1999). Providing that no person shall be an operator of nor be employed in a child care facility who has been convicted of a crime involving child neglect, child abuse, or moral turpitude, or who is an habitually excessive user of alcohol or who illegally uses narcotic or other impairing drugs, or who is mentally or emotionally impaired to an extent that may be injurious to children. *Id.* Therefore, a person convicted of one of the aforementioned crimes is barred from serving as a child care provider by statute, with the Division having the discretion to qualify or disqualify an individual based upon any other conviction, including those listed in section 110-90.2.

34. N.C. ADMIN. CODE tit. 10, r. 3U.2701(e), (f) (June 2000).

emergency situation exists, or there is a complaint alleging violation of licensure law, including but not limited to a report of child abuse or neglect.<sup>35</sup> The protection of children in the most vulnerable circumstances is most deserving of protection from abusive and neglectful care providers or others who may take advantage of their condition. Inspections of facilities when there is an allegation of abuse or neglect is but one way of protecting children during the early years of life.<sup>36</sup>

Abuse and neglect allegations are investigated by the Department, and if the Department substantiates that child abuse or neglect has occurred in a child care facility, the Department may issue a written warning specifying the corrective action to be taken. A failure to comply with the Department's directive may result in a provisional license being issued for no more than six months. The Department may take appropriate action to correct the situation, including the permanent removal of the substantiated abuser or neglecter from the premises, or the administration of other available statutory remedies.<sup>37</sup>

A child is abused when the child is less than eighteen years of age and suffers serious physical injury by other than accidental means, or when grossly inappropriate devices are used to modify behavior. Any person who commits, permits, or encourages the commission of a violation of the enumerated statutes is guilty of abuse or neglect. Additionally, a person who creates a condition causing serious emotional damage, including severe anxiety, depression, withdrawal, or aggressive behavior, is also guilty of abuse or neglect.<sup>38</sup> Any person who is substantiated as an abuser or neglecter of children is entered into the Central Registry on Child Abuse and Neglect as mandated by federal and state law.

Selected statistical data is regularly maintained in the Central Registry, including the number of children abused or neglected. Additionally, the type of abuse or neglect, the age of the victim, the race and gender of the person accused of abuse or neglect, and the relationship of the perpetrator to the child are also maintained. In 1999-2000, the most recent year for which Central Registry Statistical Data is available, the Department reported that 37,611 children were substantiated as having been abused or neglected. A similar number of children were reported to have suffered abuse or neglect in 1998-

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35. N.C. GEN. STAT. § 110-105(a)(1)-(3) (1999).

36. See *supra* note 1 for statutory language indicating the legislative intent and purpose. In fact, the underlying purpose of section 110-85, et. seq., is to protect children receiving day care, and to ensure that children receive care in a safe environment by persons of good moral character.

37. N.C. GEN. STAT. § 110-105.2 (1999).

38. N.C. GEN. STAT. § 7B-101 (1999).

1999. During this period, 36,674 children were abused or neglected. Similarly, during 1997-1998, 34,201 children were substantiated as having been abused or neglected, and in 1996-1997, 32,678 children were substantiated as abused or neglected, and for 1995-1996, the number of children substantiated as abused or neglected was 30,340.<sup>39</sup> During each of the past five years, over 96,000 incidents of abuse or neglect were reported.<sup>40</sup>

The number of children reported and substantiated as having been abused or neglected in this state in the past five years is indeed startling. While the overwhelming majority, or 80-85% of children substantiated as abused or neglected, suffered the abuse or neglect at the hand of a biological parent,<sup>41</sup> the number of children suffering abuse or neglect outside of the parent/child relationship is nonetheless significant. For example, the total number of children abused or neglected in the combined categories of "other than parent or relative Caretaker," "institution," and "day care facility" is 1,511 children during 1995-96; 1,585 during 1996-97; 1,738 during 1997-98; 2,169 during 1998-99; and 2,165 during 1999-2000. The "day care facility/plan" yielded numbers for 1995-1995 of 257; 1996-1997 of 362; 1997-1998 of 432; 1998-1999 of 498; and 1999-2000 of 508 children.<sup>42</sup>

During the 1995 legislative session, when the North Carolina Senate proposed section 114-19.5, which requires a criminal record check for day care providers, subsection (d) of the bill provided that the Legislative Research Commission was to study the use of records in the Central Registry on Child Abuse and Neglect as part of the process of conducting records checks of child care providers. Additionally, as part of its study, the Commission was to evaluate current procedures for substantiating claims of child abuse or neglect, and for maintaining records in the Central Registry, and then determine what procedures should be implemented to: (1) ensure that records are accurate; (2) provide appropriate notice to interested parties; (3) provide for expungement or correction of information; and (4) provide for the release of information.<sup>43</sup> Subsection(d), however, was not included in

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39. See [http://childrenservices.dhhs.state.us...\\_and\\_planning/programstatistics/index.htm](http://childrenservices.dhhs.state.us..._and_planning/programstatistics/index.htm) (last visited August, 2001).

40. *Id.*

41. *Id.*

42. *Id.*

43. N.C. GEN. STAT. § 114-19.5 (1999). Article 2 of Chapter 114 of the General Statutes is amended by adding a new section to read:

§ 114-19.5. Criminal Records Check of Child Care Providers.

*The Department of Justice may provide to the Division of Child Development, Department of Human Resources, the criminal history from the State and National Repositories of Criminal Histories in accordance with G.S. 110-90.2, of any child care provider, as defined in G.S. 110-90.2. The Division shall provide to the Department of Justice, along with the request, the*

the final version of the statute that was ratified by the General Assembly.

Consequently, the Central Registry information is not available as a record check component of the child care provider's application process.<sup>44</sup> Thus, a viable method of identifying substantiated abusers and neglecters is not currently available to employers or the Department. The Department has a substantial interest in ferreting out those individuals who may pose a danger to children, or who otherwise do not possess the requisite moral character to qualify as child care providers.<sup>45</sup> Therefore, the effectiveness of the statute is called into question by the omission of a mechanism that would assist in identifying persons who are not suitable candidates as child care providers.

## II. RECOMMENDATIONS FOR STRENGTHENING THE STATUTE

North Carolina law requires that a criminal history check be conducted on all persons who provide child care in a licensed child care facility, and on all persons providing child care in non-licensed child care homes that receive state or federal funds.<sup>46</sup> We can assume, with-

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*fingerprints of the provider to be checked, any additional information required by the Department of Justice, and a form consenting to the check of the criminal record and to the use of fingerprints and other identifying information required by the State or National Repositories signed by the child day care provider to be checked. The Division shall keep all information pursuant to this section privileged, as provided in G.S. 110-90.2(e). The Department of Justice shall charge a reasonable fee only for conducting the checks of the national criminal history records authorized by the section.* (Emphasis original)

(c) the North Carolina Child Care Commission shall adopt rules to implement this section, in consultation with the Division of Child Development and Social Services of the Department of Human Resources, and the Division of Criminal Information of the Department of Justice.

(d) The Legislative Research Commission shall study the issue of using the records in the Central Registry on Child Abuse and Neglect for the purpose of conducting records checks of child day care providers. In its study, the Commission shall evaluate current procedures for substantiating claims of child abuse or neglect and for maintaining records in the Central Registry, and shall determine what procedure should be implemented to (i) ensure that records are accurate, (ii) provide appropriate notice to interested parties, (iii) provide for expungement or correction of information, and (iv) provide for release of information. The Commission shall report its findings and recommendation to the 1997 General Assembly.

(e) Subsection (d) of this section is effective upon ratification. The remainder of this section becomes effective January 1, 1996, and as defined in this section, applies to all child day care providers providing child day care employment, and to all child day care providers newly owning or operating child day care, on or after that date.

44. N.C. GEN. STAT. § 7B-311 (1999).

45. See *supra* note 1.

46. N.C. GEN. STAT. § 110-90.2(c) (1999). The referenced statement is actually included in the "Notice" provision of the statute. Therefore, each person submitting an application as a child care provider is given notice of the requirement of the criminal history check. Additionally, the statute states that "Criminal History" includes county, state, and federal convictions or pending indictment of any of the following crimes: the following Articles of Chapter 14 of the General Statutes: Article 6, Homicide; Article 7A, Rape and Kindred Offenses; Article 8, Assaults; Article 10, Kidnapping and Abduction; Article 13, Malicious Injury or Damage by use of

out proof to the contrary, that each child care provider submits the requisite forms to the Department to facilitate the criminal history check.<sup>47</sup> It is what happens to the documentation once submitted that has the potential to eviscerate or render the statute vacuous.

The process of determining the qualifications of a prospective child care provider after receipt of the criminal records check documentation presents a two-fold scenario for consideration. The first scenario involves an applicant who has been convicted of a potentially disqualifying criminal offense, and the Department is, or should be, aware of the same upon receipt of the local record check. The second scenario involves an applicant who relocated to the state, had a disqualifying conviction out of state, and the local record check does not indicate a criminal conviction. In either scenario, the applicant is allowed to accept conditional employment until the record check is processed and returned to the Department.<sup>48</sup> One might presume that the scenario involving the local conviction, where this information is provided to the Department at the time of application, would warrant swift action by the Department to qualify or disqualify the child care provider.

On the contrary, neither the statute, nor rules promulgated by the Commission, mandate a given period of time for a determination of qualification by the Department after submission of an application.<sup>49</sup> During 1997, information provided to potential operators of child care facilities indicated that the criminal records background check could take from 90 to 120 days to determine qualifications.<sup>50</sup> The May 2000 supplement to the Criminal Record Check(CRC) procedure does not indicate the amount of time necessary to determine qualifications fol-

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Explosive or Incendiary Device or Material; Article 26, Offenses Against Public Morality and Decency; Article 40, Prostitution; Article 39, Protection of Minors; Article 40, Protection of Family; and Article 59, Public Intoxication; violation of the North Carolina Controlled Substance Act, Article 5 of Chapter 90 of the General Statutes, and alcohol-related offenses such as sale to underage persons in violation of section 18B-302 or driving while impaired in violation of section 20-138.1 through section 20-138.5; or similar crimes under federal law or under the laws of other states.

47. A failure to comply with the requirements of submitting the necessary information to allow the processing of the criminal record check is a violation of the law. The Department has at its disposal Administrative Penalties, section 110-102.2; Criminal Penalties, section 110-103; Civil Penalties, section 110-103.1, and Injunctive Relief, section 110-104, all designed to ensure compliance.

48. N.C. ADMIN. CODE tit. 10, r. 3U.2701(b) (June 2000) (Sept. 2001 Supp.).

49. See *supra* notes, 22 and 23. The Division must notify the child day care provider in writing of the determination by the Division of the individual's fitness to have responsibility for the safety and well-being of children based on the criminal history. In addition, the division must notify the employer in writing of the Division's determination concerning the child day care provider; however, the employer shall not be told the specific information used in making the determination. N.C. ADMIN. CODE tit. 10, r. 3U.2702(e) (June 2000).

50. Division of Child Development, Criminal Records Background Checks Instructions for Potential Owners/Operators of Licensed Child Day Care Facility (April 1997).

lowing submission of the application documents.<sup>51</sup> In actuality, the determination of qualification after submission of the pertinent documents to the Department may take more than a year.

*Long v. Dep't of Health and Human Services*<sup>52</sup> is illustrative of the Department's delay in determining the qualifications of an applicant with a local criminal history. In November of 1997, Mr. Long submitted a local record check to the Department through his employer, as required by statute, after being employed as a cook at a day care center. The record check indicated that he was convicted of a crime other than a minor traffic violation in 1987. Moreover, the local record indicated that Mr. Long was convicted of a felony. On January 27, 1999, the Department notified Mr. Long that he was disqualified as a child care provider. Mr. Long did not have any convictions other than the one reflected in the local records check. It is inexplicable why the Department waited thirteen months to act on his application as a child care provider.<sup>53</sup> Other jurisdictions with similar statutes, and with similar legislative purposes, have addressed this issue.

#### A. *California*

California has a statute<sup>54</sup> that is substantially similar to the statute that is currently in effect in North Carolina. Pursuant to California's statute, a permanent set of fingerprints must be submitted to the Department of Justice by the licensee.<sup>55</sup> Within fourteen calendar days of the receipt of the fingerprints, the Department of Justice must notify the State Department of Social Services of the criminal record information. If no criminal record information has been recorded, the Department of Justice must provide the licensee and the State Department of Social Services with a statement of that fact within fourteen days of receipt of the fingerprints.<sup>56</sup> Thus, both the licensee/applicant and the Department responsible for determining qualifica-

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51. Division of Child Development, Green Sheet, Criminal Records Background Checks supplemental Instructions (May 2000).

52. *Long v. Dep't of Health and Human Services*, 548 S.E.2d 832 (N.C. Ct. App. 2001).

53. I became familiar with the statute under consideration here in my capacity as Clinical Director and Supervising Attorney supervising third-year law students. One of my students conducted the initial interview of Mr. Long at North Central Legal Assistance Program (Legal Services). Mr. Long sought help filing a civil case in Durham County District Court. An individual who is potentially dangerous to children should not be around children for approximately thirteen months. Therefore, where a prospective child care provider has a local criminal record, the Department certainly could, and should, make a determination regarding the applicant's qualifications within a reasonable time. A determination based on the local record check within fourteen (14) to thirty (30) days is reasonable, a thirteen-month delay provides serious cause for concern.

54. CAL. HEALTH & SAF. CODE § 1596.871 (2000).

55. CAL. HEALTH & SAF. CODE § 1596.871(c)(1)(B) (2000).

56. *Id.*

tion will know of the applicant's status and fitness as a child care provider based on the criminal record check within fourteen calendar days. Any violation of the statute is met with an immediate \$100.00 civil penalty.<sup>57</sup>

### B. *Kentucky*

The State of Kentucky requires all conviction information for any applicant for employment from the Justice Cabinet prior to employing the applicant.<sup>58</sup> However, the Kentucky legislation provides that operators of child care centers may employ persons convicted of sex crimes classified as a misdemeanor at their discretion. Therefore, the complete ban only applies to felony convictions.<sup>59</sup>

### C. *Oregon, Ohio and Illinois*

Oregon<sup>60</sup>, Ohio<sup>61</sup>, and Illinois<sup>62</sup> have statutes similar to North Carolina's, where the applicant may commence working as a child care provider on a probationary or conditional basis pending receipt of the criminal record check. However, in Illinois the newly hired employee is not allowed to be alone with children until the results of the criminal record check have been received.<sup>63</sup> Unlike the North Carolina statute, the Illinois statute provides that persons who have committed certain crimes may not be employed in a child care facility pending receipt and approval of the criminal records check.<sup>64</sup> Additionally, the Illinois statute requires each applicant seeking licensure or qualification as a child care provider to certify under penalty of perjury that she is not more than thirty days delinquent in complying with a child support order.<sup>65</sup>

### D. *Idaho*

Idaho legislation, which has a records procedure similar to that of North Carolina, provides for a temporary certification pending the outcome of the criminal records check.<sup>66</sup> However, Idaho's statute

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57. CAL. HEALTH & SAF. CODE § 1596.871(c)(1)(C) (2000).

58. KY. REV. STAT. § 119.896(19) (Michie 2001 Supp.).

59. *Id.*

60. OR. REV. STAT. § 657A.030(6)(b) (1997).

61. OHIO REV. CODE ANN. § 5104.012(B)(2) (Anderson 2000).

62. ILL. ADMIN. CODE tit. 89, § 408.40(b) (1997).

63. *Id.*

64. ILL. ADMIN. CODE tit. 89, § 408.40(c) (1997).

65. ILL. ADMIN. CODE tit. 89, § 408.40(e) (1997).

66. IDAHO CODE § 16.06.02.300(10)(a) (Michie 2000).

provides that the temporary certification shall not exceed 120 days, unless otherwise extended by the overseeing department.<sup>67</sup>

If the express purposes of its statute are to be realized, North Carolina must adopt a statute similar to California's, under which the Department would have access to the criminal records check outcome, and make a determination of qualifications as a child care provider, within a specified time of receipt of the requisite forms from the applicant.

### III. A CROSS-CHECK OF ABUSE AND NEGLECT REGISTRY IS RECOMMENDED

Presently, no provision exists for checking the Central Registry for Child Abuse and Neglect for the identity of current or prospective child care providers as a part of the record check procedures required by statute and Commission rules. The Department of Health and Human Services is required by statute to maintain the Central Registry,<sup>68</sup> and "to compile data for appropriate study of the extent of abuse and neglect within the state . . . for its use for study and research . . . ."<sup>69</sup> The Department compiles data furnished by county directors of social services to the Department of Health and Human Services, and each year the Division produces summary statistics from the Central Registry regarding child abuse and neglect in North Carolina. The Division has taken care to ensure that the data is focused on unduplicated counts of maltreated children. Files are maintained consisting of one page for each of the 100 counties in North Carolina. To help understand the data, files contain county levels and state totals.

Each county is designated as level one, two or three based on county population, providing a basis for comparison between counties.<sup>70</sup> The Division is divided into seven teams. The Policy and Planning Team is responsible for managing the Central Registry for Child Abuse and Neglect.<sup>71</sup> The available data does not include the names or identification information of perpetrators of child abuse or neglect. Nevertheless, it seems the task of compiling the name, date of birth and social security number of a perpetrator or substantiated abuser

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67. IDAHO CODE § 16.06.02.300(10)(a)(i) (Michie 2000).

68. See N.C. GEN. STAT. § 7B-311 (1999).

69. *Id.*

70. Unduplicated Central Registry Statistics, at [http://childrensservices.dhhs.state.nc.us/policy\\_and\\_planning/programstatistics/index.htm](http://childrensservices.dhhs.state.nc.us/policy_and_planning/programstatistics/index.htm) (last visited Nov. 1, 2001). The data is provided for years 1996-1997 through 1999-2000, including all investigative assessments and children substantiated as having been abused or neglected for each county, the state, and county comparison tables for the rates as a ratio of total county child population.

71. Policy and Planning, at [http://Childrensservices.dhhs.state.nc.us/policy\\_and\\_planning/index.htm](http://Childrensservices.dhhs.state.nc.us/policy_and_planning/index.htm) (last visited Nov. 1, 2001).



would be rather ministerial. A number of other jurisdictions require a check of the Abuse and Neglect or similar Registry in conjunction with the criminal record check.<sup>72</sup> The Central Registry for Abuse and Neglect contains a wealth of information, and arguably would provide a valuable tool for identifying and screening child care providers.

Although the Central Registry is an excellent screening tool, we must be cognizant of the stigma associated with inclusion in the registry, where that information is disclosed to the public. Section 7B-311 requires that data furnished to the Department shall be confidential.<sup>73</sup> One method of using the data in the criminal record check procedure and preserving the confidentiality of the identifying information, is to permit the Department to conduct an internal review of Central Registry data concerning child care providers.<sup>74</sup> The statute provides that the information received through the criminal record check is not public record. Rather, it is privileged information for the exclusive use of the Department.<sup>75</sup>

Unlike Sex Offender and Public Protection Registration Programs,<sup>76</sup> Central Registry inclusion does not create such a community opprobrium,<sup>77</sup> because only the Department has access to the infor-

72. See generally, ARK. CODE ANN. §§ 20-78-602 (a)(1)(A) (Michie 1999) (requiring Central Registry and criminal records checks of each "applicant" for a license to own or operate a child day care facility); COLO. REV. STAT. § 26-6-107(1)(a)(i)(C) (2000) ("[T]he rules shall require the criminal background check . . . As part of said investigation, the state central registry of child protection shall be accessed to determine whether the owner, applicant, employee, newly hired employee, licensee, or individual who resides in the licensed facility being investigated is the subject of a report or known or suspected child abuse"); WIS. ADM. CODE Ch. HFS 12, Subch. III, App. A (2001); TENN. COMP. R. & REGS. ch. 1240-4-1-.01-1240-4-1-.03 IV(iv) (2001); FLA. ADMIN. CODE ANN. r. 65C-16.007 (1999); IDAHO CODE § 16.06.02.300.09 (Michie 2000); ILL. ADM. CODE tit. 89, § 385.30 (1999); OR. REV. STAT. § 657A.030(3) (1999); N.H. REV. STAT. ANN. § 170-E:7(II) (1999); MO. REV. STAT. § 210.903(1) (1999); and MISS. CODE ANN. § 43-20-8(3) (2000).

73. N.C. GEN. STAT. § 7B-311 (1999).

74. In *Petition of Preisendorfer*, 719 A.2d 590 (N.H. 1998), the New Hampshire Supreme Court addressed the issue of applying the probable cause standard in any hearing to determine registration in the Central Registry based on allegations of child sexual abuse. The court acknowledged that to enter petitioner's name into central registry essentially barred him from working with children, and caused him to become unemployed and unemployable in his profession, and thus his interest in his profession was a protected liberty interest under New Hampshire Constitution.

75. N.C. GEN. STAT. § 110-90.2(e) (1999).

76. N.C. GEN. STAT. § 14-208.5 (1999). The sex offender and public registration programs, commonly referred as Megan's Law, have come under scrutiny because of the registration and community notification requirements. A number of recent cases have addressed the issues raised by these programs. See generally, *Artway v. Attorney General of New Jersey*, 81 F.3d 1235 (3d Cir. 1996); *Doe v. Pataki*, 940 F.Supp. 603 (S.D.N.Y. 1996), and articles cited *infra* note 77.

77. See generally, Wayne Logan, *A Study in "Actuarial Justice": Sex Offender Classification Practice and Procedure*, 3 BUFF. CRIM. L. REV. 593 (2000); Mary-Marsh Porter Loe, Comment, *Arkansas Sexual Offender Registration and Notification Laws: An Ex Post Facto Violation?* Ark. Code Ann. §§ 12-12-901 to -20 and *Synder v. State of Arkansas*, 53 ARK. L. REV. 176 (2000).

mation. Additionally, the Department's internal cross-check of the Central Registry pursuant to the criminal record check procedure would not have a community notification requirement as required by the Sex Offender Registration and Notification laws.<sup>78</sup> As a result, the confidentiality of the information is maintained and the purpose of the statute is furthered by screening out child care providers who may be harmful to children.

#### IV. THE STATUTE'S IMPLICATIONS CONCERNING THE RIGHTS, PRIVILEGES AND RESPONSIBILITIES OF CHILD CARE PROVIDERS

Section 110-90.2 was enacted in 1995 and became effective January 1, 1996.<sup>79</sup> Therefore, analysis of the statute's implications concerning the rights, privileges and responsibilities of child care providers involves convictions occurring before and after January 1, 1996. The statute on its face does not proscribe, or require, retroactive application. However, the general rule in North Carolina is that a statute will be given prospective effect only, unless the law in question clearly forbids such a construction.<sup>80</sup>

It is not surprising that the anti-retroactivity principle finds expression in several provisions of the United States Constitution. The *ex post facto* clause expressly prohibits retroactive application of penal legislation. Additionally, the United States Constitution prohibits states from passing laws "impairing the Obligation of Contracts."<sup>81</sup> Moreover, prohibitions on Bills of Attainder prohibit legislation that singles out disfavored persons and metes out summary punishment for past conduct.<sup>82</sup> The Due Process Clause also protects the interests of fair notice and repose that may be compromised by retroactive legislation; a justification sufficient to validate a statute's prospective application under the Clause "may not suffice" to warrant its retroactive application.<sup>83</sup> Thus, section 110-90.2, applied retroactively, raises concerns with respect to all persons who may be impacted by such an application. The primary focus here, however, is on a person's dis-

78. See generally, Wayne Logan, *A Study in "Actuarial Justice": Sex Offender Classification Practice and Procedure*, 3 BUFF. CRIM. L. REV. 593 (2000); Mary-Marsh Porter Loe, Comment, *Arkansas Sexual Offender Registration and Notification Laws: An Ex Post Facto Violation?* Ark. Code Ann. §§ 12-12-901 to -20 and *Synder v. State of Arkansas*, 53 ARK. L. REV. 176 (2000).

79. N.C. GEN. STAT. § 110-90.2(b) (1999). ("Effective January 1, 1996, the Department shall ensure that the criminal history of all child care providers is checked and a determination is made of the child care provider's fitness to have responsibility for the safety and well-being of children based on the criminal history.").

80. Corp. of Elizabeth City v. Comm'r of Pasquotank, 60 S.E. 416 (N.C. 1908).

81. U.S. CONST. art. I, § 10, cl.1.

82. Landgraf v. USI Film Products, 511 U.S. 244 (1994).

83. See *id.*, citing *Unsery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 17 (1976).

qualification as a child care provider resulting from convictions that occurred prior to the date of the statute's enactment.

### A. *Ex Post Facto* Clause Violation Analysis

A cogent argument can be made that any conviction occurring before the statute was enacted cannot be used to disqualify a child care provider since disqualification for a conviction that occurred before the enactment would be giving the statute retroactive effect. This would, in turn, violate the *ex post facto* Clause of the United States Constitution<sup>84</sup> and the North Carolina Constitution.<sup>85</sup> Prohibitions against *ex post facto* laws date as far back as ancient Greece. As Justice Scalia has explained, "the presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic."<sup>86</sup> The United States Constitution mandates that "[n]o state shall . . . pass any . . . *ex post facto* Law."<sup>87</sup> The North Carolina Constitution provides that, "[R]etrospective laws, punishing acts committed before the existence of such laws and by them only declared criminal, are oppressive, unjust, and incompatible with liberty, and therefore no *ex post facto* law shall be enacted."<sup>88</sup> An *ex post facto* law is a law passed after the occurrence of a fact or commission of an act, which retrospectively changes the legal consequences or relations of such fact or deed. An *ex post facto* law also is defined as a law which aggravates a crime or makes it greater than when it was committed or a law that changes the punishment or inflicts a greater punishment than the law annexed to the crime when it was committed.<sup>89</sup>

The United States Supreme Court defines an *ex post facto* law as one which "punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punish-

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84. U.S. CONST. art. I, § 10, cl.1.

85. N.C. CONST. art. I, § 16.

86. Doe v. Pataki, 940 F. Supp. 603, 613 (S.D.N.Y. 1996), citing Landgraf v. USI Film Products, 511 U.S. 244, 265 n.17 (1994) (quoting Kaiser Aluminum & Chemical Corp. v. Bonjorno, 494 U.S. 827, 842-44, 855-56 (1990) (Scalia, J. concurring)). In *Kaiser Aluminum*, Justice Scalia wrote:

The principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal human appeal. It was recognized by the Greeks, see 2P. Vinogradoff, *Outlines of Historical Jurisprudence* 139-140 (1922), by the Romans, see *Justinian Code*, Book 1, Title 14, § 7, by English common law, see 3 H. Bracton, *De Legibus et Consuetudinibus Angliae* 531 (T. Twiss trans. 1880); Smead, 20 Minn.L.Rev., at 776-778, and the Code Napoleon, 1 Code Napoleon, Prelim. Title, Art. I, cl. 2 (B. Barrett trans. 1811). It has long been a solid foundation of American Law.

*Kaiser Aluminum*, 494 U.S. at 855.

87. U.S. CONST. art. I, § 10, cl.1.

88. N.C. CONST. art. I, § 16.

89. BLACK'S LAW DICTIONARY 580 (6th ed. 1990).

ment for a crime, after its commission, or which deprives one charged with crime of any defense available according to law at the time when the act was committed.”<sup>90</sup> Pursuant to the North Carolina Constitution, the *ex post facto* clause applies only to criminal statutes, that is, to legislative, and not judicial action.<sup>91</sup>

The statute under consideration is a legislative enactment, and in order for the enactment to be considered *ex post facto*, two critical elements must be present: (1) it must apply to events occurring before its enactment; and (2) it must disadvantage the offender affected by it.<sup>92</sup> However, the analysis does not end with a finding that the offender is disadvantaged by the legislation since the statute under consideration, if a sanction at all, is a civil sanction. A civil sanction disqualifying a child care provider will implicate *ex post facto* concerns only if it can fairly be characterized as punishment.<sup>93</sup> The mark of an *ex post facto* law is the imposition of what can fairly be designated punishment for past acts. The question in each case where unpleasant consequences are brought to bear upon an individual for prior conduct, is whether the legislative aim was to punish that individual for past activity, or whether the restriction of the individual comes about as a relevant incident to a regulation of a present situation, such as the proper qualification for a profession.<sup>94</sup>

It follows that a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can also be explained as serving either retributive or deterrent purposes, is punishment, as we have come to understand the term.<sup>95</sup> In the most basic terms, punishment is, in the context of the justice system, the imposition of a penalty—a suffering in right, person, or property—for the commission of a crime.<sup>96</sup>

An applicant who has been convicted of a disqualifying offense is punished by the enacted legislation by being denied the right to earn a livelihood as a child care provider. The Division may disqualify a child care provider pursuant to the statute after receiving information indicating a conviction for any of the enumerated statutory offenses.<sup>97</sup> A determination by the Division that a prospective child care provider is disqualified because of a past conviction provides reasonable cause

90. *In re Hayes*, 432 S.E.2d 862, 865 (N.C. Ct. App. 1993), *appeal dismissed*, 436 S.E.2d 376 (N.C. 1993), *citing* *Beazell v. Ohio*, 269 U.S. 167, 169-170 (1925).

91. N.C. CONST. § 16, and Editor's Note (1999).

92. *In re Hayes*, 432 S.E.2d at 865-66.

93. *United States v. Harper*, 490 U.S. 435, 447-48 (1989).

94. *DeVeau v. Braisted*, 363 U.S. 144, 160 (1960).

95. *Bae v. Shalala*, 44 F.3d 489, 493 (7th Cir. 1995), *citing*, *Harper*, 490 U.S. at 447-49.

96. *See Farmer v. Brennan*, 511 U.S. 825, 854 (1994) (Blackmun, J. concurring).

97. N.C. GEN. STAT. § 110-90.2(a)(3) (1999).

to deny issuance of the permit to operate as a child care provider.<sup>98</sup> The employment of any child care provider determined by the Division to be disqualified shall be terminated by the facility or small day care home immediately upon receipt of the disqualification notice.<sup>99</sup> Since the statute, as written, does not provide for any time frame for consideration of past convictions, it arguably is in violation of the *ex post facto* clause of the United States and North Carolina Constitutions, where the conviction occurred before the statute was enacted and the disqualification is determined to be punishment.<sup>100</sup>

In *Cummings v. Missouri*, the United States Supreme Court stated that:

the theory upon which our political institutions rest is that all men have certain inalienable rights; that among these are life, liberty, and the pursuit of happiness; and that in the pursuit of happiness, all avocations, all honors, all positions, are alike open to every one; and that, in the protection of these rights, all are equal before the law. Any deprivation or suspension of any of these rights for past conduct is punishment, and can be in no other wise defined.<sup>101</sup>

In *Ex parte Garland*, the Supreme Court reviewed an act of Congress which required that, among other things, a certain oath be taken as a condition to the right to appear and be heard as an attorney previously admitted to the bar. The Court, referring to certain clauses of the act relating to past conduct, found that:

[t]he statute is directed against parties who have offended in any of the particulars embraced by these clauses. And its object is to exclude them from the profession of the law, or at least from its practice in the courts of the United States. As the oath prescribed cannot be taken by these parties, the act, as against them, operates as a legislative decree of perpetual exclusion. *An exclusion from any of the professions or any of the ordinary vocations of life for past conduct can be regarded in no other light than as punishment for past conduct.* The exaction of the oath is the mode provided for ascertaining the parties upon whom the act is intended to operate, and instead of lessening, increases, its objectionable character. All enactments of this kind partake of the nature of bills of pains and penalties, and are subject to the constitutional inhibition against the passage of bills of attainder, under which general designation they are included. In the exclusion which the statute adjudges, it imposes a punishment for some of the acts specified which were not punishable at the time they were committed; and for other of the acts it adds a new punishment to that before prescribed, and it is thus brought within the further inhibition of the con-

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98. N.C. ADMIN. CODE tit. 10, r. 3U.2702(f) (June 2000).

99. N.C. ADMIN. CODE tit. 10, r. 3U.2702(g) (June 2000).

100. See *Loc. supra* note 77, at 176.

101. *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 321 (1866).

stitution against the passage of an *ex post facto* law.<sup>102</sup> (Emphasis added).

A statement that a statute will become effective on a certain date does not suggest that it has any application to conduct that occurred at an earlier date.<sup>103</sup> The Supreme Court, in *Landgraf v. USI Film Products*, held that provisions of the Civil Rights Act of 1991 creating the right to recover compensatory and punitive damages for certain violations of Title VII and providing for trial by jury if such damages are claimed, do not apply to Title VII cases pending on appeal when the statute was enacted. In *Landgraf*, the Court stated that in order to resolve the question left open by Congress, federal courts have labored to reconcile two seemingly contradictory statements found in its discussions concerning the effect of intervening changes in the law. Each statement is framed as a generally applicable rule of interpreting statutes that do not specify their temporal reach.<sup>104</sup> The first rule of interpretation holds that "a court is to apply the law in effect at the time it renders its decision."<sup>105</sup> The second rule is the axiom that "[r]etroactivity is not favored in the law," and its interpretive corollary is that legislative "[e]nactments and administrative rules will not be construed to have retroactive effect unless their language requires this result."<sup>106</sup>

Section 110-90.2 does not evince any clear expression of intent to operate retroactively as applied to prior convictions, cases pending, acts, or other conduct which occurred prior to the enactment of the statute. An apparent tension exists between the rules espoused by the United States Supreme Court for handling similar problems in the absence of an instruction from Congress.

The better rule is the one espoused in *Bowen v. Georgetown Univ. Hospital*, in which Justice Scalia in a concurring opinion stated that there exists a judicial presumption, of great antiquity, that a legislative enactment affecting substantive rights does not apply retroactively absent *clear statement* to the contrary.<sup>107</sup> It is further reiterated in *Kaiser Aluminum and Chemical Corp. v. Bonjorno*, where Justice Scalia, again, concurring, stated that he:

[w]ould. . .reaffirm the clear rule of construction that has been applied, except for these last two decades of confusion, since the begin-

102. *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 337 (1866). See also, *Hawker v. People of New York*, 170 U.S. 189, 203 (1898) (Harlan, J. dissenting).

103. *Landgraf v. USI Film Products*, 511 U.S. 244, n. 10 (1994), citing *Jensen v. Gulf Oil Refining & Marketing Co.*, 623 F.2d 406, 410 (5th Cir. 1980) and *Sikora v. American Can Co.*, 622 F.2d 1116, 1119-1124 (3rd Cir. 1980).

104. *Id.*

105. *Id.*, citing *Bradley v. School Bd. of Richmond*, 416 U.S. 696 (1976).

106. *Id.*

107. *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204 (1988).

ning of the Republic and indeed since the early days of the common law: absent specific indication to the contrary, the operation of non-penal legislation is prospective only.”<sup>108</sup>

The general rule in North Carolina is in accord with *Landgraf* and *Bonjorno*.<sup>109</sup> The rules of statutory construction in North Carolina do not suffer the tension created by *Bradley* and *Georgetown Univ. Hospital*. The North Carolina Supreme Court, in *Corporation of Elizabeth City v. Commissioners of Pasquotank County*, held that

it is an elementary rule of construction that a statute will not be declared to be retroactive, unless it was clearly intended so to be, and especially where such a construction would take away rights acquired under a former law, even though the Legislature would have the constitutional power to thus divest them.

[In North Carolina] courts will not give to a law a retrospective operation, even where they might do so without violation of the Constitution, unless the intention of the Legislature is clearly expressed in favor of such retrospective operation. Except in the case of remedial statutes and those which relate to procedure in the courts, it is a general rule that acts of the Legislature will not be so construed as to make them operate retrospective, unless the Legislature has explicitly declared its intention that they should so operate, or unless such intention appears by *necessary implication* from the nature and words of the act so clearly as to leave no room for a reasonable doubt on the subject.<sup>110</sup> (Emphasis added)

Arguably, the Legislature intends to protect children from individuals deemed dangerous or not of good moral character. Thus, to the extent that a conviction is evidence of dangerousness or bad character, it is immaterial when the conviction occurred. This intention may be viewed as a *necessary implication* of the statute.

“In the case of remedial legislation, the general rule is not as insistent, and such statutes are not infrequently given retrospective effect where the language permits and where such a construction will best promote the intent of the legislature.”<sup>111</sup> This statute, arguably remedial in nature, has not been the subject of an opinion in North Carolina’s appellate courts. Therefore, we are left to rely on the previous holdings of the North Carolina appellate courts, the United States Supreme Court, and the federal courts for guidance.

Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform

108. *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827, 841 (1990) (Scalia, J. concurring).

109. See *supra* notes 75 and 104 and accompanying text.

110. *Corp. of Elizabeth City v. Comm’r of Pasquotank*, 60 S.E. 416, 417-18 (N.C. 1908).

111. *Wadill v. Masten*, 60 S.E. 694, 696 (N.C. 1916).

their conduct accordingly; settled expectations should not be lightly disrupted.<sup>112</sup> The legislature has unmatched powers, and can sweep away settled expectations suddenly and without individualized consideration. The legislature's "responsivity to political pressures poses a risk that it may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals."<sup>113</sup> The groups or individuals adversely impacted by section 110-90.2 are those with pending indictments or convictions of a crime, including felonies and misdemeanors. It could easily be a situation where the crime was committed, and the individual's debt was paid to society more than a decade before the statute was enacted.<sup>114</sup> Therefore, if the legislature is determined to alter settled expectations, then at a minimum, the legislature should issue a "clear statement" in the text of the statute to that end. In the alternative, because of the arguably remedial nature of the statute, the statutory language needs to be consulted to determine whether retroactivity will best promote the meaning and purpose of the legislature.

As a safeguard, it is important that the legislature first make its intention clear. This will tend to ensure that the legislature has determined that the benefits of retroactivity outweigh the potential for disruption or unfairness. Statutory retroactivity has long been disfavored.<sup>115</sup> In Justice Story's view, the ban on retrospective legislation embraces "all statutes, which, through operating only from their passage, affect vested rights and past transactions."<sup>116</sup> Justice Story elaborated by stating that

every statute, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective."<sup>117</sup> "Sound guidance, in reaching a conclusion, is guided by principles of 'fair notice,' 'reasonable reliance,' and 'settled expectations.'"<sup>118</sup>

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112. See *Landgraf v. USI Film Products*, 511 U.S. 244, n.18 (1994), citing *General Motors Corp v. Romein*, 503 U.S. 181, 191 (1992) ("Retroactive legislation presents problems of unfairness that are more serious than those posed by prospective legislation, because it can deprive citizens of legitimate expectations and upset settled transactions"); Munzer, *A Theory of Retroactive Legislation*, 61 TEXAS L.REV. 425, 471 (1982) ("The rule of law . . . is a defeasible entitlement of persons to have their behavior governed by rules publicly fixed in advance"); see also, L. FULLER, *THE MORALITY OF LAW* 51-62 (1964).

113. *Landgraf*, 511 U.S. 244 (1994).

114. See *supra* note 52.

115. *Society for Propagation of the Gospel v. Wheeler*, 22 F. Cas. 756 (C.C.N.H. 1814) (No. 13, 156).

116. *Id.*

117. *Id.*, citing *Calder v. Bull*, 3 Dall. 386, 1 L.Ed 648 (1798).

118. *Landgraf*, 511 U.S. at 244 (1994).



Requiring a clear statement assures that the legislature itself has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits.<sup>119</sup> Such a requirement allocates to the legislature responsibility for fundamental policy judgments concerning the proper temporal reach of statutes, and has the additional virtue of giving legislators a predictable background rule against which to legislate.<sup>120</sup>

The “clear statement” rule is no less poignant where the statute is deemed a remedial one. A remedial statute is defined as “a law that affords a remedy” or “a law that is intended to correct, remove, or lessen a wrong, fault or defect.”<sup>121</sup> Further, a remedial statute is legislation “that does not proscribe any conduct that was previously legal.”<sup>122</sup>

A review of section 110-90.2 requires an examination of Article 7 of the North Carolina General Statutes, in which section 110-90.2 is found. Criminal record check provisions, set out in section 110-90.2, when considered within the larger context of Article 7, have both remedial and penal aspects. The remedial components are set out in sections 110-85,<sup>123</sup> 110-90.2(b),<sup>124</sup> and 110-91(8).<sup>125</sup> The aforementioned sections arguably are remedial and presumably promote the laudable purposes of the statute. For example, they ensure that “[c]hildren are cared for by qualified persons of good moral character,”<sup>126</sup> they provide for a “determination of the child care provider’s fitness to have responsibility for the safety and well-being of children,”<sup>127</sup> they provide “no person shall be an operator of nor be employed in a child care facility who . . . may be injurious to children,”<sup>128</sup> and they are intended to ensure that “children in child care are cared

119. *Id.*

120. *Id.* *C.F. Hawker v. New York*, 170 U.S. 189, 200 (1898) (Dr. Hawker was convicted of the crime of abortion, a felony, in 1878, and imprisoned for ten years. New York enacted a statute in 1895 which provided that “any person after conviction of a felony, who practice[s] or attempt[s] to practice medicine” shall be fined \$250.00, or imprisoned for six months. During April 1896, Dr. Hawker was indicted, alleging the 1878 conviction, as being in violation of the statute when he practiced medicine during February 1896. The Defendant challenged this statute on the grounds that it violated the ex post facto clause. The judgment was affirmed on the premise that disbarment for the practice of medicine was not a penalty, but as prescribing the qualifications for the duties to be discharged and the position to be filled, and naming what is deemed to be, and what is in fact, appropriate evidence of such qualifications. *Id.* at 200).

121. BLACKS LAW DICTIONARY 1293 (6th Ed. 1991).

122. *Landraf*, 511 U.S. at 297 (Blackmun, J. dissenting).

123. N.C. GEN. STAT. § 110-85 (1999).

124. N.C. GEN. STAT. § 110-90.2(b) (1999).

125. N.C. GEN. STAT. § 110-91(8) (1999).

126. N.C. GEN. STAT. § 110-85(1) (1999).

127. N.C. GEN. STAT. § 110-90.2(b) (1999).

128. N.C. GEN. STAT. § 110-91(8) (1999).

for by qualified people.”<sup>129</sup> If the examination were to end here, the statute would be deemed constitutional, because “the presumption is that the General Assembly’s actions are correct and constitutional, and a statute will not be declared unconstitutional unless this conclusion is so clear that no reasonable doubt can arise.”<sup>130</sup> However, the examination does not end here.

The penal aspects of the statutory scheme must be examined to determine if the statute is rendered defective as a result thereof. Section 110-98 mandates compliance with the statute,<sup>131</sup> and section 110-103 provides that any person who violates the enumerated provisions of the statute is guilty of a crime.<sup>132</sup> Additionally, any operator who violates any provision of Article 7 of the General Statutes may be levied a civil penalty.<sup>133</sup>

One means of determining whether a statute violates the *ex post facto* clause, is to ascertain whether the statute makes illegal an act which was legal before the statute was enacted. The statutory scheme of section 110-90.2 makes employing a child care provider who was previously convicted of a statutorily enumerated crime illegal, an act that was innocent before the statute was enacted. Additionally, a civil penalty for violation of any provision in Article 7 disadvantages any operator of a child care facility. Further, any person convicted of a crime and employed by a child care facility and subsequently terminated by the facility in compliance with the statute is disadvantaged by the passage of the statute.<sup>134</sup>

A counter argument that the statute is not an *ex post facto* law as it relates to an operator is that an *ex post facto* law punishes a person for his own past act which was legal when committed. Here, operators are subjected to punishment for employing the person who committed an act which was a crime when committed. Thus, the act now being punished, is the act of employing, which is not a past act relative to enactment of the statute. To this extent, the statute may be deemed a criminal or punitive law, but not *ex post facto*, with respect to the operator.

With respect to employees, however, as opposed to operators, the statute arguably is *ex post facto* in that it increases the punishment for an act committed by an employee before the enactment of the statute.

129. *Id.*

130. *Mitchell v. Financing Authority*, 159 S.E.2d 745 (N.C. 1968).

131. N.C. GEN. STAT. § 110-98 (1999).

132. N.C. GEN. STAT. § 110-103 (1999).

133. N.C. GEN. STAT. § 110-103.1 (1999).

134. *See generally, Landgraf*, 511 U.S. at 291. (providing that “[m]ost statutes are meant to regulate primary conduct, and hence will not be applied in trials involving conduct that occurred before their effective date.”)

In this regard, it will be necessary to distinguish employees who committed a crime before the enactment of the statute from those who committed a crime after its enactment. As Justice Story elaborated, "every statute which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective."<sup>135</sup>

Applying the foregoing principles to section 110-90.2, the statute is in violation of the *ex post facto* clause if applied to individuals who were convicted of an enumerated offense prior to January 1, 1996. Two additional points merit mention concerning passage of a statute which may be construed as being in violation of the *ex post facto* clause. First, consider James Madison's prescient statement, expressing concern that

[t]he sober people of America are weary of the fluctuating policy which has directed public councils. They have seen with regret and indignation that sudden changes and legislative interferences in cases affecting personal rights, become jobs in the hands of enterprising and influential speculators, and snares to the more industrious and less informed part of the community.<sup>136</sup>

Further, "bills of attainder, *ex post facto* laws, and laws impairing the obligation of contracts" were "contrary to the first principle of the social compact, and to every principle of sound legislation."<sup>137</sup>

Second, the statute takes no meaningful account of the character, at the time of the Department's decision, of the person whose previous conviction of a misdemeanor or felony is cause for disqualification as a child care provider.<sup>138</sup> "The offender may have become, after conviction, a new man in point of character and so conduct himself as to win the respect of his fellow men, and be recognized as one capable . . . of doing great good."<sup>139</sup>

Additionally, being debarred from his chosen avocation interferes with the offender's ability to rehabilitate. Proponents of the statute may advocate that the offender gets what he deserves because he committed the offense leading to the conviction.<sup>140</sup> "[A] society, or a legislature, may have a right to make that generalization as a matter of social policy, but a statutory scheme built upon a presumption that an

135. *Society for Propagation of the Gospel v. Wheeler*, 22 F. Cas. 756 (C.C.N.H. 1814) (No. 13, 156), *citing*, *Calder v. Bull*, 3 Dall. 386, 1 L.Ed 648 (1798).

136. *THE FEDERALIST* NO. 44, at 282 (James Madison) (McLean ed. 1961).

137. *Id.* See, also, *Landgraf* 511 U.S. at 268 n. 20.

138. See *Hawker v. People of New York*, 170 U.S. 189, 203 (1898).

139. *Id.* at 204 (Harlan, J. dissenting).

140. *Doe v. Pataki*, 940 F.Supp. 603, 605 (S.D.N.Y. 1996).

entire group of individuals is incapable of rehabilitation is fundamentally punitive in nature.”<sup>141</sup> Moreover,

the *ex post facto* clause forbids all laws that increase punishment after the fact; there is no exception for laws that are based on good intentions or that seek to protect our children. If a law increases punishment, it cannot be applied retroactively even if it would also prevent further acts of violence and abuse.<sup>142</sup>

Thus, section 110-90.2 violates both the United States and North Carolina Constitutions because of its retroactive application to convictions that occurred before January 1, 1996.

## B. *Bill of Attainder Analysis*

I do not conclude lightly that section 110-90.2 is unconstitutional as a bill of attainder. Although the statute may be substantively lacking, ill-suited to protect children receiving child care, and capable of adversely impacting citizens previously convicted of a criminal offense, the judiciary is loathe to find a legislative enactment unconstitutional. In this regard, “it must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people,”<sup>143</sup> and, in this instance, the guardians of our most cherished resource - our children. However, the statute does raise the specter of punishment in the separation of powers sense, to the extent it is applied retroactively, and consequently is defective as written.

### 1. Historical Analysis

In *Cummings v. State of Missouri*<sup>144</sup>, the United States Supreme Court found that “[a] bill of attainder is a legislative act which inflicts punishment without a judicial trial. If the punishment is less than death, the act is termed a bill of pains and penalties. Within the meaning of the Constitution, bills of attainder include bills of pains and penalties.”<sup>145</sup> Any statute enacted by the legislature, or rule promulgated pursuant to legislative authority, “that appl[ies] . . . to easily ascertainable members of a group in such a way as to inflict punishment on them without trial are bills of attainder prohibited by the Constitution.”<sup>146</sup>

Punishment is important to separation of powers, which ensures that the legislature shall not punish individuals. It is undisputed that

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141. *Id.*

142. *Id.*

143. *United States v. Lovett*, 328 U.S. 303, 319 (1946) (Frankfurter, J., concurring), quoting *Missouri K & T.R. Co. v. May*, 194 U.S. 267, 270 (year).

144. *Cummings v. State of Missouri*, 71 U.S.1 (4 Wall.) 227 (1866).

145. *Id.* at 323.

146. *Lovett*, 328 U.S. at 315.

the legislature can set general standards, impose regulations, or establish qualifications. However, the judicial branch of government must apply the standards, regulations or qualifications to a fact situation that involves an individual.<sup>147</sup>

In *United States v. Lovett*<sup>148</sup>, a landmark case illustrating the separation of powers aspect of punishment, Congress, through legislation, sought to punish three federal employees because of their political conduct by proscribing their employment as government employees. The legislation was held to be a bill of attainder. Today, the prohibition against bills of attainder prevents any "legislative acts, no matter what their form, that apply either to named individuals or easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial."<sup>149</sup>

Pursuant to *Lovett*, section 110-90.2 applies to an easily ascertainable group. The group is, quite simply, any child care provider or prospective child care provider who has been convicted of a statutorily enumerated offense. For purposes of this discussion, the group is divided into a fixed group<sup>150</sup> (those convicted of a relevant offense prior to January 1, 1996), and a shifting group<sup>151</sup> (anyone convicted of an offense on or after January 1, 1996). The fixed group will occupy the bulk of this discussion, because as related to the fixed group, whether the statute is a bill of attainder is a closer question and the separation of powers concerns are more important.

Once it is determined that a law identifies its subject with specificity, the issue becomes whether the statute inflicts punishment as defined by *Nixon v. Administrator of Gen. Serv.*<sup>152</sup> Under *Nixon*, whether a statute imposes a "punishment" under the Bill of Attainder Clause depends on: (1) whether the challenged statute falls within the historical meaning of legislative punishment; (2) whether the statute, viewed in terms of the type and severity of the burdens imposed, can reasonably be said to further non-punitive legislative purposes; and (3) whether the legislative record evinces a congressional intent to punish.<sup>153</sup>

The historical meaning of legislative punishment includes the death sentence, imprisonment, banishment, confiscation of property, and

147. See Note, *Punishment: Its Meaning in Relation to Separation of Power and Substantive Constitutional Restrictions and Its Use in the Lovett, Trop, Perez and Speiser Cases*, 34 Ind. L.J. 231, 232 (1959); see also, *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 136 (1810).

148. *Lovett*, 328 U.S. 303 (1946).

149. *Bell South Corporation v. FCC*, 162 F.3d 678, 683 (1998), quoting *Lovett*, 328 U.S. at 315 (1946).

150. See Note, *supra* note 147, at 239.

151. *Id.*

152. *Nixon v. Administrator of Gen. Serv.*, 433 U.S. 425 (1977).

153. *Id.* at 473, 475, 76.

legislative bars to participation by individuals or groups in specific employment or professions.<sup>154</sup> Section 110-90.2 imposes a legislative bar of employment to all persons specifically excluded by statute.<sup>155</sup> In addition to the fixed group specifically barred by statute from employment as a child care provider, the legislature has delegated to the Department the prerogative to disqualify any person who has been adjudicated guilty of a statutorily enumerated misdemeanor or felony.<sup>156</sup>

As the writer correctly stated in Note, *Punishment: Its Meaning in Relation to Separation of Power and Substantive Constitutional Restriction and Its use in the Lovett, Trop, Prez and Speiser Cases*<sup>157</sup> (hereinafter "Note, *Punishment*"), the Bill of Attainder Clause only prevents legislative punishment and not merely regulation of a narrow group. The problem of determining when the legislation constitutes punishment is critical to finding bills of attainder.<sup>158</sup>

In Note, *Punishment*, two seventeenth century attainders were examined to aid analysis. In the first, it was decreed that the Earl of Clarendon "should suffer perpetual exile and be forever banished from the realm . . . ." In the second, the "attainder was against the Earl of Kildare which said that 'all such persons which be or hereto-

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154. *Navegar, Inc. v. U.S.*, 192 F.3d 1050, 1066 (Cir. 1999). The court in *Navegar* quoted *Bell South II*, 162 F.3d at 683, as defining the modern bill of attainder analysis. Under the current interpretation of the Bill of Attainder Clause, a law is constitutionally impermissible if it both singles out individuals (or businesses) and imposes punishment on them. The Bill of Attainder Clause has been one of the original guarantees of civil liberty, and has existed for over two hundred years. However, the Supreme Court has relied upon it to strike down legislation only five times. See *U.S. v. Brown*, 381 U.S. 437 (1965); *U.S. v. Lovett*, 328 U.S. 303; *Pierce v. Carskadon*, 83 U.S. (16 Wall.) 234 (1872); *Ex parte Garland*, 71 U.S. (4 Wall.) 333 (1866); *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277 (1866). In *Legislative Disqualitive As Bills of Attainder*, 4 VAND. L. REV. 603 (1951), Professor Wormuth surmised that during the time the Constitution was adopted, the term bill of attainder had not been given a precise definition. Justice Story described the bill of attainder as

such special acts of the legislature as inflict capital punishment upon persons supposed to be guilty of high offenses, such as treason and felony, without any conviction in the ordinary court of judicial proceedings. If an act inflicts a milder degree of punishment than death, it is called a bill of pains and penalties. But in the sense of the Constitution, it seems that bills of attainder include bills of pains and penalties. In such cases, the legislature assumes judicial magistracy, pronouncing on the guilt of the party without any of the common forms and guards of trial, and satisfying itself with proof, when such proofs are within its reach, whether they are conformable to the rules of evidence or not. In short, in all such cases, the legislature exercise the highest power of sovereignty, and what may be properly deemed an irresponsible despotic discretion, being governed solely by what it deems political necessity or expediency, and too often under the influence of unreasonable fears or unfounded suspicions.

2 STORY, COMMENTARIES ON THE CONSTITUTION § 1344 (5th ed., Bigelow, 1891).

155. N.C. GEN. STAT. § 110-91(8) (1999).

156. N.C. GEN. STAT. § 110-90.2(a)(3), (b) (1999).

157. Note, *Punishment: Its Meaning in Relation to Separation of Power and Substantive Constitutional Restrictions and Its Use in the Lovett, Trop, Perez and Speiser Cases*, 34 IND. L.J. 231 (1959).

158. *Id.* at 238.

fore have been . . . confederated . . . in his false and traitorous acts and purposes shall in likewise stand, and be attainted, adjudged, and convicted of high treason.’”<sup>159</sup> These two illustrations help to make group or class distinctions:

At the time it was passed the attainder of the Earl of Kildare burdened a determinable group—‘all such persons which be or heretofore have been’ allied with him. By its terms, the statute was retrospective. This type of statute is labeled a *disability*, and the class which is burdened is *fixed*. People fall within the classification because of activity prior to the passage of the statute. Nothing they do now allows them to remove themselves from the group to which the statute applies. If the legislature intends to punish this fixed group, then it is attainder. At the opposite end of the spectrum is a statutory *qualification* which involves a *shifting* group. The statute is prospective, not retrospective. Since future conduct is the test of membership in the statutory class, the group is *shifting*. At the time the statute is enacted, the individual who will suffer the burden of the statute cannot be known.<sup>160</sup> (Emphasis added).

The terms “disability,” “fixed group” and “shifting group” will be used to explain the application of section 110-90.2 to the groups impacted by the statute.

## 2. Lovett, Nixon, Part I, Analysis

In reviewing the cases where the Supreme Court relied upon the prohibition against bills of attainder to strike down the legislation<sup>161</sup>, only *United States v. Brown* addressed a statute encompassing both a “fixed” and “shifting” group.<sup>162</sup> The fixed group in *Brown* consisted

159. *Id.* at 239.

160. *Id.*

161. *Brown*, 381 U.S. 437 (1965) (statute prohibiting anyone who is or has been member of communist party from holding union office was held to be a bill of attainder); *Lovett*, 328 U.S. 303 (bill naming and barring three government employees deemed to be subversive from all future government employment held to be bill of attainder); *Pierce v. Carskadon* (statute denying attorneys access to the courts unless they attested under oath to lack of participation in rebellion held to be bill of attainder); *Ex parte Garland*, 71 U.S. 4 (Wall) 333 (1866) (held federal statute requiring attorneys prior to admission in federal court to take an oath disavowing any part in the rebellion to be bill of attainder); and *Cummings v. Missouri* (constitutional provision forbidding persons to hold office or participate in certain avocation unless under oath they denied participating in or being in sympathy with rebellion was bill of attainder).

162. In *Brown*, the Court struck down as a bill of attainder, 73 Stat. 536, 29 U.S.C. § 504 (1958 ed., Supp. IV) (hereinafter § 504), which statute provided, in pertinent part, that no person who is or has been a member of the Communist Party . . . shall serve . . . as an officer, director, trustee, member of any executive board or similar governing body, business agent, manager, organizer, or other employee (other than as an employee performing exclusively clerical or custodial duties) of any labor organization . . . [d]uring or for five years after the termination of his membership in the Communist Party. 29 U.S.C. § 504(a), (a)(1) (1958 ed., Supp. IV). In addition, § 504 held that “[a]ny person who willfully violates this section shall be fined not more than \$10,000.00 or imprisoned for not more than one year or both. § 504(b).

of the persons who had been a member of the Communist Party within the preceding five years. At the time the statute became effective, there was nothing this group could do to purge themselves of the disqualification. In this sense the statute was applied retroactively to the fixed group.<sup>163</sup>

The retroactive application of the statute to a fixed group is some evidence of legislative intent to punish.

The important fact is that the group is fixed—that one became a member of the burdened group not of choice, but because of legislative fiat. A statute aimed at a narrow group should sensitize one to the possibility of attainder, but that fact alone should not control the analysis . . . . That the burdened group is fixed is essential to attainder; that it is small is possibly indicative of attainder.<sup>164</sup>

The fact that section 110-90.2 is applied retroactively to a fixed group, arguably small in number, can be inferred as evidence of intent to punish. However, the statute may also be said to merely state qualifications, which legitimately is a proper legislative function. In establishing qualifications, the legislature's obligation is to spell out affirmative qualities which are implied in the activity to which admission is restricted. The legislature serves all members of society when it establishes qualifications where the rights of all citizens are considered and do not exclude any designated person or class of persons; all are eligible to acquire the qualification.

Legislative establishment of qualifications, rules and regulations are all proper. However, "the establishment of disabilities is another matter. Here the legislature does not confine itself to reciting the requisite virtues which serve as qualifications; it specifies a characteristic which it declares to constitute a disqualification."<sup>165</sup> This disqualification speaks to the character of the person disqualified. A disqualifying determination in this instance results from a legislative judgment that the proscribed person possesses a bad character or a character trait not found in people generally. It is a legislative determination, judicial in nature, of culpability, blameworthiness, or a character trait worthy of society's opprobrium.<sup>166</sup> This sort of legislative action

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163. *American Communications Ass'n v. Douds*, 339 U.S. 382 (1950) (In *Douds*, § 9h of the National Labor Relations Act withstood challenge as a bill of attainder. However, one of the significant differences between § 9h (*Douds*), and § 504 (*Brown*), is that § 9h did not punish retroactively and the affected person could purge himself of the disqualification by terminating his membership in the Communist Party. On the contrary, in § 504 the affected person who was then a member of the Communist Party, could resign his membership, and then wait five years before he could resume his position as an officer, trustee, director, etc.)

164. Note, *supra* note 147, at 243.

165. Wormuth, *supra* note 154, at 609.

166. *Id.* at 610.



evinces a legislative intent to punish, and therefore, raises the specter of separation of power concerns.

Finally, ascertaining the requisite legislative intent to punish for purposes of bill of attainder analysis can be shown in two ways: (1) the statute's express intent to punish, on the face of the statute or other records; or (2) hidden intent. Section 110-90.2 does not, on its face or in other records, express an intent to punish. However, the fact that the statute is applied retroactively to a fixed group evinces a hidden intent to punish. This is especially true where the offense is a misdemeanor which has no relevancy to qualifications or moral character as they relate to providing child care. Therefore, it would appear that under the first part of *Lovett* (specifically singles out individuals or fixed group), and the first part of *Nixon* (bar to participation in specific employment is punishment), the test is satisfied.

### 3. Lovett, Nixon, Part II, Analysis

The next question under *Nixon* is whether section 110-90.2, viewed in terms of the type and severity of the burdens imposed, reasonably can be said to further non-punitive purposes. This question "invariably appears to be the 'the most important of the three.'"<sup>167</sup> First, the statutory scheme's stated purpose is to "[p]rotect children in child care facilities by ensuring that these facilities provide a physically safe and healthy environment where . . . these children are cared for by qualified persons of good moral character."<sup>168</sup> A determination is made of the child care provider's "[f]itness to have responsibility for the safety and well-being of children based on the criminal history."<sup>169</sup> The legislative *parens patriae* interest is consistent with the statutory scheme's stated purpose, and is a valid exercise of legislative discretion. However, the criminal record check mandated by section 110-90.2 does not speak to educational qualifications, work experience, training, or past performance as a child care provider. The provision only speaks to the disqualification, that is, unfitness as a child care provider based on a defect of moral character.<sup>170</sup> Second, the burden imposed is similar to that proscribed in *Lovett*, where the Court held the statute "'operates as a legislative decree of perpetual exclusion' from a chosen vocation. This permanent proscription. . . is punishment, and of a most severe type."<sup>171</sup>

167. *Bell South Corporation v. FCC*, 162 F.3d 678, 684 (D.C. Cir. 1998) (quoting *Bell South Corp. v. FCC*, 144 F.3d 58, 65 (D.C. Cir. 1998)).

168. N.C. GEN. STAT. § 110-85(1) (1999).

169. N.C. GEN. STAT. § 110-90.2(b) (1999).

170. See N.C. GEN. STAT. § 110-85 et seq (1999).

171. *U.S. v. Lovett*, 328 U.S. 303, 315 (1946).

The statutory scheme operating through section 110-90.2 does that which the bill of attainder clause forbids, namely, to inquire into a person's character and to impose a disability as a result of its findings. Therefore, if the statute is to be found constitutional, *Hawker v. New York*,<sup>172</sup> and its progeny must be considered.<sup>173</sup> In *Hawker*, the United States Supreme Court considered good character as a necessary qualification for all who practiced medicine and relied upon a felony conviction as evidence of bad character. In so finding, the Court stated that "[t]he State is not seeking to further punish a criminal, but only to protect its citizens from physicians of bad character. The vital matter is not the conviction, but the violation of law. The former is merely the prescribed evidence of the latter."<sup>174</sup> At first glance, one might conclude that any disqualification predicated upon a conviction of a crime will withstand challenge as bill of attainder following *Hawker*.

However, the *Hawker* ruling is significant for a more important reason. All statutes enacted following the Court's ruling in *Hawker*, where a violation of the bill of attainder clause has been raised and the statute was found to be a valid exercise of legislative authority, have what may be referred to as the "notorious connection"<sup>175</sup> between the disqualification and the activity barred.<sup>176</sup> In *Hawker*, the

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172. *Hawker v. New York*, 170 U.S. 189 (1889).

173. See Wormuth, *supra* note 154, at 611-15.

174. *Hawker*, 170 U.S. at 196. See also, Wormuth, *supra* note 154, at 612.

In conformity with *Hawker v. New York*, it has been held that conviction of felony may be made a disqualification for public office. Other statutes have carried the policy further. New York has also disqualified dentists and veterinarians who have been convicted of felony. The Secretary of the Treasury is instructed not to license any person to deal in liquor who has been convicted of felony within the past five years, or of a misdemeanor under any federal law relating to liquor within three years. The Investment Company Act bars those convicted of crimes in securities transactions from any connection with investment companies. Persons adjudged guilty of violating the antitrust laws by monopolizing or attempting to monopolize radio communication are not eligible for licenses to construct or operate radio stations. The Packers and Stockyards Act appears to be unique in that it requires no judicial proceeding; the Secretary of Agriculture is authorized to refuse a license to deal in poultry if he finds that the applicant has engaged in any of the practices forbidden by the Act within two years prior to his application. There is in each case a *notorious connection* between the disqualification and the activity barred.

*Id.* at 612.

175. See Wormuth, *supra* note 166. Professor Wormuth first coined the phrase "notorious connection" in *Legislative Disqualification As Bills of Attainder*. However, other courts have use similar or synonymous language. See *De Veau*, 363 U.S. 144, 160 (1960) (relevant incident); *Dehainaut*, 32 F.3d. 1066, 1071-72 (7th Cir. 1994) (adequate nexus); *Siegel*, 851 F.2d 412, 418 (D.C.Cir. 1998) (responsibly connected); *Veg-Mix*, 832 F.2d 601, 604 (D.C.Cir. 1987) (responsibly connected). See also, N.C. GEN. STAT. § 114-119.6(d)(5) (providing that there exists a nexus between a person's criminal history and the duties of the job for which she seeks employment).

176. See *supra* note 165. In addition to the cases referred to in *Legislative Disqualifications*, see *De Veau v. Braisted*, 363 U.S. 144, 160 (1960) (much-needed scheme for regulation of waterfront prohibited convicted felons from being officers of a waterfront union did not violate the bill of attainder clause); *Dehainaut v. Pena*, 32 F.3d. 1066, 1071-72 (7th Cir. 1994) ("[w]e find an

Court acknowledged that where there is reliance upon a conviction to illustrate bad character “[i]n a certain sense such a rule is arbitrary, but it is within the power of a legislature to prescribe the rule of general application . . . .”<sup>177</sup> In *Brown*, the Court extended the rule of general application.<sup>178</sup> More importantly, however, the *Brown* Court held that Congress “[c]annot specify the people upon whom the sanction it prescribes is to be levied.”<sup>179</sup> Additionally, in *BellSouth I*, the Court took pains to “[e]nsure that ‘the nonpunitive aims of an apparently prophylactic measure [are] sufficiently clear and convincing’” before finding that the measure did not constitute a bill of attainder.<sup>180</sup>

The General Assembly delegated to the Department the authority to disqualify child care providers pursuant to section 110-90.2, which mandates a criminal history check. “‘Criminal history’ means the county, state, or federal criminal history of convictions or *pending indictment* of a crime, whether a misdemeanor or felony, that bears upon an individual’s fitness to have responsibility for the safety and well-being of children as set forth in section 110-91(8).”<sup>181</sup> (Emphasis added)

Thus, unlike in *Hawker*, a child care provider may be disqualified based upon a pending indictment, or a misdemeanor if the Department determines the pending indictment or misdemeanor conviction bears upon the individual’s fitness. It is doubtful this statute, on its face, can pass the *Hawker* “notorious connection” test. It is not sufficiently “clear and convincing,” pursuant to *BellSouth I*, what is actually delegated to the Department and what parameters are to guide the Department’s discretion. Thus, the statute fails the *BellSouth I* test as well. Additionally, the statute is defective pursuant to *Brown*, because it specifies the “fixed group” of people to whom it is applicable. Again, this Article is primarily concerned with a conviction that

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*adequate nexus* between the restriction imposed and the legitimate governmental purpose. President Reagan determined that the intermingling of controllers who had been fired for striking with those who had replaced them would interfere with the safety and efficiency of the FAA’s operations.”); *Siegel v. Lyng*, 851 F.2d 412, 418 (D.C. Cir. 1998) (someone who was formerly *responsibly connected* with a violator of the Act was barred from employment with another licensee under the Act for one year); *Veg-Mix, Inc. v. USDA*, 832 F.2d 601, 610 (D.C. Cir. 1987) (transaction by firms employing person *reasonably connected* to disciplined licensee. . . justification for the temporary bar.)

177. *Hawker*, 170 U.S. at 197.

178. *U.S. v. Brown*, 381 U.S. 437, 461 (1965).

179. *Id.*

180. *BellSouth Corp. v. FCC*, 144 F.3d 58,65 (D.C. Cir. 1998) (quoting LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 10-5, 655 (2d ed. 1998)).

181. N.C. GEN. STAT. § 110-90.2(3) (1995); N.C. Gen. Stat. § 110-91(8) (1999).

occurred before passage of the statute.<sup>182</sup> Therefore, section 110-90.2 does not satisfy part two of the *Nixon* three-part test.<sup>183</sup>

The inclusion of a pending indictment as the basis of disqualification provides a strong counter argument that the intent of the statute is not to punish. Presumably, the legislature is aware that punishment is never appropriate prior to conviction. Therefore, one could infer that punishment is not the intent of the statute.

#### 4. Lovett, Nixon Part III Analysis

The final question under *Nixon* is whether this statute evinces a legislative intent to punish.<sup>184</sup> Attainder jurisprudence has evolved and is no longer limited to an express statutory declaration of guilt. Two separate methods of showing intent to punish have been developed. One method is by demonstrating an *express intent* from the punitive language of committee records, senate journals, and from floor debate. A second method “is the concept of *hidden intent* which states that although the statute may be entirely civil in form, because of its effect, it punishes a fixed group.”<sup>185</sup> If the effect of the statute is to punish, it can be inferred that the statute was passed with hidden intent. As was aptly pointed out in Note, *Punishment* quoting a state judge in *Starkweather v. Blair*,<sup>186</sup> “‘how on the state level can one find and prove an intent to punish? In Minnesota there are no records of committee hearings. Furthermore, one can’t look to extraneous evidence not a part of the journal entry.’”<sup>187</sup> The observation regarding the lack of state legislative records is as relevant today in North Carolina as when *Starkweather* was decided. Therefore, an analysis of section 110-90.2 must proceed under the “hidden intent” prong because it is a state statute with a sparse legislative record.

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182. Note, *supra* note 147, at 254, n.108 (1959) (“the mere presence of a prior conviction will not alone sustain a subsequent disability that has no connection at all with present fitness. [A] judicial conviction cannot be the exclusive basis of disability”).

183. The statute, viewed in terms of the type and severity of burdens imposed, i.e., perpetual exclusion, reasonably can be said to further nonpunitive legislative purposes. The fact that one can be disqualified because of an allegation of, without a finding of guilt, a misdemeanor assault, public intoxication or driving while impaired that may have occurred some time in the distant past appears to be inconsistent with the bill of attainder clause.

184. *Nixon*, 433 U.S. at 473.

185. Note, *supra* note 147, at 249 n.90, citing, *Starkweather v. Blair*, 71 N.W. 2d 869, 875 (1955), (finding that “apparently the *Lovett* case is the first in which the court has gone beyond the language of the act itself in seeking . . . [the legislature’s] motive.”)

186. *Starkweather*, 71 N.W.2d 869 (1955).

187. A search was made of the legislative records in the Legislative Library located in the Legislative Office Building, 116 West Jones Street, Raleigh, North Carolina, and no minutes regarding benefits or burdens of the legislation were found. We were able to ascertain the legislation was part of a larger appropriations bill, and identify entries where funds were appropriated for the purpose of carrying out the record checks.

The "hidden intent" test provides that when a disability is based on past conduct, and that conduct bears no relation to present qualification, there is an attainder.<sup>188</sup> In this sense, when a statute such as section 110-90.2 has "fixed" and "shifting" application, a prospective (shifting) application constitutes a qualification, and a retrospective (fixed) application constitutes a disability.<sup>189</sup> A legislative scheme applied retroactively to disqualify a child care provider constitutes a disability, and therefore, operates as a bill of attainder.

The bill of attainder clause forbids a process as well as an outcome.<sup>190</sup> The right to a full hearing ordinarily would sound the death knell to legislation as a bill of attainder, that is, "the legislature punishing a narrow group of individuals without a judicial trial."<sup>191</sup> However, it is the process of review pursuant to section 110-90.2 that arguably evinces "unmistakable evidence of punitive intent"<sup>192</sup> to punish child care providers previously convicted of a crime. The review process of the Department's decision disqualifying a child care provider is divided into three classes. Each class is treated differently based upon the member's status as either operator/owner, employee, or nonregistered home provider. In addressing each class ad seriatim, the primary focus will be on the employee, or the second class because of disparate treatment of this class.<sup>193</sup>

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188. Note, *supra* note 147, at 250 (1959).

189. *Id.* at 251.

190. Wormuth, *supra* note 154, at 608.

191. Note, *supra* note 147, at 253. The author of Note, *Punishment* indicates that a trial or hearing creates confusion because a court can consider a trial or hearing as a cure-all, justifying dismissing the challenge. The writer opined that this view is unsound and advocated the more sound view of focusing on intent, burden, and fixed class. Additionally, if a hearing is provided, it must do more than judicially determine whether the defendant falls within the fixed class. The hearing must afford the defendant an opportunity to challenge the constitutionality of the legislation.

192. *BellSouth Corp. v. Federal Communication Commission*, 162 F.3d 678, 690 (D.C. Cir. 1998), *quoting*, *Selective Service System v. Minnesota Public Interest Research Group*, 468 U.S. 841, 856 (1984) (the court incorporated the requirement, that the burdened individual show "unmistakable evidence of punitive intent" as a component of the third prong of the *Nixon* three part test. A close reading of the Court's opinion in *Selective Service System* suggests this added requirement may be misplaced. The Court in *Selective Service System* was considering statements made by two Congressmen when it stated, "but such statements do not constitute 'the unmistakable evidence of punitive intent which . . . is required before a Congressional enactment of this kind may be struck down,'" (emphasis added). The Court in *Selective Service System* was considering whether legislation that sanctioned the denial of a noncontractual governmental benefit, where the Court held no affirmative disability or restraint was imposed, is a bill of attainder. The language "Congressional enactment of this kind" may be read to limit the Court's "unmistakable evidence of punitive intent" language to legislation similar to that being considered in *Selective Service System* and *Flemming*. Section 110-90.2 is not such legislation.

193. The employee child care provider is terminated immediately upon notice of disqualification pursuant to N.C. Admin. Code tit. 10, r. 3U.2702(g) and r. 3U.2704(d) (June 2000); the nonregistered home provider may continue to operate and have payment suspended during the civil action proceedings pursuant to N.C. Admin. Code tit. 10, r. 3U.2704(h) and (i) (June 2000);

In the first class, Administrative Procedure Act review is statutorily provided for a child care operator.<sup>194</sup> An operator in this context is limited to “owner” when the statute is considered *in pari materia* with rules promulgated pursuant to this Article.<sup>195</sup> The conclusion that the owner, and not an employee, may seek administrative review is consistent with the rule, which states that “operator” includes the owner, and “operator,” and that “sponsor” or “licensee” may be used interchangeably with “owner”.<sup>196</sup> After all, it is the owner, operator, licensee or sponsor who is “the person or entity held legally responsible for the child care business.”<sup>197</sup>

Additionally, one may look to the plain language of the statute and the rules as further evidence that the legislature intended to grant only the owner or operator a right to appeal the Department’s determination regarding disqualification. The rule indicates that the

refusal on the part of the employer to dismiss a child day care provider who has been found disqualified shall be grounds for suspension, denial or revocation of the permit. If an employer, that is, an owner or operator, appeals the administrative action, the child day care provider shall not be employed during the appeal process.<sup>198</sup>

The third class, a nonregistered home provider, is an arrangement whereby day care is provided in a home that is not subject to registration or licensure pursuant to section 110-86(2)-(4)<sup>199</sup> or the requirements of section 110-106.<sup>200</sup> The rules apply only to nonregistered home providers which voluntarily choose to participate in the state subsidized day care program.<sup>201</sup> A disqualified nonregistered home

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and the operator/owner may file a contested case proceeding pursuant to section 150B-23, in response to an attempt to revoke its license pursuant to section 110-90(5).

194. N.C. GEN. STAT. § 110-94 (1999) (“a *child care operator* shall have 30 days to file a petition for a contested case pursuant to G.S. 150B-23”) (Emphasis added); N.C. GEN. STAT. § 110-86(7) (1999). (“operator includes the owner, director or other person having primary responsibility for operation of a child care facility subject to licensing”); N.C. ADMIN. CODE tit. 10, r. 3U.0102(19) (June 2000). (“Operator” means the person or entity held legally responsible for the child care business. The term “operator”, “sponsor”, or “licensee” may be used interchangeably).

195. N.C. ADMIN. CODE tit. 10, r. 3U.0102(6) (June 2000). (Providing that ‘child care provider’ includes but is not limited to the following employees: facility director, administrative staff, teacher, teacher’s aide, cooks, maintenance personnel and drivers).

196. N.C. ADMIN. CODE tit. 10, r. 3U.0102(18) (June 2000).

197. N.C. ADMIN. CODE tit. 10, r. 3U.0102(19).

198. N.C. ADMIN. CODE tit. 10, r. 3U.2702(h) (June 2000).

199. See *supra* note 5, and accompanying text.

200. N.C. GEN. STAT. § 110-106 (1999). (Providing that “religious sponsored child care facility” as used in this section shall include any child care facility or summer day camp operated by a church, synagogue or school of religious charter,” and that “[r]eligious sponsored child care facilities including summer day camps shall be exempt from the requirement that they obtain a license and that the license be displayed and *shall be exempt from any subsequent rule or regulatory program not dealing specifically with the minimum standards* as provided in the applicable provisions of G.S. § 110-91 . . . .”) (emphasis added).

201. N.C. ADMIN. CODE tit. 10, r. 46G.0109(b) (June 2000).

provider is subject to have payment terminated pending the outcome of any appeal.<sup>202</sup> Pursuant to section 108A-79, the nonregistered home provider is afforded three levels of appellate review. The first review is local and is to be held within five days after the request is made.<sup>203</sup> If the nonregistered home provider is not satisfied, she may appeal to the Department,<sup>204</sup> and if there not satisfied, she may file a civil suit in district court.<sup>205</sup> In summary, the statutory and procedural safeguards are more than sufficient to insulate the statute against challenge as applied prospectively or to convictions occurring after January 1, 1996. However, the disparate treatment of the classes, that is, owner/operator, employee, and nonregistered home provider evinces a legislative intent to punish the "fixed group" of each class.

In the second class, a child care provider who is an employee, as opposed to an owner/operator, who disagrees with the Department's disqualification decision may file a civil lawsuit in district court.<sup>206</sup> Once an employer is notified that a childcare provider is disqualified, the childcare provider's employment must be terminated.<sup>207</sup> The review process of the Department's disqualification decision has onerous and vexatious consequences for employees as compared to an owner/operator or nonregistered home provider.

The legislative denial of an employee's right to appeal the Department's decision concerning disqualification is "unmistakable evidence of punitive intent." First, the employee, nonregistered home provider, and operator/owner are all similarly situated as it relates to providing child care. If good moral character and fitness to have responsibility for the safety and well being of children are the determining factors, it is difficult to justify a difference in treatment concerning appellate review. Neither the statute nor the rules provide a basis for the disparate treatment. Additionally, the employee who is adversely affected

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202. N.C. ADMIN. CODE tit. 10, r.3U.2704(e) (June 2000) (The Department delegates to the local purchasing agency the responsibility of denying payment to the nonregistered home provider for its services. It is clear that suspension of payment by the local purchasing agency is not mandatory).

203. N.C. GEN. STAT. § 108A-79(c) (1999).

204. N.C. GEN. STAT. § 108A-79(g) (1999).

205. N.C. GEN. STAT. § 108A-79(k) (1999). (Providing that "[a]ny applicant or recipient who is dissatisfied with the final decision of the Department may file, within 30 days of the receipt of notice of such decision, a petition for judicial review in **superior** court of the county from which the case arose."). There is an apparent conflict between the statute and the rule. The statute requires filing in superior court, whereas the rule indicates the nonregistered home provider may file a civil action in district court. See N.C. Admin. Code tit. 10, r. 3U.2704(i) (June 2000). The legislative intent would apparently be to have all appellate [judicial] review heard in district court. This view is consistent with section 110-90.2, and the commission rules promulgated to carry out the intent of the statute. See *Peoples Bank v. Loven*, 90 S.E. 948 (N.C. 1916).

206. N.C. GEN. STAT. § 110-90.2(c), (d) (1999). See also, N.C. ADMIN. CODE tit. 10, r.3U.2704(i) (June 2000).

207. N.C. ADMIN. CODE tit. 10, r. 3U.2702(g) (June 2000).

is the subject of the Department's action and is an obvious party, who is entitled to administrative and judicial review.<sup>208</sup> However, the legislature has determined that if this "fixed class" is to review the Department's decision, it must initiate a civil lawsuit in district court.<sup>209</sup> There is a significant difference in appealing a judgment believed rendered in error and initiating a civil lawsuit to vindicate a right believed to be unjustly denied.

The employee suffers the most onerous impact of the three classes because it is only this class of child care providers that must be immediately terminated upon receipt by the employer of notice of disqualification.<sup>210</sup> Arguably, the employee will need to retain counsel to prosecute the civil suit on her behalf. A civil action necessarily will include drafting pleadings and the summons, submitting interrogatories, preparing a request for production of documents, and taking depositions.

It is axiomatic that the employee is in the least favorable position financially to afford counsel fees when considered with the operator/owner and nonregistered home provider. Additionally, the normal delay of six to twelve months, or more, in having the matter heard before a district court judge evinces a legislative intent to exclude employees convicted of crimes from serving as child care providers.<sup>211</sup> As a practical matter, a child care facility is loathe to rehire someone who was previously administratively discharged at the behest of the same Department that has the power to issue or deny the means of its livelihood, that is, the issuance of the license for the child care facility.

Another factor indicative of "unmistakable evidence of punitive intent" to punish the employee is the statutory provision denying to the employee a copy of the criminal record forming the basis of her disqualification.<sup>212</sup> Rhetorically, how does one prepare a civil suit alleging maltreatment without knowing the basis of the Department's

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208. BERNARD SCHWARTZ, ADMINISTRATIVE LAW § 6.1, at 272-73 (2nd. ed. 1984) (Further providing that the individual who suffers the adverse effect of agency action should have the "right to appear both at the administrative and judicial levels." A current trend in administrative law is opening agency proceedings to greater public participation. "The law starts with the individual who may be called the *obvious party* . . . [t]he individual ordered to do or not do specific things, the applicant for a license or other grant . . .").

209. N.C. ADMIN. CODE tit. 10, r.3U.2704(i) (June 2000).

210. N.C. ADMIN. CODE tit. 10, r.3U.2702(g) (June 2000).

211. In *Goldberg v. Kelly*, 397 U.S. 254 (1970), the Court, discussing the necessity of providing welfare recipients a pre-termination evidentiary hearing to guard against erroneous termination, stated that "the crucial factor in this context . . . is that termination of aid pending resolution of a controversy over eligibility may deprive an eligible recipient of the very means by which to live while he waits." *Id.* at 264.

212. N. C. Gen. Stat. § 110-90.2(d) (1999). ("The Department *shall not release nor disclose any portion of the child care provider's criminal history to the child care provider or the child care provider's employer or local purchasing agency.*") (emphasis added).



disqualifying decision? Chief Justice Burger speaking for the Court in *Selective Service Systems v. Minnesota Public Research Group*,<sup>213</sup> surmised that "Congress reasonably concluded that [The Military Selective Service Act], 50 U.S.C. § 12(f) would be a strong tonic to many nonregistrants."<sup>214</sup>

The legislature here enacted section 110-90.2, which is a strong dose of hemlock for child care providers with employee status and a prior conviction. Therefore, the retroactive application to convictions of a relevant crime prior to January 1, 1996, constitutes a bill of attainder. The restrictions do fall within the historical meaning of legislative punishment (disbarment of employment), they do not further nonpunitive purposes, and there is unmistakable evidence of legislative intent to punish.

## V. DUE PROCESS AND EQUAL PROTECTION ANALYSIS

### A. Due Process Analysis

This section examines the substantive due process issues concerning section 110-90.2's criminal record check procedure as arbitrary and unreasonable. First, a review will be conducted of two regulations: (1) the rule permitting a child care provider to work as a conditional employee where the local record check indicates a conviction for which she could be disqualified; and (2) the rule expanding the definition of a child care provider to include those who, arguably, do not have contact with children. Second, an analysis will be conducted of the statute requiring submission of information necessary to conduct the record check under the penalty of perjury, and the prospect of a criminal conviction for providing false information. Additionally, an analysis will be conducted of procedural due process issues concerning the care provider's right to appellate review of the Department's decision in determining qualification and fitness.

#### 1. Substantive Due Process

Substantive Due Process considerations relate to a statute, its regulations, or a statute in combination with its regulations.<sup>215</sup> The same

213. *Selective Service Systems v. Minnesota Public Research Group*, 468 U.S. 841 (1984).

214. *Id.* at 854.

215. See Erica Grubb, *Day-Care Regulation: Legal and Policy Issues*, 25 SANTA CLARA L.REV. 301, 351 n.239 (1985). ("Substantive requirements are the standards and criteria which day-care facilities must satisfy in order to be allowed to operate-such as adult/child ratios, sanitation requirements, fire safety precautions, fingerprinting of teachers, etc. They differ from the procedural requirements of day-care regulation (also subject to due process scrutiny), which involves such things as appeals from agency decision, complaint procedure for parents, and the manner in which agencies must formulate their standards."). See, also, *Florida Public Employees Council 79 v. Department of Children and Families and Jeb Bush*, 745 So.2d 487, 491 (1999)

analytical approach generally applies to statutes, regulations, or a combination of statutes and regulations. In each instance the concern is whether the statute or regulation is arbitrary or unreasonable.<sup>216</sup> A court engaged in substantive due process review of a statutory challenge will evaluate the government's "ability to restrict freedom of action regarding life, liberty, or property."<sup>217</sup> The statute is presumed to be constitutional, and only the clearest proof of arbitrariness or unreasonableness will result in violation of substantive due process.<sup>218</sup>

However, an alternate legal theory applies to a challenged regulation. This legal theory prohibits a regulation from exceeding the authority granted by legislative delegation.<sup>219</sup> During judicial review of a regulation, the court will ascertain whether the regulation or rule promulgated pursuant to the statute is within the authority conferred.<sup>220</sup> If the rule or regulation exceeds the statutory grant of authority, it is *ultra vires*. The initial determination is whether the regulation or rule passes the *ultra vires* test.<sup>221</sup> Following a determination that the rule is not *ultra vires*, the court will determine whether the rule is reasonable, and not arbitrary.<sup>222</sup> Otherwise, the regulation or rule will be deemed inconsistent with the statutory purpose, and invalidated.<sup>223</sup>

#### a. Ultra Vires Rule or Regulation?

Pursuant to the statutory scheme of which section 110-90.2 is a part, the Commission is given the power to adopt rules and develop policies for the implementation of Article 7 of the general statutes.<sup>224</sup> The Secretary of the Department of Health and Human Services is em-

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(appellants challenged the dismissal with prejudice by circuit court of their complaint challenging constitutionality of record check statute as applied to incumbent employees by Department of Children and Families. The court stated that "three types of constitutional challenges may be raised with regard to the administrative decision-making process of an executive agency . . . (1) the facial constitutionality of a statute authorizing an agency action, (2) the facial constitutionality of an agency rule adopted to implement a constitutional provision or a statute, or (3) the unconstitutionality of the agency's action in implementing a constitutional statute or rule." *Id.* The court held that appellants were entitled to bring a declaratory judgment action alleging a facial challenge to the constitutionality of statutory employment screening requirements, but remainder of complaint was properly dismissed for failure to exhaust administrative remedies).

216. Grubb, *supra* note 215, at 352.

217. Nowak, John E. & Rotunda, Ronald D., *Constitutional Law*, § 11.4 at 369 (4th ed. 1991).

218. See *Flemming v. Nestor*, 363 U.S. 603, 617 (1960).

219. SCHWARTZ, *supra* note 208, § 4.4 at 153. See, also, Grubb, *supra* note 215, at 352.

220. SCHWARTZ, *supra* note 208, § 4.4 at 153.

221. *Citizens to Save Spencer County v. EPA*, 600 F.2d 844, 873 (D.C. Cir. 1979).

222. *In re Permanent Surface Mining Reg. Litig.*, 653 F.2d 514, 523 (D.C. Cir. 1981), *cert. denied*, 454 U.S. 822 (1981).

223. *Manhattan General Equip. Co. v. Commissioner*, 297 U.S. 129, 134 (1936).

224. N.C. GEN. STAT. § 110-88(5) (1999).

powered to carry out the policies and rules of the Commission.<sup>225</sup> The rule allowing a child care provider convicted of a crime, including but not limited to those specified in section 110-90.2, is promulgated by the Commission, and is carried out by the Division under the direction of the Secretary.<sup>226</sup> The pertinent question is whether the rule promulgated by the Commission and carried out by the Division is *ultra vires*, that is, whether the rule is arbitrary, unreasonable, or inconsistent with the purpose of the statute.

The purpose of the statute is to protect children in child care facilities by providing a physically safe and healthy environment where children are cared for by persons of good moral character.<sup>227</sup> Persons excluded by statute are those who have been convicted of a crime involving child neglect, child abuse, or moral turpitude, or suffer other conditions inimical to the health and well-being of children.<sup>228</sup> The statute proscribes the employment of certain individuals, and where an individual has been convicted of a crime barred by the statute, the Commission or the Division does not have the authority to grant conditional employment.<sup>229</sup> Ostensibly, in some instances the Division will not know of the disqualifying conviction prior to receipt of the state or national record check. However, where the local record check reveals a conviction excluded by statute, the administrative rule is difficult to reconcile with the statutory restriction.<sup>230</sup> This rule exceeds the scope of delegated authority, and is contrary to the express language of the statute, rendering it *ultra vires*.<sup>231</sup> Thus, this rule is invalid because it is inconsistent with, and not reasonably related to the purpose of the statute.<sup>232</sup>

Section 110-90.2(2)(a) defines "child care provider" as a person "who is employed by a child care facility . . . and has *contact* with the children . . . ." <sup>233</sup>(emphasis added). In complete derogation of the statute, the Department seeks to redefine "child care provider" through the promulgation of an Administrative Code rule.<sup>234</sup> The De-

225. N.C. GEN. STAT. § 110-90(5) (1999).

226. See N. C. ADMIN. CODE tit. 10, r. 3U.2702(a) (June 2000).

227. N.C. GEN. STAT. § 110-85(1) (1999).

228. N.C. GEN. STAT. § 110-91(8) (1999). See generally, *Atkins v. Department of Social Services*, 284 N.W.2d 794 (Mich. Ct. App. 1979) (affirming denial of renewal of license where appellant had history of heroin addiction, continued to use drugs, and did not have the character to assure the welfare of day care children).

229. *Id.*

230. See *supra*, note 46. See also, *Atkins*, 284 N.W.2d 794 (Mich. Ct. App. 1979).

231. SCHWARTZ, *supra* note 208, § 4.4 at 153-54. ("Agency power to make rules extends no further than the authority given by the relevant statutory delegation," and the *ultra vires* test "[i]nsures that the agency has not exceeded the power delegated by the legislature").

232. *Id.*

233. N.C. GEN. STAT. § 110-90.2(a)(2)(a) (1999).

234. N.C. ADMIN. CODE tit. 10, r. 3U.0102(6) (June 2000).

partment exceeded the scope of its statutory authority by expanding the definition of child care provider to include employees arguably not intended by the legislature. The statute's definition of child care provider is very specific, including employees, owners and operators, and children over 15 years of age who are members of the household in a family care home and are present when children are in care. The statutorily imposed limitation applies to employees who have *contact* with children. The Department's definition, however, includes employees who normally do not have contact with children, such as maintenance personnel and cooks, without regard to whether this group of employees has contact with children. The Department's attempt to redefine a "child care provider" is *ultra vires*, inconsistent with the purpose of the statute, and thus invalid.<sup>235</sup>

#### b. Statute Arbitrary and Unreasonable?

North Carolina General Statute § 110-90.2(c) provides that "any child care provider who intentionally falsifies any information required to be furnished to conduct the criminal history shall be guilty of a class 2 misdemeanor."<sup>236</sup> The statute also provides that "refusal to consent to a criminal history check is grounds for the Department to prohibit the child care provider from providing child care."<sup>237</sup> Consequently, the statute provides an incentive for all persons who desire to be employed as a child care provider to provide truthful information for the criminal history check.

The Department promulgated a rule applicable to those individuals previously convicted of a criminal offense other than a minor traffic violation. Pursuant to the Department's rule, one must sign a statement subject to a penalty of perjury.<sup>238</sup> Perjury is a crime codified by statute in North Carolina, and is punishable as a Class F felony.<sup>239</sup> The punishment exposure for providing false information if previously convicted of a crime far exceeds the statutorily prescribed punishment for giving false information generally.<sup>240</sup> Arguably, the Department exceeds its authority by promulgating a rule increasing punishment prescribed by statute. The rule is *ultra vires*, inconsistent with legisla-

235. See *Atkins v. Dept. of Social Services*, 284 N.W.2d 794, 800 (Mich. Ct. App. 1979) (tension between administrative rule extending departments inquiry to character of all persons living in family day care home, where statute limits promulgation of administrative rules to consideration of only those persons who are directly responsible for the children). See also, SCHWARTZ, *supra* note 208, § 4.4 at 154.

236. N.C. GEN. STAT. § 110-90.2(c) (1999).

237. *Id.*

238. N.C. ADMIN. CODE tit. 10, r. 3U.2702(b) (June 2000).

239. N.C. GEN. STAT. § 14-209 (1999).

240. N.C. GEN. STAT. § 15A-1340.17(c) (1999).

tive intent, and is invalid.<sup>241</sup> Moreover, the rule is arbitrary and unreasonable, because it singles out for harsher treatment prospective child care providers previously convicted of a crime.<sup>242</sup>

The United States Supreme Court has consistently applied the rational basis test in the area of economic and social welfare legislation, conferring a presumption of constitutionality and requiring merely that a challenged statute bear a rational relationship to a legitimate state interest.<sup>243</sup> In *Lopez v. McMahon*, a California appeals court stated that “the cardinal principle of substantive due process is that a law which deprives a person of life, liberty or property must not be the product of arbitrary legislative judgment. Such a law must be reasonably related to the object sought to be obtained by its enactment.”<sup>244</sup>

The legislative judgment to enact a statute requiring that all prospective child care providers provide information utilized in checking their criminal history furthers the State’s legitimate interest in protecting children in child care facilities. The legislation represents a sound policy determination rationally related to the objective of averting potential harm to day care children by providing a physically safe and healthy environment where children are cared for by persons of good moral character.<sup>245</sup> However, to impose a criminal penalty for providing false information is problematic.

The poignant issue here is not whether the legislature has authority to enact the statute, but whether the methods it or the Department has chosen in so doing is arbitrary or unreasonable so as to offend constitutional guarantees of individual rights.<sup>246</sup> The Fourteenth Amendment to the United States Constitution prohibits a state from denying “any person of life, liberty, or property, without due process of law.”<sup>247</sup> The Law of the Land clause provides “no person shall be . . . deprived of his life, liberty, or property but by the law of the land.”<sup>248</sup> For purposes of this analysis, we posit that the provisions of section 110-90.2 implicate a liberty interest sufficient to invoke due

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241. See *supra* notes 231-235, and accompanying text.

242. *Mourning v. Family Publications Serv.*, 411 U.S. 356, 369 (1973).

243. *Dandridge v. Williams*, 397 U.S. 471 (1970).

244. *Lopez v. McMahon*, 205 Cal. App. 3d 1510, 1518 (1988) (denying a constitutional challenge to the code section of California Child Day Care Facilities Act, which automatically denies a license to operate a day care facility to an applicant residing with an adult convicted of a violent felony).

245. *Id.* at 1519. See also, *supra* notes 1 and 239, and accompanying text.

246. See generally, *Selective Service System v. Minnesota Public Interest Research Group*, 468 U.S. 841 (1984) (Marshall, J., dissenting).

247. U.S. CONST. amend. XIV § 1.

248. N.C. CONST. Art. I, § 19. See also, *Hewitt v. Helms*, 459 U.S. 460, 466 (1983) (Due Process Clause protects liberty interest created under state law in addition to federal liberty interest).

process protection under federal and state law.<sup>249</sup> Once disqualified, a child care provider is presumptively barred for life from working in child care. In situations where one is deprived not only of present employment and future opportunity for employment, but a stigma is imposed, foreclosing the opportunity for future employment, the courts have found a liberty interest protected by the Due Process Clause.<sup>250</sup>

To determine whether a substantive right protected by the Due Process Clause has been violated, it is necessary to balance the liberty interest at issue against the state's asserted reasons for restraining that interest.<sup>251</sup> The child care provider's interest here is to remain employed or employable, and not be permanently disqualified from working in her chosen profession. The state's interest is for the child care provider to provide truthful information regarding any prior conviction other than a minor traffic violation. Arguably, the State's interest, ultimately, is to protect children in child care facilities.

The statutory provision requiring prospective child care providers to provide information used in the criminal record check does not violate substantive due process. In *Henry v. Earhart*<sup>252</sup>, plaintiffs appealed on substantive due process grounds the denial of a permanent injunction challenging the application of a Employment Background and Criminal Record Checks statute as a class of employees of private nursery schools and other preschool education programs who are subject to regulations promulgated by defendant.<sup>253</sup> Two of plaintiffs' contentions were that the regulations violated their due process rights by imposing a presumption of guilt on the disqualified, and that the regulations invaded their right to privacy by making the criminal records and fingerprints available to the commissioner of education. The court denied each of these contentions, finding that gathering the information for the criminal record checks "merely require, as part of the licensing or employment process, certain background information

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249. *Board of Regents v. Roth*, 408 U.S. 564, 572 (1972) (The term liberty as guaranteed by the Fourteenth Amendment has not been defined by the Court with exactness. However, liberty denotes more than merely freedom from bodily restraint, but also the right of the individual to contract, and to engage in any of the common occupations of life) (emphasis added). See also, *Petition of Preisendorfer*, 719 A.2d 590, 592 (N.H. 1998) (Petitioner alleged to have abused children challenged decision of Division for Children, Youth and Families to enter his name into central registry based on allegations of child abuse which would essentially bar him from working with children and cause him to be unemployed and unemployable in his profession. His interest in his profession was a protected liberty interest).

250. *Roth*, 408 U.S. at 574. See also, *Petition of Preisendorfer*, 719 A.2d 590, 592 (N.H. 1998); *Lee TT v. Dowling*, 664 N.E.2d 1243, 1250 (N.Y. 1996).

251. *Youngberg v. Romeo*, 457 U.S. 307, 320 (1982); *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting).

252. *Henry v. Earhart*, 553 A.2d 124 (R.I. 1989).

253. *Id.*

to ensure the safety of the children to be cared for.”<sup>254</sup> On balance, the equities here arguably weigh in favor of the state.

Unlike no other similar state statute, section 110-90.2 imposes a criminal penalty for providing false information. The specter of punishment by criminal prosecution raises issues not addressed by statute or the Department’s rule under the Fifth Amendment: no provision for Miranda warnings, and the use of any statement given as self incriminating evidence; Sixth Amendments right to counsel during the criminal prosecution; the question of who will prefer the charges on behalf of the Department, and what process will issue; matters of proof where the statement was not given under oath or affirmation, or in a judicial proceeding as required to prove perjury. Stated differently, “the primary restrictions on the criminal process are the result of the application of the principles of the Bill of Rights. The guarantees of the fourth, fifth, sixth, and eight amendments restrict the ways in which the government may investigate as well as prosecute someone for a criminal charge.”<sup>255</sup> The aforementioned amendments encompass specific requirements:

(1) respect for individual rights to privacy and freedom from self-incrimination in the investigative process; (2) that the person not twice be placed in jeopardy for the same offense; (3) prompt processing of the charges; (4) that the trial of the charges be public; (5) that the charges be tried before an impartial jury; (6) fair notice of the charges and a chance to prepare a defense; (7) the right to confront and cross-examine witnesses; (8) compulsory process to obtain favorable witnesses and evidence (9) the assistance of counsel; (10) that excessive bail not be used to keep the individual in custody prior to the termination of the prosecution; (11) that the punishment not be excessive or cruel.<sup>256</sup>

This provision is fraught with legal issues not addressed by the statute or Department rule.

The information provided is not utilized in the qualification determination process, as the Department does not render a decision concerning qualification until the record check process is complete.<sup>257</sup> Therefore, the statutory provision and Department’s rule impose restrictions on liberty that are not reasonably related to a legitimate state objective and are tantamount to punishment.<sup>258</sup> Moreover, the

254. *Id.* at 128.

255. NOWAK AND ROTUNDA, *supra* note 217, § 13.9, at 534.

256. *Id.* at 535

257. See N.C. ADMIN. CODE tit. 10, r. 3U.2702(c). (“The Division shall notify the child care provider in writing of the determination by the Division of the individual’s fitness to have responsibility for the safety and well-being of children *based on the criminal history.*”) (emphasis added).

258. *Youngberg v. Romeo*, 457 U.S. 307, 320 (1982).

state's interest in receiving truthful information could be as effectively served by admonishing prospective child care providers that provide false information will result in immediate disqualification and termination of employment. On balance, the equities here arguably weigh in favor of the individual.

## 2. Procedural Due Process

"The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property. When protected interests are implicated, the right to some kind of prior hearing is paramount."<sup>259</sup> It was determined in substantive due process discussion that the child care providers have a liberty interest protected by the Due Process Clause.<sup>260</sup> The legislature has sought to protect that interest by providing that a child care provider, who is not satisfied with the Department's decision, may file a civil suit in district court within sixty days of receiving notice of disqualification.<sup>261</sup>

The question is whether the post disqualification procedure, filing a civil law suit, afforded by the legislature is sufficient or proper under the circumstances. A court must utilize the *Mathews v. Eldridge*<sup>262</sup> three factors balancing test to resolve this question:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedure used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requisite would entail.<sup>263</sup>

### a. *Mathews v. Eldridge*, First Prong Analysis

During consideration of the first prong of the analysis, the court in *Petition of Preisendorfer*, held that "an individual right to work within

259. *Board of Regents of State College v. Roth*, 408 U.S. 564, 569-70 (1972).

260. *See* *Petition of Preisendorfer*, 719 A.2d 590 (N.H. 1998).

261. N.C. GEN. STAT. § 110-90.2(d) (1999). Additionally, N.C. ADMIN. CODE tit. 10, r.3U.2704(i), applicable to nonregistered home providers, indicates that "if a nonregistered home provider disagrees with the decision of disqualification and files a civil action in district court, the provider may continue to operate but shall not receive payment during the proceedings." *But see*, N.C. ADMIN. CODE tit. 10, r. 46G.0215 (June 2000) (granting the nonregistered day care home providers a right to appeal following procedures for grant-in-aid programs pursuant to section 108A-79).

262. *Mathews v. Eldridge*, 424 U.S. 319 (1976).

263. *Id.* at 335. *See also*, NOWAK AND ROTUNDA, *supra* note 217, § 13.8, at 531 (stating that "all courts must now employ the *Mathews v. Eldridge* balancing test to determine the type of procedures that are required by due process when a governmental action would deprive an individual of a constitutionally protected liberty or property interest.").



one's profession is a 'privilege of fundamental significance.'"<sup>264</sup> In *Boddie v. Connecticut*, the Court held that prior to a person being deprived of a protected property or liberty interest, "he must be afforded opportunity for some kind of hearing, except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event."<sup>265</sup> Notwithstanding any controversy concerning what is due process, the United States Supreme Court has held "it is fundamental that except in emergency situations (and this is not one) due process requires that when a State seeks to terminate (a protected) interest. . . , it must afford 'notice and opportunity for hearing appropriate to the nature of the case' before the termination becomes effective."<sup>266</sup> The last two prongs of the analysis address the risk of error and the state interest, and any attendant fiscal and administrative burdens.

#### b. Mathews v. Eldridge, Second Prong Analysis

The risk of erroneous deprivation of the protected interest through the procedures used places the brunt, if not the entire risk of error, on the disqualified child care provider. Arguably, the Department has unbridled discretion to qualify or disqualify a child care provider notwithstanding the nature of the conviction, except as provided by section 110-91(8).<sup>267</sup> It is significant that neither the statute nor the Departmental rule provides a minimum standard of proof before disqualification. Minimum due process requires an identifiable standard of proof that reflects not only the weight of the individual and state's interests, but also ensures objective and consistent consideration of the competing interests.<sup>268</sup>

However, the Department rule provides that "determination by the Division that the prospective child day care provider is disqualified is *reasonable cause* to deny issuance of a permit."<sup>269</sup> Reasonable cause<sup>270</sup> and probable cause<sup>271</sup> are synonymous terms and may be used interchangeably. To the extent that the Department utilized the

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264. *Petition of Preisendorfer*, 719 A.2d 590, 593 (N.H. 1998); *see also*, *Lee TT v. Dowling*, 664 N.E.2d 1243, 1250 (N.Y. 1996) (an individual's interest in continuing his employment is substantial).

265. *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971).

266. *Bell v. Burson*, 402 U.S. 535, 542 (1971).

267. N.C. GEN. STAT. § 110-91(8) (1999).

268. *Santosky v. Kramer*, 455 U.S. 745, 754 (1982) (standing for the proposition that due process, at a minimum, requires the adoption of a standard of proof that reflects the weight of the private and public interest affected).

269. N.C. ADMIN. CODE tit. 10, r. 3U.2702(f) (June 2000).

270. BLACK'S LAW DICTIONARY 1138 (5th ed. 1991) (defining reasonable cause as the "basis for arrest without a warrant, is such state of facts as would lead man of ordinary care and prudence to believe and conscientiously entertain honest and strong suspicion that person sought to be arrested is guilty of crime.").

"reasonable cause" standard to disqualify one convicted of a crime as a child care provider, the probable cause standard was expressly rejected as the proper standard, in favor of "by preponderance of evidence," standard as used by the New Hampshire Supreme Court in *Petition of Preisendorfer*.<sup>272</sup> In *Preisendorfer*, the court stated that "the probable cause standard of proof falls between suspicion and preponderance of the evidence, where proof by preponderance 'means that evidence, taken as a whole, shows that [the] fact or cause shown to be proven is more probable than not.'"<sup>273</sup> The probable cause standard may be utilized to allow officials to take emergency action. "It is not justified, however, when it results in a 'permanent denial of the right to employment in the childcare field without any consideration of the accuracy of the fact finding process.'"<sup>274</sup>

The procedure currently provides that the child care provider with a record of a potentially disqualifying conviction **may** submit additional information concerning the conviction that **could** be used, and the Department **may** consider other relevant information.<sup>275</sup> Moreover, a child care provider who is terminated and files a civil action in district court is unemployed during the litigation process. More importantly, even if the child care provider wins the civil suit, there is no adequate remedy, because her position will have been filled; the child care facility is not obligated to pay back wages; and the child care facility and Department, arguably are granted immunity by statute.<sup>276</sup>

### c. Mathews v. Eldridge, Third Prong Analysis

The governmental interests include protecting children, and avoiding the increased administrative and fiscal burdens which result from increased procedural requirements. These interests have been recognized as significant by other jurisdictions.<sup>277</sup> The fiscal and administrative burdens that a hearing would impose prior to disqualification and/or termination is minimal as compared to engaging the full blown litigation process of a trial in district court for each person disqualified

271. BLACK'S LAW DICTIONARY 1081 (5th ed. 1991) (defining probable cause as "[r]easonable cause; having more evidence for than against. A reasonable ground for belief in the existence of facts warranting the proceedings complained of . . .").

272. See *Petition of Preisendorfer*, 719 A.2d 590, 593 (N.H. 1998).

273. *Id.* at 593 (citing *State v. 77,014.00 Dollars*, 607 So.2d 576, 581-82 (La. Ct. App. 1992).

274. *Id.* (citing *Dietz v. Damas*, 948 F.Supp. 198, 209 n. 18 (E.D.N.Y. 1996)).

275. N.C. ADMIN. CODE tit. 10, r.3U.2702(b) (June 2000).

276. See N.C. GEN. STAT. 110-90.2(f) (1999) (providing that "[t]here shall be no liability for negligence on the part of an employer of a child care provider, an owner or operator of a child care facility, a State or local agency, or employees of a State or local agency, arising from any action taken or omission by any of them in carrying out the provisions of this section . . .").

277. See *Petition of Preisendorfer*, 719 A.2d 590, 593 (1998); *Lee TT v. Dowling*, 664 N.E.2d 1243, 1251 (N.Y. 1996); *Cavarretta v. DCFS*, 660 N.E.2d 250, 258 (Ill. App. Ct. 1996).

and terminated from employment. The risk of harm to children is not appreciably greater because the child care provider has been allowed to be employed as a conditional employee pending receipt of the criminal record check.<sup>278</sup> This is the case even where the local record check indicates a potentially disqualifying conviction.

### B. *Equal Protection Analysis*

The Equal Protection Clause, pursuant to the Fourteenth Amendment, provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws."<sup>279</sup> The Equal Protection Clause has not been interpreted to require that all persons be treated alike, but more a "direction that all persons *similarly situated* should be treated alike."<sup>280</sup> (Emphasis added) For purposes of this paper, the analysis will be limited in two respects: (1) a comparison of the statute's and Department's treatment of child care providers who are employees with their treatment of child care providers who are owners or operators, including nonregistered day care home and nonregistered home providers; and (2) a comparison of section 110-90.2's consideration of a conviction by a child care provider with the statutory consideration of other individuals with convictions providing services to other vulnerable persons.

As child care providers, owners, operators, and employees of a child care facility are similarly situated pursuant to *Cleburne Living Center*.<sup>281</sup> The disparate treatment of these different classes of child care providers is found in the right to appeal the Department's decision, and the application of the Administrative Procedure Act to operators.<sup>282</sup> Similarly, a nonregistered home provider who disagrees with a Department's decision and files a civil action in district court may continue to operate but shall not receive payment during the litigation proceedings.<sup>283</sup> Additionally, any nonregistered day care home who appeals a decision by the local purchasing agency, where the Department authorizes the local purchasing agency to make the decision, shall follow the appeals procedure for grant-in-aid programs pursuant to section 108A-79.<sup>284</sup> Thus, it would appear that child care providers who are owners/operators have a right to appeal, either pursuant to the Administrative Procedure Act or section 108A-79, while the re-

278. See N.C. ADMIN. CODE tit. 10, r.3U.2702(d) (June 2000).

279. U.S. CONST. amend. XIV § 1.

280. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439 (1985).

281. *Id.*

282. N.C. GEN. STAT. § 110-94 (1999).

283. N.C. ADMIN. CODE tit. 10, r. 3U.2704(i) (June 2000).

284. N.C. ADMIN. CODE tit. 10, r. 46G.0215 (June 2000).

course for child care providers who are employees is to file a civil action in district court.

The classification here is owner, operator or employee child care provider. The classification does not involve a suspect class or quasi-suspect class; therefore, heightened scrutiny does not apply.<sup>285</sup> The distinctions here need only be rationally related to a legitimate State interest.<sup>286</sup> The legislature could have rationally concluded that an owner or operator, because of her economic investment, is deserving of an appeals process that does not require an immediate loss of income or the resources necessary to prosecute a civil law suit in district court.

A comparison of investigation requirements and use of criminal records checks, where care is rendered to children, the elderly, mental health patients, the sick and the disabled, and a criminal record check and the investigation requirements pursuant to section 110-90.2 show a disparate treatment of child care providers.<sup>287</sup> For individuals other than child care providers, if an applicant's criminal record check reveals a conviction, the conviction shall not automatically prohibit employment. The following factors *SHALL* be considered by the Department or Office determining whether employment **shall** be denied:

- (1) The level and seriousness of the crime;
- (2) The date of the crime;
- (3) The age of the person at the time of the conviction;
- (4) The circumstances surrounding the commission of the crime, if known;
- (5) The nexus between the criminal conduct of the person and job duties of the person;
- (6) The prison, jail, probation, parole, rehabilitation, and employment records of the person since the date the crime was committed; and
- (7) The subsequent commission by the person of a crime listed in subsection (a) of this section.<sup>288</sup>

A child care provider previously convicted of a crime pursuant to G.S. 110-90.2 and rules promulgated pursuant to the statute **may** submit additional information which the Department **could** consider in making a decision.<sup>289</sup> The burden is on the child care provider to submit the information. The Department has discretion to consider or not consider the information submitted. Pursuant to other vulnerable person statutes, the same information **shall** be obtained, whether submitted by the applicant or obtained by other means. Further, the Di-

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285. See *Chapman v. United States*, 500 U.S. 453, 465 (1991).

286. *Id.*

287. See *generally*, N.C. GEN. STAT. § 114-19.3 (1999).

288. N.C. GEN. STAT. § 114-19.6(d) (1999).

289. See N.C. ADMIN. CODE tit. 10, r. 3U.2702(c) (June 2000).

vision **may** consider the information, unlike pursuant to section 114-19.6, where the Department or Office **shall** consider the information.<sup>290</sup> Applying the rational basis test, the statute arguably will be held constitutional and not violative of the Equal Protection Clause. However, care providers who are subject to a criminal record check and are considered for employment pursuant to section 110-90.2 are treated differently than other care providers similarly situated.

## VI. CONCLUSION

The North Carolina General Assembly was correct in enacting legislation requiring a criminal history check for all child care providers. However, as I have argued in this Article, the statute provides little protection for children. Moreover, the protection, to the extent that such protection is provided, is virtually invisible. The number of children substantiated as abused or neglected in this state has remained relatively constant for the years 1994/1995 through 1999/2000, which is the last year data is available. Annually, of the more than one hundred thousand allegations of abuse and neglect, approximately thirty thousand are substantiated. This is indeed a disturbing statistic. Furthermore, it is axiomatic that the criminal record check statute fails to address approximately 98.5% of the child abuse or neglect occurring in this state.

Since more than ninety percent of the children abused or neglected suffer maltreatment at the hand of someone other than a child care provider in a day care facility, the lack of a Central Registry search requirement renders the statute's protection of children from maltreatment very much like the Emperor's Clothes-invisible. Use of the Central Registry information would alert the Department and Social Services Agencies in each county of situations potentially dangerous to children. Additionally, where the local record check indicates a disqualifying conviction, the prospective child care provider should be deemed qualified by the Department before being allowed to provide child care in a facility. I would recommend that the time to complete the record check procedure be shortened to two weeks. Children are our most cherished and important resource, and we should endeavor to protect, nourish and provide a safe and healthy environment for each child.

An equally important consideration is protection of the individual rights of each citizen. Those individuals found to be dangerous to children by competent evidence prior to disqualification should not be permitted to have responsibility for their care. Conversely, a criminal

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290. N.C. GEN. STAT. § 114-19.6(d) (1999).

conviction which has no logical nexus to providing high quality child care should not disqualify an individual who has chosen child care as his or her avocation. As a practical matter, an act of youthful indiscretion or an exercise of poor judgment on one occasion should not serve as a permanent bar to employment as child care provider. If it is to be the viable statute the legislature intended, section 110-90.2 must, unlike the Emperor's New Clothes, in fact clothe and protect the child as well as adult citizens.