Constitutional Law

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CONSTITUTIONAL LAW

I. EQUAL PROTECTION—THE GUEST STATUTE

In *Ramey v. Ramey*, the South Carolina Supreme Court held the South Carolina Automobile Guest Statute unconstitutional as violative of the equal protection clauses of the South Carolina and United States Constitutions. The guest statute provides that a nonpaying passenger injured in a motor vehicle collision may not bring a cause of action against the owner or operator of the vehicle "unless such accident shall have been intentional on the part of such owner or operator or caused by his reckless disregard of the rights of others." In *Ramey*, plaintiff sued her husband for injuries she sustained while a gratuitous passenger in his automobile. In his answer defendant denied that the collision resulted from intentional or reckless, willful, or wanton misconduct in the operation of his vehicle within the terms of the guest statute.

The lower court granted plaintiff's motion to strike the portion of defendant's answer that pertained to the guest statute, holding that the "statute was inherently unconstitutional because there was no rational justification for singling out persons injured in automobile accidents as different from all others in-

5. S.C. CODE ANN. § 15-1-290 (1976). This section provides:
   No person transported by an owner or operator of a motor vehicle as his guest without payment for such transportation shall have a cause of action for damages against such motor vehicle or its owner or operator for injury, death or loss in case of an accident unless such accident shall have been intentional on the part of such owner or operator or caused by his heedlessness or his reckless disregard of the rights of others.
   This section shall not relieve a public carrier or any owner or operator of a motor vehicle which is being demonstrated to a prospective purchaser of responsibility for any injuries sustained by a passenger while being transported by such public carrier or while such motor vehicle is being so demonstrated.
6. ___ S.C. at ___, 258 S.E.2d at 883.
7. Id.
jured in negligent torts . . . ." 8 The sole question on appeal was whether the guest statute was inherently unconstitutional as violative of the equal protection clauses of the South Carolina and United States Constitutions. The South Carolina Supreme Court concluded that it was.

The common law imposed on automobile owners and drivers a duty of ordinary or reasonable care toward nonpaying passengers. 9 Since 1927, 10 however, twenty-seven states 11 have enacted guest statutes that substantially alter this common-law duty. Under these statutes a nonpaying passenger can recover from his driver host only upon a showing "of some form of aggravated misconduct." 12 Even though the statutory language differs among jurisdictions, the purposes underlying each guest statute are the same: "(1) the protection of host drivers from suits by ungrateful guests; . . . (2) the elimination of collusive lawsuits," 13 and the minimization of automobile liability insurance rates. 14

With the advent of widespread automobile liability insurance, however, academic and judicial forums increasingly have criticized guest statutes. Both have begun to question seriously whether the guest statutes actually promote the underlying legislative purposes. 15 Prior to 1973, however, there was only one

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8. Id. (quoting Record at 10).
13. ___ S.C. at ___, 258 S.E.2d at 884. The appellant analogized "a gratuitous guest who sues his host . . . to the dog in the old proverb that bites the hand that feeds him." Brief of Appellant at 16.
successful constitutional challenge to a state guest statute; courts typically found the statutes to be within the legislature’s police power.17

In 1973, the California Supreme Court overturned that state’s guest statute on constitutional grounds in Brown v. Merlo.16 Since then, eight other states also have held their guest statutes invalid,19 but, in nearly the same time period, thirteen states have upheld their statutes against constitutional attack.20 Although Ramey was the first case to come before the South Carolina Supreme Court challenging the constitutionality of the state’s guest statute,21 the United States Supreme Court in the 1929 case of Silver v. Silver22 found an identical Connecticut statute23 to be constitutional.24 The South Carolina Supreme Court distinguished Silver from Ramey25 and held that the traditional justifications for the statute did not constitute “a rational basis for the differential treatment spawned by the statute.”26 The appropriate equal protection test set forth by the South

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17. See note 20 infra.
21. ___ S.C. at ___, 258 S.E.2d at 884 n.3.
22. 280 U.S. 117 (1929).
25. ___ S.C. at ___, 258 S.E.2d at 885.
26. Id.
Carolina Supreme Court in *Ramey*, is a minimum rationality standard, that requires merely that the classification be rationally related to the purpose of the statute.\(^{27}\) If a statute satisfies this test, then it must be upheld as a valid exercise of the legislature's authority. The test is the same as that used to strike down the automobile comparative negligence statute\(^{28}\) in *Marley v. Kirby*\(^{29}\).

Arguably, however, the court, failed to adhere to its own equal protection analysis in *Ramey*. First, the court found that the "protection of hospitality" argument has lost its force as justification for "differential treatment of automobile guests as distinguished from all other recipients of a host's generosity. Our compulsory insurance law, which requires every policy to afford uninsured motorist coverage to the insured, defeats the hospitality argument upon which most prior cases have relied."\(^{30}\) Although not explaining why such insurance coverage defeats the rationale, the court apparently concurs with the reasoning in *Brown v. Merlo*,\(^ {31}\) in which the California Supreme Court declared:

> First, if the characterization of an injured guest's lawsuit as an act of "ingratitude" ever had general validity, its rationality has been completely eroded by the development of almost universal automobile liability insurance coverage in recent years. . . . today with the widespread prevalence of insurance coverage, it is the insurance company, and not the generous host, that in the majority of instances wins protection under the guest statute. Thus, in a day in which nearly 85 percent of automobile drivers carry liability insurance, the statute can no longer sequester the defense that it is a necessary means to thwart "ungrateful" guests. In plain language, there is simply no notion of "ingratitude" in suing your host's insurer.\(^{32}\)

The opinion of the court in *Ramey*, however, failed to consider the possibility of a judgment in excess of the required liability insurance coverage. The difference between the judgment

\(^{27}\) Id.
\(^{30}\) __ S.C. at __, 258 S.E.2d at 885.
\(^{32}\) Id. at 868, 506 P.2d at 221, 106 Cal. Rptr. at 397 (footnotes omitted).
amount and the insurance coverage amount would fall on the driver or owner. The Georgia Supreme Court, addressed this issue in the recent case of *Bickford v. Nolen*, and noted additionally that the host risks cancellation of insurance or a substantial increase in premiums. It concluded that "[a]lthough these reasons may not be absolute they are strongly persuasive, and they do satisfy the test of equal protection. The classification of guest passenger bears a fair and substantial relation to a valid purpose of the rule." The Georgia court preferred to leave the "final determination of values" to the legislature. It is apparent, then, that the advent of compulsory insurance coverage has not totally dispensed with the hospitality rationale.

Secondly, the court found the "collusion prevention" rationale to be unpersuasive, declaring that "[a]lthough the guest statute may prevent some collusive suits between hosts and their passengers, the statute's overinclusiveness is devastating as it operates to bar the great majority of valid claims." The proper manner to "ferret out fraudulent actions," concluded the court, "is to impose existing civil law sanctions rather than to exclude an entire class of claims." Again, however, the court failed to satisfactorily explain the argument that it is reasonable to assume that "an injured guest and an agreeable host may be anxious to see compensation paid so long as the host does not have to pay it." The danger of collusion is especially clear when, as in *Ramey*, the host and the guest are husband and wife. In *Bickford*, the Georgia Supreme Court also addressed this issue stating: "Here again, we must defer to legislative judgment. That the rule may also bar some claims is not a sufficient ground to hold the guest passenger classification as violative of the equal protection clause."

Although its conclusion was expressed in terms of the minimum rationality standard, the South Carolina Supreme Court appeared to utilize a higher standard of scrutiny in its analysis.

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34. *Id.* at 257, 240 S.E.2d at 26-27.
35. *Id.* at 257, 240 S.E.2d at 27.
36. *Id.* at __, 258 S.E.2d at 884.
37. *Id.* at __, 258 S.E.2d at 885.
38. 240 Ga. at 257-58, 240 S.E.2d at 27.
39. *Id.* at 258, 240 S.E.2d at 27.
40. *Id.* at __, 258 S.E.2d at 883.
of Ramey. The policy of preventing collusive lawsuits, though perhaps not as strong a rationale as it once was, nevertheless, remains a valid objective of the statute.\textsuperscript{41} The court conceded that the statute served to prevent collusive lawsuits.\textsuperscript{42}

Under its enunciated standards, the court then should have determined only whether the prevention of collusion was rationally related to a classification based on the relationship of driver to nonpaying guest. If the two are reasonably connected, the court should defer to the judgment of the legislature. Instead, the court concluded that since the statute also prevented meritorious claims it was not "the proper way to ferret out fraudulent actions . . . . [W]e cannot accept the premise that the supposed prevention of collusive lawsuits may justify a statute which bars meritorious litigation."\textsuperscript{43} Arguably, in making this determination, the court went beyond the requirement of a reasonable relation and scrutinized the relative merits of the method chosen by the legislature as against other means of reaching the intended legislative objective.

The standard of review utilized by the court conflicts with the standard that is firmly established in this state. In \textit{University of South Carolina v. Mehlman},\textsuperscript{44} the court stated the rule for judicial review of state statutes as follows:

[I]t is a well settled rule in this State that a statute will, if possible, be construed so as to render it valid; that legislative Act will not be declared unconstitutional unless its repugnance to the Constitution is clear and beyond reasonable doubt; that every presumption will be made in favor of the constitutionality of a legislative enactment; that it will be declared unconstitutional only when its invalidity appears so clearly as to leave no room for reasonable doubt that it violates some provision of the Constitution; that all reasonable presumptions must be made in favor of the validity of the Act; and that the Constitution of South Carolina is a limitation upon, rather than a grant of, legislative power.\textsuperscript{45}

\textsuperscript{41} 240 Ga. at 258, 240 S.E.2d at 27.
\textsuperscript{42} ___ S.C. at ___, 258 S.E.2d at 883.
\textsuperscript{43} Id.
\textsuperscript{45} 245 S.C. at 185, 139 S.E.2d at 774.
In *State v. Smith*, the court declared that "[s]tate legislatures are presumed to have acted within their constitutional power despite the fact that in practice their laws result in some inequity. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." It is not clear on what basis the *Ramey* court found that the statute's "repugnance to the Constitution is clear and beyond reasonable doubt." The guest statute has been part of the statutory law of South Carolina for fifty years. Cases concerning this statute have been before the court on numerous occasions, but the court had never questioned the constitutionality of the statute. The court in *Ramey* did not indulge all reasonable presumptions in favor of the validity of the guest statute as was required previously under *Mehlman* and *Smith*.

The court also declared that the statute was "doubly onerous, as it is limited to motor vehicles and is accordingly defective under *Marley*, and it irrationally distinguishes nonpaying guests from paying passengers." The United States Supreme Court in *Silver v. Silver*, however, reached the opposite conclusion:

> It is said that the vice in the statute is not that it distinguishes between passengers who pay and those who do not, but between gratuitous passengers in automobiles and those in other classes of vehicles. But it is not so evident that no grounds exist for the distinction that we can say a priori that the classification is one forbidden as without basis, and arbitrary.

The South Carolina court, in distinguishing *Silver*, stated that the Supreme Court in that case "did not consider the two historical justifications . . . to determine if there was a rational connection between the objectives of the statute and the means pro-

47. Id. at 320, 247 S.E.2d at 332.
50. Since the enactment of the guest statute, the South Carolina Supreme Court has reviewed no fewer than fifty cases concerning the Act.
51. Id. at 258 S.E.2d at 886. It is also interesting to note that S.C. Code Ann. § 55-1-10 (1976) applies to aircraft the recovery limitations of the guest statute.
52. 280 U.S. at 123.
vided to accomplish the objectives."\textsuperscript{53} As a result, the South Carolina court found that\textit{Silver}'s limited scope precluded it from being either controlling or persuasive.\textsuperscript{54} The United States Supreme Court, however, has never overruled\textit{Silver}.\textsuperscript{55}

The South Carolina Supreme Court, in holding the guest statute unconstitutional on equal protection grounds, broke with the majority of state courts which have held their statutes constitutional in the face of similar attacks.\textsuperscript{56} \textit{Ramey}, following so closely the decision in\textit{Marley}, makes clear that the court will look initially at statutes separately classifying automobile-related negligence. A difficulty arising from the court's conclusory analysis in\textit{Ramey}, however, is the uncertainty it introduces into the area of equal protection in South Carolina. The presumptions of constitutionality traditionally utilized by the court to approach equal protection problems are curiously absent in\textit{Ramey}. Furthermore, the classification imposed by the statute appears rationally related to a valid legislative purpose. As Justice Littlejohn stated in his well-written dissent, "[t]he legislature was entitled to consider the relationship between a driver and a nonpaying passenger in enacting the legislation here involved. Classification is primarily for the legislature, and the courts should not interfere unless classification is clearly unreasonable."\textsuperscript{57}

\section*{II. MAGISTRATES' COURTS}

\subsection*{A. Advisory Election of Magistrates}

The constitutionality of advisory primary elections to deter-

\textsuperscript{53} id. at 885.

\textsuperscript{54} id.

\textsuperscript{55} On November 8, 1976, the United States Supreme Court denied a petition for certiorari in Sidle v. Majors, 429 U.S. 945 (1976). That case concerned a constitutional challenge of the Indiana guest statute. In Hicks v. Maranda, 422 U.S. 332 (1975), the Supreme Court held that state courts and lower federal courts are bound to the same extent by the Supreme Court's summary dismissal of appeals as by the Court's disposition after plenary consideration. Thus, contrary to the South Carolina court's conclusion,\textit{Silver} remains persuasive authority with respect to the United States Constitution. Furthermore, while the federal cases do not dispose of the equal protection claim under the South Carolina Constitution, they are persuasive and entitled to much weight. Accordingly, the South Carolina Supreme Court should not have dismissed the holding in\textit{Silver} so lightly.

\textsuperscript{56} See notes 16-20 and accompanying text\textit{supra}.

\textsuperscript{57} id. at 887 (Littlejohn, J. dissenting).

https://scholarcommons.sc.edu/sclr/vol32/iss1/5
mine nominees for gubernatorial appointment to magisterial office was tested in two cases consolidated for review in *State v. Pechilis.* Both cases were brought by the Attorney General pursuant to the Uniform Declaratory Judgments Act and heard under the original jurisdiction of the South Carolina Supreme Court. One action was commenced to determine "whether or not the practice of certified political parties advisory primary elections for nominations to the office of magistrate violates article V, section 4 of the South Carolina Constitution." The State sought to enjoin the defendants and those they represented from either "participating in or holding advisory primary elections . . . ." The other action was brought to determine whether a state statute authorizing the Commissioners of Election for Spartanburg County to conduct such elections violated the South Carolina and United States Constitutions.

Although the State challenged the advisory elections on several constitutional grounds, the supreme court considered one is-

60. This action was brought against "Nick Peters Pechilis, John B. Halloran, Jr., and Richard A. Patterson, individually and as representatives of all other candidates for nomination by advisory election to the office of magistrate, and against the Democratic Party of South Carolina and the Republican Party of South Carolina, individually and as representatives of all other certified political parties in South Carolina . . . ." *State v. Pechilis,* ___ S.C. ___, ___, 258 S.E.2d 433, 433 (1979).
61. Brief of Plaintiff at 3-4.
62. See note 60 supra.
63. Brief of Plaintiff at 4.
64. This action was instituted against "Joseph E. Hines, Jr., L. Paul Barnes and C. Tyrone Gilmore as Commissioners of Election for Spartanburg County, South Carolina, and their successors in office . . . ." ___ S.C. at ___, 258 S.E.2d at 433.
65. See 1956 S.C. Acts 1716, No. 714, as amended by 1972 S.C. Acts 3044, No. 1559. The statute provides:

Effective in 1976 the magistrates in Spartanburg County shall be nominated for appointment at the general election by the voters residing in their respective districts. Candidates for magistrates shall not be nominated in party primaries or conventions but by petitions signed by one hundred or more qualified electors residing in the magisterial district. Upon petition being filed with the Spartanburg County Election Commission not later than sixty days prior to the date of the holding of the general election and the payment to the county treasurer of a one hundred dollar filing fee, the names of the nominees shall be placed upon the ballot.

*Id.*

66. Brief of Plaintiff at 4-5. The specific articles allegedly violated were S.C. CONST. art. I, §§ 3, 8 & art. V, §§ 4, 23 and U.S. CONST. amend. XIV.
issue critical: "we need only consider the contention that elections impermissibly chill the constitutional process which prescribes the manner in which magistrates are to be selected." The supreme court held that the magisterial elections did not pass constitutional muster primarily for two reasons. First, the court found that a literal interpretation of the state constitution prohibited such election. Second, the court concluded that magisterial elections conducted by Commissioners of Election or by political parties impermissibly chill the Governor's constitutionally granted discretionary power to appoint magistrates.

In South Carolina, a magistrate is a judicial officer appointed pursuant to the state constitution, which provides that "[t]he Governor, by and with the advice and consent of the Senate, shall appoint a number of magistrates for each county as provided by law." Strictly construing the constitution, the court declared that "[s]ince the Constitution clearly and plainly states that magistrates shall be appointed, we must assume that every other method of selection was excluded, including election by popular vote." In the court's view, this constitutional provision sets forth an exclusive method of selection for magistrates; thus, any statute or requirement which operates to defeat the express language of the foregoing provision must be struck down as unconstitutional. The court noted, however, that in spite of this constitutional language, for many years political parties have used preferential primary elections in some counties as a method to select nominees for gubernatorial appointments. In addition, the legislature has enacted numerous statutes providing for nominating elections of magistrates. The nominating elections are not binding on the Governor. His magisterial appointments are not necessarily determined by the statutorily mandated election process. Rather, the election merely provides

67. _S.C. at __, 258 S.E.2d at 433.
68. _Id. at __, 258 S.E.2d at 434.
69. _Id. at __, 258 S.E.2d at 434-35.
71. _S.C. at __, 258 S.E.2d at 434.
72. _Id.
a means by which the state senate may assess local public sentiment as an aid to fulfilling its constitutional duty to provide "advice and consent" to the Governor.\textsuperscript{74}

The court has previously stated in Young \textit{v. Sapp},\textsuperscript{75} that

The nominations for magistrates do not conflict with any provisions of our constitution . . . but . . . appear to be in conformity with the constitutional provisions. As a matter of fact and of law, the nomination of a candidate for magistrate by the Democratic party, or any other party, is simply a suggestion to the Governor of the State of a suitable person to be appointed by him as magistrate.\textsuperscript{76}

Thus, the Governor "may ignore such recommendation, and make such appointment as he thinks fit and proper, subject to confirmation by the Senate."\textsuperscript{77} Breeden \textit{v. Democratic Executive Committee}\textsuperscript{78} concerned a contested preferential election for Marlboro County auditor; the auditor's office like that of magistrate was filled by gubernatorial appointment with the advice and consent of the senate. The court concluded that "the parties are entitled to have determined and presented to the Governor the lawful nominee of the party so that he may have an opportunity, if he chooses, to honor the suggestion made by the electorate in the primary."\textsuperscript{79} The appointee "obtains title to office not by nomination in a Democratic primary but by appointment by the Governor and confirmation by the Senate . . . the primary is the chosen method of suggesting [candidates] to the Governor . . . ."\textsuperscript{80}

The \textit{Pechilis} court stated that the constitutionality of advisory elections was not at issue in \textit{Young} or \textit{Breeden} and that the cases were not controlling.\textsuperscript{81} The court rejected defendant's argument that the Governor is not bound to accept the elected nominees and found instead, that "[w]ith the overwhelming ac-

\textsuperscript{74} Brief of Amicus Curiae at 27.
\textsuperscript{76} 167 S.C. at 370, 166 S.E. at 356-57.
\textsuperscript{77} \textit{Id.} at 370, 166 S.E. at 357.
\textsuperscript{78} 226 S.C. 204, 84 S.E.2d 723 (1954).
\textsuperscript{79} \textit{Id.} at 208, 84 S.E.2d at 725.
\textsuperscript{80} Weston \textit{v. Williams}, 190 S.C. 112, 114, 2 S.E.2d 381, 382 (1939).
\textsuperscript{81} \textit{---} S.C. at \textit{---}, 258 S.E.2d at 435.
ceptance through the years by the Governor and the Senate of the nominees of the magisterial elections, candidates are, for all practical purposes, forced to enter the popular election process to become magistrate."\(^{82}\) The court determined, therefore, that the decisive factor in this case was not the advisory nature of the elections but the effect of the elections upon the exercise of the appointive power.

The practical effect of the statute and the party primaries, according to the court, was to virtually assure that nominees elected would be appointed by the Governor and approved by the senate, while those who were not elected or refused to enter such elections would be precluded from nomination and consideration for the office. The court found that "[t]he undeniable purpose of the elections held pursuant to statute and by the political parties is to use the election machinery to coerce the Governor into appointing and the Senate into confirming the nominees of the election, regardless of his or her qualifications . . . ."\(^{83}\)

The court decided "[t]he clear effect of such primaries is to chill the constitutional selection process and abridge the discretionary power of the Governor to appoint magistrates."\(^{84}\) Thus, the court held that elections held pursuant to the challenged statute or by party primary clearly violated article V, section 23, of the South Carolina Constitution and the court permanently restrained and enjoined further attempts to hold advisory elections for magistrates.\(^{85}\) The court's resolution of this issue may have a profound impact on the selection of magistrates since "[f]or many years, at least half a century, some county organizations within the South Carolina Democratic Party have conducted magisterial primaries."\(^{86}\)

### B. Magistrate Juries

In *State v. Warren*,\(^ {87}\) the South Carolina Supreme Court

\(^{82}\) *Id.* In November, 1976, the first election pursuant to the challenged statute was conducted. The only persons appointed to the office of magistrate were those nominated through the advisory election. Record at 61, 72.

\(^{83}\) *Id.* at —, 258 S.E.2d at 434-35.

\(^{84}\) *Id.* at —, 258 S.E.2d at 435.

\(^{85}\) *Id.*

\(^{86}\) Brief of Defendant Democratic Party of South Carolina at 2.

held that certain state statutes providing for magistrate juries in criminal cases are unconstitutional as violative of the sixth and fourteenth amendments to the United States Constitution. The defendant was arrested while participating in an anti-nuclear demonstration. He was convicted of trespassing and sentenced to fifteen days or a $100 fine. At trial in magistrate's court, defendant attacked the constitutionality of these state statutes and contended that the manner of jury selection at his trial violated his sixth and fourteenth amendment rights. His argument, however, was rejected by the presiding magistrate and the circuit court affirmed. The supreme court held the statutes unconstitutional; it was not necessary for the court to reach the issue of the fairness of the jury selection in this particular case.

88. These statutes provide:
Every person arrested and brought before a magistrate, charged with an offense within his jurisdiction, shall be entitled on demand to a trial by jury which shall be selected as provided in § 22-3-780.


In criminal causes in a magistrate's court a jury shall be selected in the following manner: The sheriff, constable or other officer appointed by the magistrate shall write and fold up eighteen ballots, each containing the name of a respectable voter of the vicinity. He shall deliver the ballots to the magistrate, who shall put them into a box and shake them together, and the officer shall draw out one, and the person so drawn shall be one of the jury unless challenged by either party. The officer shall thus proceed until he shall have drawn six who shall not have been challenged. Neither party shall be allowed more than six challenges. But if the first twelve drawn shall be challenged and the parties do not agree to a choice, the last six shall be the jury. When any of the six jurors so drawn cannot be had or are disqualified by law to act in the case and the parties do not supply the vacancy by agreement, the officer shall proceed to prepare, in the manner before directed, ballots for three times the number thus deficient, which shall be disposed of and drawn as above provided.

Id. § 22-3-780. These statutes were repealed following the court's decision in this case. 1979 S.C. Acts —, No. 164.

89. The sixth amendment to the United States Constitution provides in pertinent part that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state wherein the crime shall have been committed." U.S. Const. amend. VI.

90. Brief of Appellant at 2.
91. Id. at 3.
92. 273 S.C. at 160, 255 S.E.2d at 668.
93. The appellant's jury was drawn from a list of forty potential jurors selected by the Chief Deputy Sheriff of Barnwell County. Record at 41-43. The Chief Deputy and the Sheriff Department's secretary went "through the [voter] registration books and got people from the Barnwell area in all types of business." Id. at 43. The selection process apparently took place at the Sheriff's Department Office. Id. at 42-43. The voter registra-
Under the statutes, a magistrate was permitted to appoint "[t]he sheriff, constable, or other officer . . ." to select eighteen "respectable voter[s] of the vicinity,"94 from whom a jury was selected. The court held that the statutes failed to meet constitutional requirements for two reasons: (1) "there is given the magistrate the authority to look about him and to select a person to choose a jury panel . . ."95 and (2) "it permits the person selected an almost unbridled authority to find 18 'respectable voters' from whom a jury of 6 will be selected to try a particular criminal case."96 The main concerns of the court, therefore, appeared to be the broad discretion entrusted to the person selecting the jury panel and the attendant potential for abuse arising from the magistrate's discretionary power to appoint a sheriff to select a jury. "The sheriff, because of his office, is allied with the State, which is the prosecuting authority."97

The court declared that the sixth amendment encompasses the right to a jury drawn from a pool broadly representative of the community and impartial in a specific case.98 This analysis is consistent with prevailing case law.99 The court then found that the statutory method of drawing a magistrate's jury did "not tend to assure a cross-section of citizens fairly representative of

94. S.C. Code Ann. § 22-3-760. For full text of this statute see note 88 supra.
96. Id. at 162, 255 S.E.2d at 669.
97. Id.
98. Id.
99. The United States Supreme Court has "unambiguously declared that the American concept of the jury trial contemplates a jury drawn from a fair cross section of the community." Taylor v. Louisiana, 419 U.S. 522, 528 (1975). In Smith v. Texas, 311 U.S. 128 (1940), a unanimous Court stated that "[i]t is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community." Id. at 130, quoted in Taylor v. Louisiana, 419 U.S. 522, 528 (1975). See Glasser v. United States, 315 U.S. 60 (1942). The fair cross-section requirement was made binding on the states in Taylor, 419 U.S. 522 (1975), in which the Supreme Court held this requirement to be fundamental to the sixth amendment right to trial by jury.
the community."\(^{100}\) The court noted that, while this method of jury selection could result in a fair trial, the selection process did not provide sufficient assurance of a fair trial.\(^{101}\) Moreover, any resultant prejudice would be of "the type . . . difficult, if not impossible in most cases, to prove."\(^{102}\) For these reasons the court held the statute unconstitutional as violative of the sixth amendment of the United States Constitution\(^{103}\) as made applicable to the states by the fourteenth amendment.\(^{104}\) The court concluded that "the fundamental right to trial before an impartial jury is so basic and crucial as to demand that no vestige of suspicion be permitted to impugn the impartial method of selection of jurors."\(^{105}\)

III. THE SIXTH AMENDMENT: THE RAPE SHIELD STATUTE

In *State v. McCoy*,\(^{106}\) the South Carolina Supreme Court upheld the constitutionality of the South Carolina rape shield statute.\(^{107}\) This statute establishes an exclusionary rule barring

\(^{100}\) 273 S.C. at 162, 255 S.E.2d at 669.
\(^{101}\) Id.
\(^{102}\) Id.
\(^{103}\) Id.
\(^{104}\) Id.
\(^{105}\) Duncan v. Louisiana, 391 U.S. 145 (1968). In *Duncan*, the Supreme Court held that because the right to trial by jury is fundamental to the American scheme of justice, the "fourteenth amendment guarantees a right of jury trial in all criminal cases which—were they to be tried in federal court—would come within the sixth amendment's guarantee." *Id.* at 149.
\(^{106}\) 273 S.C. at 162, 255 S.E.2d at 669.
\(^{108}\) S.C. Code Ann. § 16-3-659.1 (Cum. Supp. 1979). This statute provides:

1. Evidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct and reputation evidence of the victim's sexual conduct shall not be admitted in prosecutions under §§ 16-3-652 to 16-3-656; *provided*, however that evidence of the victim's sexual conduct with the defendant, or evidence of specific instances of sexual activity with persons other than defendant introduced to show origin of semen, pregnancy or disease about which evidence has been previously introduced at trial shall be admissible [sic] if the judge finds that such evidence is relevant to a material fact and issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value. *Provided*, however, that evidence of specific instances of sexual activity which would constitute adultery and would be admissible [sic] under rules of evidence to impeach the creditability of the witness shall not be excluded.

2. If the defendant proposes to offer evidence described in subsection (1), the defendant, prior to presenting his defense shall file a written motion and offer of proof. The court shall order an in-camera hearing to determine
the admission of all reputation and opinion evidence of the victim's sexual conduct.\textsuperscript{108} Subject to two exceptions, it also prohibits the admission of specific instances of the victim's prior sexual conduct. The first exception provides for the admission of evidence of the victim's prior sexual conduct with the defendant. The second allows admission of specific conduct with third parties to show the origin of semen, pregnancy, or disease about which evidence has been previously introduced.\textsuperscript{109} Although the statute does not prohibit all evidence of the victim's prior sexual conduct, its "net effect is to strictly restrain the use of this type of evidence."\textsuperscript{110}

In McCoy, the appellant was tried on charges of criminal sexual conduct in the first degree.\textsuperscript{111} At trial appellant moved to dismiss the indictment on the grounds that the shield statute placed "an unconstitutional limitation on due process and the right of the defendant to a fair and impartial trial."\textsuperscript{112} The trial court overruled this motion and the defendant was subsequently convicted. On appeal defendant argued that the statute "limits the right to confront witnesses and deprives the accused of a fair trial in violation of the sixth and fourteenth amendments of the Constitution of the United States and their South Carolina counterparts."\textsuperscript{113} The United States Supreme Court has held that the sixth amendment right of an accused to confront the witnesses against him is a "fundamental right . . . made obligatory on the States by the fourteenth amendment."\textsuperscript{114} The Court

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whether the proposed evidence is admissible under subsection (1). If new evidence is discovered during the presentation of the defense that may make the evidence described in subsection (1) admissible, [sic] the judge may order an in-camera hearing to determine whether the proposed evidence is admissible [sic] under subsection (1).

\textit{Id.}

\textsuperscript{108} Prior to enactment of the rape shield statute in 1977, South Carolina followed the common-law rule allowing the defendant charged with criminal sexual assault to introduce the prosecuting witness' reputation for chastity. \textit{See} State v. Taylor, 57 S.C. 483, 35 S.E. 729 (1900).


\textsuperscript{110} Criminal Law, Annual Survey of South Carolina Law, 30 S.C.L. Rev. 61, 61 (1979).


\textsuperscript{112} Record at 2.

\textsuperscript{113} \textit{Id.} at \textit{Id.}, 261 S.E.2d at 160.

has declared: "It cannot seriously be doubted at this late date that the right of cross-examination is included in the right of an accused in a criminal case to confront the witnesses against him." Cross-examination takes on this importance because it is a principal means "by which the credibility and veracity of a witness is tested."

The South Carolina Supreme Court, though recognizing that "cross-examination is essential to a fair trial . . . ." upheld the statute against appellant's constitutional challenge. It relied heavily on the opinions of other state courts that had upheld the constitutionality of rape shield statutes. Underlying

117. ___ S.C. at __, 261 S.E.2d at 160.
118. See, e.g., People v. McKenna, 196 Colo. 367, 585 P.2d 275 (1978). On upholding the constitutionality of the Michigan rape shield statute, the Michigan Court of Appeals declared:

The right of confrontation protected by the Sixth Amendment secures principally the right to cross-examine witnesses. . . . Cross-examination is principally a means by which the credibility and veracity of a witness is tested. Being based upon the Sixth Amendment, defendant's challenge to the statute thus may be stated: prohibiting the testing of the rape victim's credibility and veracity by asking the victim about his or her sexual conduct with third persons infringes upon the fundamental right of confrontation. The problem is, however, that there is no fundamental right to ask a witness questions that are irrelevant. Inquiry on cross-examination into the rape victim's sexual behavior with third persons is not relevant. Evidence is relevant when it is sufficiently probative of a fact in issue to offset the prejudice its admission produces. . . . The rape victim's sexual activity with third persons is in no way probative of the victim's credibility or veracity. If it were, the relevancy would be so minimal it would not meet the test of prejudice.

People v. Thompson, 76 Mich. App. 705, 711-12, 257 N.W.2d 268, 272 (1977)(citations omitted). The Ohio Supreme Court, when upholding the constitutionality of a rape shield statute, stated:

In determining whether [the Ohio shield statute] was unconstitutionally applied in this instance, we must thus balance the state interest which the statute is designed to protect against the probative value of the excluded evidence.

Several legitimate state interests are advanced by the shield law. First, by guarding the complainant's sexual privacy and protecting her from undue harassment, the law discourages the tendency in rape cases to try the victim rather than the defendant. In line with this, the law may encourage the reporting of rape, thus aiding crime prevention. Finally, by excluding evidence that is unduly inflammatory and prejudicial, while only marginally probative, the statute is intended to aid in the truth-finding process.

The key to assessing the probative value of the excluded evidence is its relevancy to the matters as proof of which it is offered. Appellants contend
the court's opinion is the recognition that the prevailing policy purpose of the shield statute is to counteract a "tendency by counsel for persons accused of rape or criminal sexual conduct to try the prosecutrix instead of the defendant." The court concluded that the avoidance of undue prejudice towards and unnecessary harassment of the prosecuting witness is a legitimate policy goal.

The South Carolina rape shield statute, protects rape and sexual assault victims from "humiliating and embarrassing public 'fishing expeditions' into their past sexual conduct," unless there has been a preliminary showing that the evidence to be elicited is relevant to some issue in the case. The court found that a probe of the prosecuting witness' past sexual experience "has a chilling effect on [rape] prosecutions, to the detriment of society, while providing minimal benefit to the accused person in his defense." Furthermore, a woman's consent to sexual intercourse with one person is not substantial evidence that she consented with another. In modern times, the court noted, such evidence no longer has the probative value it once had. Moreover, the state has a legitimate interest in encouraging rape victims to report crimes and to present testimony against offenders. "That interest is served by discouraging the oftentimes pointless and sometimes cruel treatment of victims who testify." Against these interests, the court weighed the claims of the appellant. It noted that the rape shield statute does not prohibit

that evidence of complainant's reputation as a prostitute is relevant to the issue of consent, which was Ogletree's defense to the rape charge. The supposed relevancy here rests on an assumption that prior unchastity with other individuals indicates a likelihood of consent to the act in question with defendant. While this premise may have had some validity in an earlier time, it seems quite unpersuasive in today's era of more fluid morals. "As critical thought and analysis have been brought to bear on these issues, it has become apparent that in many instances a rape victim's past sexual conduct may have no bearing at all on either her credibility or the issue of consent."


119. ___ S.C. at ___, 261 S.E.2d at 160.
120. Id. at ___, 261 S.E.2d at 160.
121. Id. at ___, 261 S.E.2d at 161.
122. Id. at ___, 261 S.E.2d at 160.
123. Id. See also State v. Superior Court, 113 Ariz. 22, 545 P.2d 946 (1976).
124. ___ S.C. at ___, 261 S.E.2d at 160.
125. Id.
all evidence of the victim's past sexual conduct with the defendant, only reputation and opinion evidence is flatly prohibited. The statute reflects the legislature's view of relevant evidence in a criminal sexual prosecution.\textsuperscript{126} It does not deny a defendant the right to confront the victim and reveal the evidence; it merely requires a showing prior to admission that the evidence is relevant to the defendant's case.\textsuperscript{127} If the defendant desires to introduce evidence of specific instances of the victim's prior sexual conduct with the defendant, he may file a written motion and offer of proof. An in-camera hearing is then held by the court to determine the admissibility of the proffered evidence. If the court finds that evidence of the victim's previous sexual conduct is relevant, and that this relevance is not outweighed by its potential prejudicial impact, then the defendant may introduce that evidence at trial. If, on the other hand, the court determines that the proffered evidence is irrelevant or unduly prejudicial, the prosecuting witness is spared the ordeal of public cross-examination regarding her past sexual conduct. Even if the evidence is excluded, the offer, however, is recorded so that the effect of the exclusion may be reviewed on appeal.

In essence, the court utilized a balancing test, as did the legislature when it passed the statute. Both "considered the interests of society and prosecuting witness, while protecting the defendant's constitutional rights."\textsuperscript{128} The defendant's rights are protected by the statute's in-camera hearing provision. The introduction of evidence of specific conduct is allowed, provided it is not unduly prejudicial and its relevance is demonstrated. The court in McCoy recognized and preserved the balance struck by the statute between arguably relevant evidence on the one hand and the clear possibility of undue prejudice to the prosecuting witness on the other.

\textit{E. Stratton Horres, Jr.}

\textsuperscript{126} \textit{Id. at \_\_}, 261 S.E.2d at 161.


\textsuperscript{128} \textit{S.C. at \_\_}, 261 S.E.2d at 161.