Legislative Kudzu and the New Millennium: An Opportunity for Reflection and Reform

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LEGISLATIVE KUDZU AND THE NEW
MILLENNIUM: AN OPPORTUNITY FOR
REFLECTION AND REFORM

PATRICK K. HETRICK*

"Now, O King, establish the decree, and sign the writing, that it be not changed, according to the law of the Medes and Persians, which altereth not."

I. INTRODUCTION

North Carolinians have come a long way in two and a half centuries from several thin volumes of general statutes bound in what Dick-
ens aptly described as "that under-done-pie-crust-coloured cover."² Succeeding generations of lawmakers have added to the original quaint base of legislation and have also dismantled much of the common law, replacing it with twenty volumes of slick-looking green statute books adorned with gold print and the "Great Seal" of the State of North Carolina. Doubtless, most legislators of the past two centuries have had good intentions. Yet, in fact, and in the application of these twenty green volumes of laws to a modern, complex society, numerous negative consequences and unintended side effects have resulted. Unfortunately, the exuberance and pride that appear to exist in drafting and enacting statutes do not continue insofar as the repeal or corrective functions of a legislature are concerned.

Throughout this article, I will address issues related to laws and lawmaking by using real property laws as an example. I do this because I am familiar with real property laws and feel comfortable illustrating points by referring to statutes in that important substantive area of law. While real property statutes constitute but one substantive framework for critically analyzing the North Carolina General Statutes and the process by which statutes are enacted and evaluated, my comments and criticisms are equally applicable to all of the green volumes.³

While there is much that is logical about North Carolina statutory law on the topic of real property, there is also much that might be placed in a "nettlesome hodge-podge" category. About two decades ago, some frustrated practitioners of property law blamed complications in the practice of law on an inadequate index to the North Carolina General Statutes. Although there was merit in the criticism, the complaints did not address the true problem—the existence of what I will call troublesome statutes. The focus on index problems was mis-

2. Charles Dickens, Pickwick Papers, ch. xxxiv. Dickens would be pleased to know that two hundred years of aging of the original law-calf covers produces a wonderful antique patina, perhaps an "over-done-pie-crust-coloured cover."

3. This article is limited to a discussion of North Carolina law because I am optimistic that concerned members of the bar and citizens can still do something at the state level. The United States Code, with its accompanying myriad of so-called implementing regulations, contains the most egregious examples of legislative and administrative overkill. The now-staggering volume of practically useless and unnecessary laws drives up the cost of legal services and has the aggravating effect of complicating what once were straightforward and simple transactions. Allow me to save a discussion of federal law for a future article. It suffices to say that the unnecessary federal laws affecting real property ownership and real estate transactions generally are legion, and I fear that the United States Congress is unable to do anything but add to the morass.
placed, somewhat akin to blaming the inadequacy of road signs for a bumpy road. The advent of computerized search-and-retrieve techniques has effectively eliminated most problems with respect to locating statutory provisions on point. If it ever was a pressing problem, the search itself is not one any longer; instead, it is what one discovers at the end of the search—the statute itself—that can cause challenges. Indeed, it is this wonderful ability to instantly search and locate statutes related to any given problem or issue that allows one to discover just how many statutes there are and how many we could do without.

In some respects, legislation has a great deal in common with kudzu. Legislative kudzu, like its botanical counterpart, “grows like the devil” and “just will not die.” 4 One ill-advised, poorly drafted or obsolete statute, for example, can result in a proliferation of other statutes enacted to make adjustments or clarifications. 5 The inevitable and necessary “judicial gloss” contributes to the kudzu thicket insofar as some of the more problematic statutes on the books are concerned. Confusing and at times incomprehensible statutes entwine themselves

4. See Doug Stewart, Kudzu Love It—Or Run: The lush, aggressive weed that “grows like the devil” and just will not die is manna for sheep, cows and folks who use it to cure hangovers, weave baskets and make jelly, Smithsonian, Oct. 1, 2000, at 64. Another author has recently made use of the kudzu analogy in an article about legislation. See Robert C. Ellickson, Taming Leviathan: Will The Centralizing Tide Of The Twentieth Century Continue Into The Twenty-First? 74 South. Cal. L. Rev. 101, 105 (2000) (“State and local law also have grown like kudzu.”) See also Natural Resources Defense Council, Inc. v. Grant, 355 F. Supp. 280 (E.D.N.C. 1973), in which District Judge Larkins took judicial notice of the nature and dangers of kudzu, and astutely observed:

Although one may not know what it is called, a person does not have to be a scientist to recognize kudzu. One can frequently see kudzu along roads and highways. Most likely it can be seen growing on banks, stretching over shrubs and underbrush, engulfing trees, small and large, short and tall, slowly destroying and snuffing out the life of its unwilling host. Even manmade structures are susceptible to the vine—the tall slender green tree may be your telephone pole. However, if controlled, kudzu may have erosion value.

Id. Judge Larkin went on to hold that an environmental impact statement filed concerning the construction of a watershed project failed to satisfy the National Environmental Policy Act where the impact statement disclosed that “[o]ne row of kudzu will be planted at the very top edge of the channel slope through cultivated areas. The growth of kudzu will be controlled by mechanical methods.” This impact statement, according to Judge Larkin, failed “to disclose how the growth of kudzu can be controlled by mechanical or any other methods and in this respect fails to satisfy the requirements of NEPA.” Id. at 280, 288.

5. N.C. Gen. Stat. § 29-30, which will be discussed extensively in this article, is a prime example of legislative kudzu.
around the day-to-day transactions of humankind and clog what would otherwise be simple problems or challenges with confusion. The negative effects of bad statutes at the grassroots level of the practice of law often go unreported. The actual effect of a given statute in terms of utility and cost to the client is virtually ignored. As will be discussed in more detail later in this article, lawyers and professors tend to evaluate the worth and effect of a statute by studying appellate court decisions. This "top-down" technique provides only one helpful but incomplete representation of the true state of affairs in terms of how a statute is operating in the day-to-day world.

The leading discussion of the proliferation of legislation and the effect of outdated statutes in American law was made by professor and then-dean Guido Calabresi in a 1982 book titled "A Common Law For The Age of Statutes." In this book, Calabresi describes the "statutorification" of American law as an orgy of statute-making. He addresses the challenges of statutory obsolescence and discusses the circumstances in which obsolete statutes may be judicially overruled.

Two decades after the publication of Calabresi's observations have brought about little more than an intensification of the challenges posed both by the continuing existence of vague or obsolete statutes

6. As I read and reread and then read again and outlines N.C. Gen. Stat. § 136-67, the "Neighborhood public roads" statute, and reflect on questions I have received from attorneys in regard to the interpretation of this statute, I am figuratively, if not literally, awestricken by how complex and confusing a simple matter can be made by a statute passed in good faith to clarify things. For the latest appellate court decision demonstrating the futility of trying to prove that a "neighborhood public road" exists, see Coghill v. Oxford Sporting Goods, Inc., 2001 WL 503057 (N.C. App. 2001).


9. Id. (giving Grant Gilmore credit for the description).

10. Id. at 163-166.
and by the unabated trend of enacting new statutes. In terms of the proliferation issue, my favorite article on point is a summary of a speech given in 1978 by Dallin Oaks, then-president of Brigham Young University, to the Fifth Circuit Judicial Conference.\(^\text{11}\) Basing his ideas on reasoning from variations on Parkinson's Law, Oaks developed a number of theories of lawmaking. Oak's "three laws or principles of lawmaking": "(1) Law expands in proportion to the resources available for its enforcement; (2) bad law is more likely to be supplemented than repealed; and (3) social legislation cannot repeal physical laws."\(^\text{12}\) Oaks also suggests that "an uninformed lawmaker is more likely to produce a complicated law than a simple one."\(^\text{13}\)

While acknowledging that the recent arrival of the new millennium has already become symbolic of too many things for too many people, I will nonetheless join the club and make use of it as an opportunity for reflection, assessment, and suggestions regarding North Carolina real property law and law in general. In this article, I will address a number of matters, such as the need for a housecleaning of the North Carolina General Statutes, the effect of a proliferation of legislation on legal education and the general practitioner, and the shortcomings of "top-down" statutory analysis and evaluation. I will also include some thoughts on statutory design and make suggestions related to the enlisting of computer technology and attorney-practitioner input to evaluate and analyze the practical effect of legislation. As noted above, I will be limiting my discussion to real property legislation and examples, although my observations should be valid when applied to other substantive areas of law.

Each professor approaches his or her writing with the circumscribed objectivity of a uniquely acquired subjectivity, and my preconceptions will be soon be manifest to all. I would like this article to qualify as much as a gut-reaction/seat-of-the-pants commentary on practical matters of interest to me and, I hope, to members of the practicing bar, as it does any attempt at a detached, pseudo-scientific discussion of legal theory as it relates to legislation. I shall leave it to other members of the legal academy to attempt to at least figuratively extract jurisprudential sunbeams out of cucumbers.\(^\text{14}\) The reader is of course welcome to wholeheartedly agree or vehemently disagree, as the

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12. Id. at 22.
13. Id. at 19.
14. In Jonathan Swift's *Gulliver's Travels*, a visit to the grand Academy of Lagado is noted in Chapter V. The first "projector" or scholar encountered is described, in part, as follows:
case may be, and your feedback and input is invited. Indeed, I would thoroughly enjoy an ongoing discussion of the actual influence and effect of legislation on our professional and personal lives.

II. PRIME CANDIDATES FOR A STATUTORY HIT LIST

To get the ball rolling on a discussion of statutes that are, to be kind, “past their prime”, I am going to focus on several of my top choices for repeal. Dozens of other statutes dealing with real property law also merit membership on any housekeeping hit list. Some of them will be briefly mentioned in this article and may be the subject of future articles. Again, North Carolina practicing lawyers are encouraged to share their insights on problem statutes. For now, let’s focus on several prime candidates for the shredder.

A. Repeal N.C. Gen. Stat. § 29-30 (The “Statutory Replacement for Dower” Statute)

Let’s start this discussion with a concrete example of a statute that has been a thorn in the side of real property practitioners (and professors) for slightly more than four decades: N.C. Gen. Stat. § 29-30, titled “Election of surviving spouse to take life interest in lieu of intestate share provided.” This statute spans several pages of the North Carolina General Statutes and boasts ten sections and sixteen subsec-

The first man I saw was of meager aspect, with sooty hands and face, his hair and beard long, ragged and singed in several places. His clothes, shirt, and skin were all of the same colour. He had been eight years upon a project for extracting sun-beams out of cucumbers, which were to be put into vials hermetically sealed, and let out to warm the air in raw inclement summers.

15. The author can be reached by e-mail at: hetrick@webster.campbell.edu or at the following address: Campbell University, Norman Adrian Wiggins School of Law, P.O. Box 158, Buies Creek, N.C. 27506. Of course, the ideas expressed in this article are the personal and professional views of the author.

16. I regularly writes to attorneys involved in appellate cases and seeks their input concerning matters related to the dispute that seemed of significance to the attorney but might not have made their way into the written appellate decision. One response that I received related to an education law (rather than a property law) dispute. It involved, among other things, a lawsuit by a teacher against a high school and its principal. One of the questions that I asked related to the fact that the litigation had bounced around in the federal court system for more than five years. The plaintiff’s attorney’s response was interesting. He noted that the plaintiff-teacher and defendant-principal had reconciled in terms of their personal and professional relationship with each other and that both had become disgruntled and frustrated by the nature of the legal system and the complicated and seemingly never-ending litigation and appellate process. It is sadly ironic that the plaintiff died before the case was ultimately resolved.
tions, but the meat of it can be found in subsections (a) and (b), which read as follows:

(a) In lieu of the share provided in G. S. 29-14 or 29-21, the surviving spouse of an intestate or the surviving spouse who dissents from the will of a testator shall be entitled to take as his or her intestate share a life estate in one third in value of all the real estate of which the deceased spouse was seized and possessed of an estate of inheritance at any time during coverture, except that real estate as to which the surviving spouse:

Has waived his or her rights by joining with the other spouse in a conveyance thereof, or
Has released or quitclaimed his or her interest therein in accordance with G.S. 52-10, or
Was not required by law to join in conveyance thereof in order to bar the elective life estate, or
Is otherwise not legally entitled to the election provided in this section.

(b) Regardless of the value thereof and despite the fact that a life estate therein might exceed the fractional limitation provided for in subsection (a), the life estate provided for in subsection (a) shall at the election of the surviving spouse include a life estate in the usual dwelling house occupied by the surviving spouse at the time of death of the deceased spouse if such dwelling house were owned by the deceased spouse at the time of his or her death, together with the outbuildings, improvements and easements thereunto belonging or appertaining, and lands upon which situated and reasonably necessary to the use and enjoyment thereof, as well as a fee simple ownership in the household furnishings therein.17

In the practical world of real estate transactions, N.C. Gen. Stat. § 29-30 must be read in conjunction with N.C. Gen. Stat. § 39-7. Subsection (a) of that statute reads as follows:

(a) In order to waive the elective life estate of either husband or wife as provided for in G.S. 29-30, every conveyance or other instrument affecting the estate, right or title of any married person in lands, tenements or hereditaments must be executed by such husband or wife, and due proof or acknowledgment thereof must be made and certified as provided by law.18

The original idea behind N.C. Gen. Stat. § 29-30, as with almost all statutes, was a well-intentioned one. When the North Carolina Gen-

eral Assembly enacted a new intestate succession law in 1959, it properly saw fit to abolish both dower and curtesy as they existed at common law. Abolition of those ancient spousal rights in their common law form was necessary because they constituted blatant examples of gender discrimination against the wife. Replacing common law dower and curtesy with a uniform and objectively fair "statutory" dower and curtesy was a logical and understandable legislative sentiment in 1959. While we now have the benefit of hindsight, it is evident that the sponsors of N.C. Gen. Stat. § 29-30 did not foresee a number of practical issues and problems.

First, and this is important if laws are to be of some pragmatic value, it is extremely rare (and unheard of in some North Carolina counties) for a spouse to elect his or her life interest in one-third of the property of the deceased spouse under N.C. Gen. Stat. § 29-30. This is the case because a surviving spouse must affirmatively elect the N.C. Gen. Stat. § 29-30 life estate option rather than select an intestate share or share provided for in the decedent spouse's will. To be blunt, the statute has served no useful purpose for any meaningful number of surviving spouses in slightly more than forty years of its existence. This lack of any day-to-day utility in the law and practice of wills and estates stands in stark contrast to the millions of times through the last four decades that a non-owning spouse has been required to sign away his or her N.C. Gen. Stat. § 29-30 rights so that marketable title can be conveyed by the other spouse.

Second, what if the non-owning spouse refuses to sign? All kinds of legal problems can result. Legitimate transactions are threatened, not to mention the effect of this discord on the marriage itself. A case on point that has arrived at "real property law cult classic status," if there is such a thing, is Taylor v. Bailey. In that case, the plaintiff-vendee sought damages for breach of a contract to convey real property which was encumbered by an inchoate dower interest of the vendor's wife. Simply put, the vendor's wife (not a party to the contract to convey) apparently refused to sign the deed to the property solely owned

20. In Heller v. Heller, 7 N.C. App. 120, 171 S.E.2d 335 (1969), the court held, among other things, that the widow’s right to elect her dower interest under N.C. Gen. Stat. § 29-30 had expired. Thus, examples of persons asserting their rights under N.C. Gen. Stat. § 29-30 do exist, although they are extremely rare. As discussed later in this article, computer data can be generated to reveal precisely how many times N.C. Gen. Stat. § 29-30 has actually come into play.
by her husband. In discussing N.C. Gen. Stat. § 29-30, Judge Harry C. Martin observed, in part:

This section preserves to a surviving spouse the benefits that were formerly available as dower and curtesy. A surviving spouse is given this election so as not to be rendered penniless and would elect this option when the estate is small or insolvent. The statute limits the right of a married person to convey his or her real property free from the elective life estate provided by this section. Thus, Norma Bailey's dower interest in the property would become effective only if she were to survive defendant and make an affirmative election to take this option rather than her intestate share or her share as provided by his will.22

Judge Martin continued by noting that the inchoate dower interest under N.C. Gen. Stat. § 29-30 is not an estate in land nor a vested interest.23 Nevertheless, it acts as an encumbrance on real property when the signature of the spouse is lacking. The case ultimately turned on procedure, with the court holding that the purchaser, who had obtained a judgment against the seller for specific performance of property encumbered by the inchoate dower interest, could not then sue for damages for breach of contract. Instead, the purchaser under these circumstances was limited in damages to a reduction in purchase price for the present value of the inchoate dower encumbrance.

In a memorable dissent, Judge Clark disagreed. The procedure, according to the dissenting opinion, was to be interpreted as follows: plaintiff originally sought specific performance of the contract, and there was nothing in the first action to indicate that the vendor was unable to perform. After the first appeal of this matter to the North Carolina Court of Appeals, the vendee determined that the vendor could not perform because of his wife's refusal to sign a deed releasing her dower interest. Judge Clark concluded that the vendee then had the option to either sue for specific performance plus the cash value of the inchoate right of dower of the wife, or sue for breach of contract following the usual damages formula when contracts to convey are involved. According to Judge Clark, the plaintiff-vendee was no longer relying on specific performance and was not seeking both specific performance and damages for breach; rather, he was seeking only damages for breach.24

The dissent is memorable for its final paragraph, in which Judge Clark accuses the majority of basing its opinion on what might be termed high-altitude jurisprudence. That paragraph reads as follows:

22. Id. at 219, 271 S.E.2d at 298.
23. Id.
24. Id. at 225, 271 S.E.2d at 301.
My colleagues of the majority are mountain men. The land in question is located in the mountains. It is possible that their opinion is based on "mountain law," a body of law peculiar to western North Carolina which permeates the innermost recess of the minds of those who live in that rarefied atmosphere and which may not be fully dispelled from the minds of some mountaineers despite exposure to law of general application throughout the State.25

But whether you dwell in the mountains or the flatlands, Taylor v. Bailey represents a wonderful illustration of what is wrong with retaining N.C. Gen. Stat. § 29-30 in the statute books. This controversy bounced around in the courts for more than five years and ended up at the North Carolina Court of Appeals twice.26 Reading between the lines, the real problem in this case appears to be a vendor who had changed his mind and then, after remand from the first court of appeals decision affirming a decree of specific performance, suddenly encountered the surprising problem of his wife's refusal to sign the deed. Since she had not signed the contract to convey, there was nothing that the court could do about that refusal.

N.C. Gen. Stat. § 29-30 also has an additional unintended side effect. While enacted as part of a statutory reform to bring equality to the sexes by correcting the glaring disparity between the benefits of common law curtesy as opposed to dower, N.C. Gen. Stat. § 29-30 actually prolongs inequality between the sexes. De facto inequality persists because the statute has a tendency to give the husband a psychological veto power over proposed real estate transactions of the wife involving the wife's solely owned property. My contention that this is the case is more than merely theoretical, because I have observed this unintended effect in a number of North Carolina real estate transactions.27 To the extent that there is merit to my observations in this

25. Id. at 225, 271 S.E.2d at 302.
26. The first Taylor v. Bailey court of appeals case can be found at 34 N.C. App. 290, 237 S.E.2d 918 (1977). As of that stage in the controversy, the vendor had refused to convey cited problems with the legal description and asserting that time was of the essence as to the closing date. The trial court rejected these defenses and ordered specific performance. The court of appeals affirmed.
27. See, e.g., Melvin v. Mills-Melvin, 126 N.C. App. 543, 486 S.E.2d 84 (1997), in which the wife executed a deed of property solely owned by her to a third party. Her husband did not sign the deed. The court correctly concluded that she was perfectly free to convey solely owned real property without her husband's signature, but the sale was subject to the inchoate right of the husband who might some day elect his statutory life estate under N.C. Gen. Stat. § 29-30. While this case illustrates that a wife does not need her husband's signature, it also demonstrates an attitude on the husband's part that a wife should not convey real property, even if solely owned, without her husband's blessing.
regard, N.C. Gen. Stat. § 29-30 in part perpetuates the common law situation where the husband controlled all real property including that solely owned by his wife during marriage. In North Carolina, surviving spouses often enjoy protection from creditors far superior to that theoretically provided by N.C. Gen. Stat. § 29-30. The continuing vitality and widespread use of the tenancy by the entirety form of concurrent ownership of real property very effectively protects a surviving spouse from the creditors of the decedent spouse. While subsection (b) of N.C. Gen. Stat. § 29-30 limits the scope of what we are calling "statutory dower" to a mere life estate in the dwelling house and specified surrounding property, the tenancy by the entirety almost universally results in fee simple ownership and is only limited in North Carolina by the confines of the definition of real property. It is possible, therefore, for a surviving tenant by the entirety to solely own in fee simple absolute, free and clear of the creditors of the decedent spouse, a $700,000 family home in North Raleigh, a valuable farm in Johnston County, a beach cottage on Bald Head Island, and a mountain chalet in Blowing Rock. Indeed, a shopping center or industrial park can be owned by husband and wife as tenants by the entirety. Whatever the reader's reaction to the effect of ownership of real property in a tenancy by the entirety format, one thing is clear: tenancy by the entirety constitutes a practical and superior method of protecting a surviving spouse from the creditors of the decedent spouse. In a sense, the tenancy by the entirety form of ownership has played a major role in transforming N.C. Gen. Stat. § 29-30 into a purely theoretical right rendered meaningless in practical terms because of a far better alternative.

This is not to suggest that dower is completely useless as a concept. Continuing the analogy to kudzu, it can creep into legal disputes in unexpected ways that are sometimes beneficial. In a recent federal

28. With limited exceptions not important for this discussion, a tenancy by the entirety in personal property is not recognized in North Carolina.

29. From the standpoint of creditors' rights, an outcome that protects more than the family home through the fiction of the tenancy by the entirety is open to well-deserved criticism.

30. Of course a surviving spouse might have assumed liability in one way or another for the debt of the other spouse. In that event, creditors can reach what was once tenancy by the entirety property that is now in the hands of the survivor. That scenario is a common one, but it also negates any protection from creditors under N.C. Gen. Stat. § 29-30(a)(1). Clearly, a surviving spouse who signs on the dotted line waives rights against creditors under either theory.

31. The North Carolina homestead exemption is also rendered impotent by the tenancy by the entirety and by the limits of that exemption.
district court decision, 32 civil forfeiture proceedings were commenced by the federal government against a family home located in Massachusetts that was solely owned by the husband. Massachusetts, like North Carolina, has a statutory provision that gives a surviving spouse a dower interest for life in one-third of the property. The home contained an apartment that had been used by the husband for drug dealing without his wife’s knowledge. When her husband was arrested, she of course became aware of his prior drug activities. Soon thereafter, the husband committed suicide and devised the property to her under his will. The federal district court granted a directed verdict to the government at the close of the government’s evidence, and denied the wife’s motion for entry of judgment in her favor on the basis that she was not an “innocent owner” of the property due to the fact that she did not acquire an interest in her husband’s property until after she had become aware of her husband’s illicit activities. 33 The wife appealed. The court of appeals judge held that the wife had a sufficient ownership interest during her husband’s lifetime in the home titled solely in her husband’s name by virtue of her dower interest under Massachusetts law. This dower interest, in turn, allowed her to maintain an innocent owner defense to the forfeiture of the real property to the extent of that statutory right. Significantly, the court also held that the purposes behind civil forfeiture laws would not be served by enforcing a forfeiture of that portion of the property that was not protected by the innocent owner defense. 34 To be fair, therefore, it

32. U.S. v. 221 Dana Ave., 239 F.3d 78 (1st Cir. 2001).
34. 239 F.3d. 78, 88-89. The Court of Appeals for the First Circuit notes, in part:

We do not know whether the government, if it had recognized that Mrs. Gass was an innocent owner of a one-third interest, would have exercised its prosecutorial discretion to attempt to forfeit any arguable remaining interest. In fact, the government’s forfeiture papers claim only an interest in the entire property, not a lesser interest. We have little reason to assume the government would have done so, given the equities of the situation. But assuming arguendo the government intends the present action to reach any remaining interests, such effort fails because forfeiture would not, on these facts, serve any congressional purpose behind the forfeiture statute.

It is far from clear that Congress intended the forfeiture statute to preempt state laws governing family property arrangements. The Supreme Court has said in another context that such laws may be overridden by federal courts only where “clear and substantial interests of the National Government, which cannot be served consistently with respect for such state interests [in the field of family and family-property arrangements], will suffer major damage if the state law is applied.” United States v. Yazell, 382 U.S. 341, 352 (1966). What is clear to us, for the reasons which follow, is that the
must be admitted that the statutory form of dower may occasionally—very occasionally—serve a positive public purpose. At the same time, it should be emphasized that the side effect that dower rights might have on civil forfeiture proceedings provides no strong public policy rationale for maintaining statutory dower. The kudzu analogy can once again be utilized. Like kudzu, one statutory root, N.C. Gen. Stat. § 29-30, has entwined itself around and complicated other areas of property law and even required clarifying amendments to other portions of the North Carolina General Statutes. Statutory amendments to conform North Carolina real property law to the repercussions of a statute that is full of cobwebs. For example, statutes dealing with concurrent ownership needed to be clarified in light of N.C. Gen. Stat. § 29-30.35 Other statutes dealing with conveyancing must also reckon with the statute.36

federal interests would not suffer major damage from applying state law or from denying forfeiture. (citations omitted; italics in original).

Id. at 88-89.

35. See, for example, N.C. Gen. Stat. § 39-13.3. Subsections (a), (b), (c), and (d) of that statute read as follows:

(a) A conveyance from a husband or wife to the other spouse of real property or any interest therein owned by the grantor alone vests such property or interest in the grantee.

(b) A conveyance of real property, or any interest therein, by a husband or a wife to such husband and wife vests the same in the husband and wife as tenants by the entirety unless a contrary intention is expressed in the conveyance.

(c) A conveyance from a husband or a wife to the other spouse of real property, or any interest therein, held by such husband and wife as tenants by the entirety dissolves such tenancy in the property or interest conveyed and vests such property or interest formerly held by the entirety in the grantee.

(d) The joinder of the spouse of the grantor in any conveyance made by a husband or wife pursuant to the foregoing provisions of this section is not necessary. (Emphasis added.)

Subsection (d) was necessary, at least from the standpoint of cautious legislative drafting, because N.C. Gen. Stat. § 29-30 would dictate that the spouse of the grantor in subsections (a), (b), and (c) of N.C. Gen. Stat. § 39-13.3 would be required to sign the deed in order to waive his or her statutory dower rights.


Every competent married person of lawful age is authorized to execute, without the joinder of his or her spouse, instruments creating powers of attorney affecting the real and personal property of such married person naming either third parties, or subject to the provisions of N.C. Gen. Stat.
N.C. Gen. Stat. § 29-30 can also result in challenges for the title examiner who comes across a conveyance in the chain of title in which only one person has signed as grantor and in which there is no indication of the marital status of that grantor. A statute that is triggered on only the most rare of occasions thus provides a daily headache for title examiners.

Solution? Repeal N.C. Gen. Stat. § 29-30! It serves no utilitarian purpose, has declined to almost complete disuse, and yet unnecessarily complicates millions of real estate transfers and documents in the day-to-day practice of law. This statute would not be enacted if proposed for the first time today and is wholly inconsistent with the contemporary legal landscape. To borrow a thought from a recent federal court decision, it is ironic that it is we who plant this kudzu in the fertile soil of North Carolina jurisprudence.


The so-called “anti-deficiency” statute, N.C. Gen. Stat. § 45-21.38, is another example of a law ripe for complete elimination from the North Carolina General Statutes. Passed in the midst of the Great Depression for the apparent purpose of protecting debtors from potential abuses in certain kinds of seller-financed real estate transactions, this statute has in my opinion long outlived any meaningful purpose,
has become a litigation and dispute magnet, and is easily evaded by skillful design of the financing transaction. In addition, there is evidence that the statute periodically serves as a vehicle for a sophisticated purchaser of real estate to take advantage of a less-informed seller. Lack of understanding and compliance with the requirements of the statute have also resulted in complaints of attorney malpractice.

N.C. Gen. Stat. § 45-21.38 provides in pertinent part:

In all sales of real property by mortgagees and/or trustees under powers of sale contained in any mortgage or deed of trust ... to secure to the seller the payment of the balance of the purchase price of real property, the mortgagee or trustee or holder of the notes secured by such mortgage or deed of trust shall not be entitled to a deficiency judgment on account of such mortgage, deed of trust or obligation secured by the same.

Furthermore, the original foundational premise for the statute—that purchasers are less protected in seller-financed transactions than

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40. Some highly respected members of the real property bar may take issue with my plea to repeal N.C. Gen. Stat. 45-21.38.

41. The underlying transaction forming the basis for the malpractice action in Smith v. Childs, 112 N.C. App. 672, 437 S.E.2d 500 (1993) provides one recent example. The author has firsthand knowledge of a transaction in North Carolina where the sellers, an elderly couple, conveyed land and received a minimal down payment. The seller financed the transaction with a purchase money deed of trust, and also subordinated that deed of trust to a construction loan of considerable magnitude secured by a deed of trust. The trade-off was supposedly the security the couple would receive from monthly payments on the note over a period of time. When the project went sour, the sellers were left with nothing. The purchaser was a sophisticated real-estate investor. For a reported example of a similar transaction, see Greene v. Carpenter, Wilson, Cannon and Blair, 119 N.C. App. 415, 458 S.E.2d 507 (1995), in which a business property (a speedway) was sold by the plaintiffs-vendors to a partnership for $1,000,000. The partnership executed a promissory note to the vendors for $500,000, secured by a purchase money deed of trust. The deed of trust was, in turn, subordinated to a $400,000 mortgage and note to a bank. At a subsequent foreclosure sale, all that remained to cover the $500,000 debt owed to the plaintiffs was $4,120. The plaintiffs did not bid at the sale because they lacked sufficient funds. Plaintiffs commenced a malpractice action against their attorney, alleging that the nature of a purchase money mortgage was never explained to them. The court of appeals held that the trial court erred in granting the attorney's motion for a directed verdict on the ground that the vendors failed to properly prove their damages.

in third-party financed transactions—rings hollow in terms of current practice today. This is the case because third-party financed transactions now appear to have more relaxed standards when it comes to property valuation than those of a generation ago. Competition among institutions wishing to lend money to finance home purchases is intense. Like it or not, appraisers can be selected to make the value of the sales price meet the expectations of the third-party lender even though the true fair market value of the property being financed is significantly less. How often do conventional loans by third-party lenders involving residential real estate sales transactions fall through because of a low appraisal? In the current mortgage-lending climate, including the advent of e-mortgages, a consumer can obtain a mortgage if he or she wants to purchase the property and has an adequate credit rating. The appraised value of the property, at least in the overwhelming majority of real estate sales transactions, will somehow meet the requirements of both purchaser and third-party lender.

A 1991 federal district court decision involving a lawsuit against a number of real estate agents brought by a former major league baseball pitcher provides insight into what sometimes goes on in the area of real estate appraisals. In this case, after the prospective purchasers made an offer of $520,000 on a home in Chapel Hill, the prospective lender, the State Employees Credit Union, required an appraisal. Based upon a calculation of square footage significantly lower than the real estate agent's estimate, Pam Davis, the person selected to do the appraisal for the lender, concluded that the correct appraised value was below the market-value range arrived at by the agent. District Judge Bullock summarizes the ensuing scenario, in part, as follows:

Davis contacted Defendant Morris . . . to inform Morris that Davis' calculation of the square footage was 4,212 feet, significantly less than Robbins', and that Davis' appraised value for the home would not equal the value Robbins had previously calculated for the CMA. Plaintiffs assert that David Collins, who represented the state Employees Credit Union, refused to allow Robbins to do an appraisal for the home due to Robbins' conflict of interests in the transaction. In addition, Morris wrote in her journal on October 16, 1986, "[I] am sick of David C. saying, 'Don't you pump up an appraisal.'" At some point thereafter, Morris also entered a note in her journal that Davis was becoming hostile due to pressure from Robbins. Plaintiffs allege that Robbins pressured Davis to make her appraisal and square footage measurements

43. One recent example of this captured in the appellate decisions is John v. Robbins, 764 F. Supp. 379 (M.D.N.C. 1991).
44. John, 764 F. Supp. at 379.
more consistent with Robbins’ CMA calculations. Sally John testified that Morris called on October 15, 1986, to inform her, “Pam could not get the appraisal to come out close to the purchase price.” Sally John further testified she told Morris that, while she simply wanted the house, Tommy John wanted the appraisal to “come up close to the purchase price for the business side of it.” Morris responded that Robbins could do an appraisal of the home. Morris later called Plaintiffs to inform them Robbins’ appraisal was $520,000, and represented Davis' lower figures as the result of her “inexperience” and failure to consider the home’s Timberline roof and other quality features. The State Employees Credit Union declined to lend Plaintiffs funds to purchase the house.45

While the John v. Robbins case did not involve a transaction that culminated in a foreclosure and deficiency judgment, it is instructive in the author’s opinion on what can be described as a fairly loose-knit world of real estate appraisals in place when homes are being purchased. In this daily atmosphere where an appraisal can somehow be obtained to fit the purchase price, it is safe to say that the potential for deficiency judgments is significant regardless of whether a transaction is seller financed or financed in a conventional way through a third-party lender.

Another recent case that provides insight into the contemporary world of real property appraisal is Brown v. Roth,46 a case in which the square footage estimate for the multiple listing form and initial appraisal of the property was stated to be 3,484. The purchase price paid by the buyer, and presumably the loan obtained by the buyer, rested on the foundation of this appraisal. Two years later during a refinancing transaction, the same house measured 3,108 square feet, and this figure turned out to be the accurate one. While the home is apparently complex in design, the difference in square footage is significant.47

45. Id. at 383-384. The matter was before the Federal District Court on summary judgment, and “the facts” were taken by Judge Bullock from the complaint, answers, exhibits and depositions of the parties.

46. 133 N.C. App. 52, 514 S.E.2d 294 (1999).

47. Coincidentally, the author’s home diminished in square footage and therefore appraised value from the time of initial purchase to the time of refinancing. It is suggested that builders might be using green wood that thereafter shrinks over a period of time. In reality, it appears that the appraiser at the latter time was wearing his conservative hat on behalf of the lender providing the refinancing. In a recent real estate transaction, the appraiser thought that the sales price was $10,000 less than it actually was. The appraisal came out identical to the mistaken amount. Upon being informed of the actual price and the inadequacy of his appraisal, he responded that he
A repeal of N.C. Gen. Stat. § 45-21.38 would not leave purchase money mortgagors without a remedy. This is the case because anti-deficiency protection exists in a different form under N.C. Gen. Stat. § 45-21.36. This statute provides, in part:

It shall be competent and lawful for the defendant against whom such deficiency judgment is sought to allege and show as matter of defense and offset... that the property sold was fairly worth the amount of the debt secured by it at the time and place of sale or that the amount bid was substantially less than its true value, and, upon such showing, to defeat or offset any deficiency judgment against him, either in whole or in part... 48

In the most recent appellate court decision applying N.C. Gen. Stat. § 45-21.36, First Citizens Bank & Trust Company v. Cannon, 49 a husband and wife obtained a mortgage loan in the principal amount of $175,000 from the plaintiff bank. After default, the bank foreclosed and was high bidder at the sale with a bid of $137,500. A deficiency judgment of $29,406.21 resulted. Almost five months later, the bank sold the property for $165,000. In the action for the deficiency, the husband50 denied liability to the bank and pled in defense that the property was worth the amount owed on it at the time of confirmation of the foreclosure sale and that the bank's bid at the foreclosure sale was substantially less than the true value of the property. 51 The trial

would perform a second appraisal. Of course, the second appraisal came out close to the correct sales price for the property.

For yet another recent example of the wonderful world of appraisals, see Home American Credit, Inc. v. Investors Title Ins. Co., 199 F.R.D. 563 (E.D.N.C. 2001), an interesting case involving an imposter obtaining a $400,000 loan. At 199 F.R.D. 564, Judge Howard notes: "The 'as is' value of the house if offered for resale at time of default would have been approximately $300,000. The pre-sale appraisal of the property listed its value at $550,000. The loan was for $400,000." Considering the fact that the imposter/debtor defaulted on the first loan payment, the house made an astronomical decline in value in a very short period of time.

50. The debtors, husband and wife, had obtained a mortgage loan while married. They were divorced by the time of the action for a deficiency judgment. The ex-wife/debtor made the legally fatal mistake of not filing an answer and the court of appeals refused to set aside the default judgment against her that resulted.
51. The case also demonstrates how real estate appraisals can fluctuate. An appraiser had appraised the property at $238,000 in May of 1994 when the defendants refinanced the property and obtained a $175,000 loan from the plaintiff. The same appraiser valued the home at $199,000 a little more than two years later. The tax appraisals on the property valued it at $204,710. A realtor appraised the property as of the date of foreclosure sale at a lower value, but this appraisal was rejected by the court.
court agreed with the debtor and the bank appealed. The court of appeals affirmed.


While this goes beyond the focus of this article, it is appropriate to add that if those in positions of policy-making were truly interested in protecting the mortgagor in the event of default under a deed of trust, the “notice of sale” drafted pursuant to N.C. Gen. Stat. § 45-21.16A would include a “plain language” translation encouraging members of the general public to look at the property and bid. A review notices of sale printed each week in a county newspaper, and often one cannot figure out what is being sold based on the metes and bounds description. Why not commence a foreclosure sale notice with something helpful to the general public? Language something like: “a three-bedroom home at 2341 Swamp Drive in Weeping Willow subdivision, Buies Creek, will be sold at public sale on [date]. If you are interested


53. There is a small but strong and growing “plain language” movement in the legal profession. The Michigan Bar Journal has carried a “Plain Language” column for many years. The column is edited by Professor Joseph Kimble of the Thomas Cooley Law School. See, e.g., *An Overview of the Plain English Movement For Lawyers . . . Ten Years Later*, 71 Mich. B.J. 26 (January 1994). The State Bar of Michigan has a Plain English Committee. The idea of a plain language foreclosure notice is not new. See George Hathaway, *Plain English In Real Estate Papers*, 72 Mich. B.J. 1308, 1310 (Dec. 1993), where the author notes in part:

Joseph Backus, an attorney in Lansing, Michigan, wrote a plain English mortgage foreclosure by advertisement, which we reprinted in the February 1990 Plain Language column. This foreclosure advertisement is a model of clarity. It proves that real estate attorneys can do their job without formalisms, archaic words, redundancies, and long sentences . . . if they want to.

See also Carol M. Bast, *Lawyers Should Use Plain Language*, 69 Fla. B.J. 30 (Oct. 1995): The criticism of impenetrable legal writing is well founded, especially concerning “functional documents.” “Functional documents” are documents such as contracts, jury instructions, and legislation written to be acted upon. Legal documents, especially functional documents, should be written in plain language because a reader cannot act on a document the reader cannot understand. *Id.*
in bidding at this sale and will need a loan in the event you are the successful bidder, contact your lending institution for a loan application." The mortgage foreclosure sale process is obviously not user-friendly from the perspective of the average member of the public, and it is not designed to be.

One might ask: "Just because the typical mortgagee in a conventional third-party real estate loan is relatively unprotected in the event of foreclosure is not a sound argument for eliminating the anti-deficiency statute in seller-financed transactions." While there is merit to this response, there is a factual reality in the contemporary seller-financed real estate transaction that cannot be ignored. Unlike their depression-era counterparts, most contemporary purchasers of real estate are not in desperate straights and have the ability to obtain financing by a number of distinct legal avenues. The potential for egregious overreaching by sellers who are financing the buyer's purchase is for all practical purposes insignificant. As will be discussed immediately below, the anti-deficiency statute is an relatively easy obstacle to circumnavigate if the seller has bargaining power and an astute lawyer.

While the traditional installment land contract provides a format for financing that is clearly a mortgage substitute, it is nonetheless wholly outside of the scope of the anti-deficiency statute. Even though it has a far greater potential for seller abuse, land contract financing

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54. Subsection (3) of N.C. Gen. Stat. 45-21.16A, "Contents of notice of sale," requires that the notice of sale "Describe the real property to be sold in such a manner as is reasonably calculated to inform the public as to what is being sold, which description may be in general terms and may incorporate the description as used in the instrument containing the power of sale by reference thereto." Clearly, this statute authorizes a notice of sale that is written in plain language. There are no recent cases dealing with the adequacy of the language in a notice under this statute. Older cases deal with the language of the prior statute, which simply required that the description in the deed of trust be repeated in the notice of sale. See, for example, Douglas v. Rhodes, 188 N.C. 580, 125 S.E. 261 (1924) and Peedin v. Oliver, 222 N.C. 665, 24 S.E.2d 519 (1943).

remains completely unregulated. The equivalent of a deficiency judgment can be achieved with relative ease by proper choice of remedy in the event of a vendee's breach of a land contract. The land contract has had a checkered history in many states, including North Carolina. It has been legitimately used in the sale of vacation properties and in other situations where it is of mutual benefit to both vendor and vendee to utilize this financing device, but it has also been used to sell substandard properties to unsophisticated purchasers with low incomes in situations where the opportunity for overreaching and fraud is ripe.

The anti-deficiency statute can also be bypassed where a seller, in addition to the usual documentation required for a seller-financed purchase money mortgage transaction, also obtains an unsecured promissory note. According to several appellate decisions, the statute does not bar a holder's suit to enforce the unsecured note. Nor does the statute bar the taking of additional property as security on a

56. By analogy, mortgage law has been applied in part to land contract law. See, e.g., Lamberth v. McDaniel, 131 N.C. App. 319, 506 S.E.2d 295 (1998). In this case, the court of appeals summarizes the relationship to mortgage law as follows:

"It has been held repeatedly that 'the relation between vendor and vendee in an executory agreement for the sale and purchase of land is substantially that subsisting between mortgagee and mortgagor, and governed by the same general rules.'" Id. at 319, 506 S.E.2d at 296-97. Brannock v. Fletcher, 271 N.C. 65, 70-71, 155 S.E.2d 532, 539 (1967) (citations omitted); see also Boyd v. Watts, 316 N.C. 622, 342 S.E.2d 840 (1986); In re Foreclosure of a Deed of Trust and Taylor, 60 N.C. App. 134, 298 S.E.2d 163 (1982). "As between the parties, the vendor may be considered a mortgagee and the vendee a mortgagor." Brannock at 71, 155 S.E.2d at 539 (citations omitted). Upon default, the vendor-mortgagees may choose a variety of remedies, including forfeiture if the contract allows. Boyd v. Watts, 316 N.C. 622, 628, 342 S.E.2d 840, 843 (1986) ("The vendor, inter alia, may bring an action to quiet title, accept the noncompliance as a forfeiture of the contract, or bring an action to declare it at an end.")

N.C. Gen. Stat. § 75-1.1, of course, might also apply to overreaching in a land contract fact situation.

57. Lamberth at 319, 506 S.E.2d at 295 (1998). The vendees do have the right if they are able to prevent foreclosure by redeeming their interest by tendering the entire balance due to the vendor plus interest.

58. See, e.g., Wilkinson v. SRW/Cary Assoc., 112 N.C. App. 846, 437 S.E.2d 3 (1993), ["The statute does not, however, act to bar an in personam action where the promissory note is unsecured." Id. at 848, 437 S.E.2d at 4 (citing Brown v. Owens, 251 N.C. 348, 111 S.E.2d 705 (1959); Blanton v. Sisk, 70 N.C. App. 70, 318 S.E.2d 560 (1984)].
purchase money loan and then foreclosing on the additional security in addition to the purchase money security.59

C. The Perplexing Law of "Legal Access"

When asking practicing lawyers to identify a "number one" problem involving North Carolina real estate transactions, "legal access" is a frequent response. Disagreements over legal access have increased considerably in recent years for a number of reasons. An attitude of good neighborliness that was the hallmark of earlier generations seems to have dissipated. Real property values have increased dramatically, and property owners are reluctant to give up any aspect of their bundle of rights. Access is often sought in modern society for more than a single-family homeplace on the back forty. At times, it can mean a new subdivision or industrial park generating significant vehicular traffic that most landowners would understandably prefer to see routed elsewhere. Even where "legal access" exists, the nature and scope of that access can be a subject of dispute. Can the access way be widened? Can a speed bump be installed? Can a gate be placed on the right-of-way? Can the way be paved?

Access is a particularly troublesome problem because the modern transaction cost of pursuing a right to access can be prohibitive.60 This is the case because access disputes may involve a painstaking inquiry into the history of a property and the surrounding parcels, a review of a plethora of appellate court decisions, attempts at applying various common law theories of access (such as easements implied by necessity or prior use), and, last but not least, two partially obsolete, confusing and incomplete statutes: N.C. Gen. Stat. § 136-67, the "Neighborhood public roads" statute, and N.C. Gen. Stat. § 136-69, the "Cartway" statute. I will focus on the "Neighborhood public roads" statute in this article and save a discussion of "cartways" for another day.61 With transaction costs well out of proportion in many cases to the right sought to be vindicated, the average citizen sometimes loses his or her right to legal access. The game as important as it might be is not worth the legal fees candle.

60. This is not a criticism of attorneys and the fees that must be charged to adequately prepare for and pursue an access matter. Practicing attorneys would welcome a clear set of rules governing access to real property.
61. It suffices to say that a statute authorizing freeholders "to lay off a cartway, tramway, or railway . . . or cableways, chutes, and flumes . . ." is probably in need of substantial revision.
One can only appreciate what an attorney handling an access dispute might be faced with by reviewing the provisions of N.C. Gen. Stat. § 136-67. The first two paragraphs of the “Neighborhood public roads” statute remind us of the wisdom of Chief Justice Holt in City of London v. Wood when he wrote: “An Act of Parliament can do no wrong, though it may do several things that look pretty odd.”62 Those statutory paragraphs provide:

All those portions of the public road system of the State, which have not been taken over and placed under maintenance or which have been abandoned by the Department of Transportation, but which remain open and in general use as a necessary means of ingress to and egress from the dwelling house of one or more families, and all those roads that have been laid out, constructed, or reconstructed with unemployment relief funds under the supervision of the Department of Health and Human Services, and all other roads or streets or portions of roads or streets whatsoever outside of the boundaries of any incorporated city or town in the State, which serve a public use and as a means of ingress or egress for one or more families, regardless of whether the same have ever been a portion of any State or county road system, are hereby declared to be neighborhood public roads and they shall be subject to all of the provisions of N.C. Gen. Stat. §§ 136-68, 136-69 and 136-70 with respect to the alteration, extension, or discontinuance thereof, and any interested party is authorized to institute such proceeding, and in lieu of personal service with respect to this class of roads, notice by publication once a week in any newspaper published in said county, or in the event there is no such newspaper, by posting at the courthouse door and three other public places, shall be deemed sufficient: Provided, that this definition of neighborhood public roads shall not be construed to embrace any street, road or driveway that serves an essentially private use, and all those portions and segments of old roads, formerly a part of the public road system, which have not been taken over and placed under maintenance and which have been abandoned by the Department of Transportation and which do not sever as a necessary means of ingress to and egress from an occupied dwelling house are hereby excluded from the definition of neighborhood public roads, and the owner of the land, burdened with such portions and segments of such old roads, is hereby invested with the easement or right-of-way for such old roads heretofore existing.

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Upon request of the board of county commissioners of any county, the
Department of Transportation is permitted, but is not required, to
place such neighborhood public roads as above defined in a passable
condition without incorporating the same into the State or county sys-
tem, and without becoming obligated in any manner for the permanent
maintenance thereof. 63

This statute reads like it was drafted via the cut-and-paste method.
While three types of roads qualify as neighborhood public roads, the
statute often poses more of an obstacle to establishing access than a
help. In one recent North Carolina Court of Appeals decision, for
example, the petitioners faced the practical difficulty of proving in the
year 1998 under one prong of the statute that the road in question
"was an established legal road by prescription in 1941." 64 As the court
put it: "In other words, the relevant time period for proving the pre-
scriptive easement is twenty years prior to the enactment of the statute,
or from 1921 to 1941." 65

D. Eliminate Unnecessary Criminal Law Statutes

Civil statutes like the ones discussed above are not the only ones
that should be scheduled for oblivion. There also appear to be many
meaningless criminal law statutes on the books. Once again, I will
offer the real property law area to illustrate my point. Contemporary
American society is at times overwhelmed with serious crimes against
both persons and property. Statutes like N.C. Gen. Stat. § 42-13, titled
"Wrongful surrender to other than landlord misdemeanor," occupy a
gnat-like level of importance in the relative scheme of things. That
statute reads:

Any tenant or lessee of lands who shall willfully, wrongfully and with
intent to defraud the landlord or lessor, give up the possession of the
rented or leased premises to any person other than his landlord or les-
sor, shall be guilty of a Class 1 misdemeanor. 66

Assuming arguendo that widespread "wrongful surrender" was a
serious public policy issue at one time in North Carolina's history, 67
the statute as drafted creates a misdemeanor that is nearly impossible

65. Id. at 473, 521 S.E.2d at 144. See also Coghill v. Oxford Sporting Goods, Inc.,
2001 WL 503057 (N.C. App.).
67. N.C. Gen. Stat. 42-13 was amended by the General Assembly in 1993, effective
October 1, 1994, so someone remained concerned about this issue into the 1990s.
Laws 1993, c. 539, § 402.

http://scholarship.law.campbell.edu/clr/vol23/iss2/1
to prove. How often will a tenant surrender the nonfreehold estate to someone other than the landlord or lessor in a manner that was willful, wrongful and with intent to defraud? The reality is that no district attorney seriously considers adding "wrongful surrender" to a burgeoning caseload of violent and serious crimes. If a tenant indeed has turned over the property to the wrong person, it is a civil matter, a problem that most landlords are well equipped to efficiently deal with. It makes no sense to pollute the statute books with laws like this one. It ought to be repealed. 68

Another example from the landlord and tenant area is N.C. Gen. Stat. § 42-11, titled "Willful destruction by tenant misdemeanor." 69 This statute serves no useful purpose, is duplicative of existing civil law provisions, and is rarely if ever a basis for criminal prosecution. Why continue it on the books? 70

Another wonderful example of a law of questionable utility is N.C. Gen. Stat. § 47-32.2,71 a statute that makes violation of the provisions of other statutes related to the registration of a plat or map a misdemeanor. It is puzzling why the second paragraph of this statute states that the law does not apply to thirty-seven North Carolina counties. 72 In the history of this statute, has a single person been charged with the misdemeanor of noncompliance with the other registration statutes? Has a single person been convicted? Why is the statute on the books? Why are 37% of North Carolina's counties excluded? 73 This statute

68. Likewise, N.C. Gen. Stat. 42-11, "Willful destruction by tenant misdemeanor," seems an unnecessary duplication on a comprehensive set of criminal statutes in North Carolina. As long as we are eliminating archaic, unused statutes, add N.C. Gen. Stat. 42-22 ("Unlawful seizure by landlord or removal by tenant misdemeanor") to the scrap heap.


70. As is typical of statutes in the landlord and tenant area, there is no counterpart protection for tenants in the event a landlord destroys a tenant's property.

71. The statute is titled: "Violation of § 47-30 or § 47-32 a misdemeanor."

72. That paragraph reads:
The provisions of this section shall not apply to the following counties:

73. Most local variations of the North Carolina General Statutes are unnecessary in the real property area. They unnecessarily complicate the law and convert North Carolina into a series of de facto fiefdoms with unique customs and rules. There is enough confusion in the uniform application of statutes.
and most statutes like it should be repealed. They serve no function other than to trivialize what should be the important role of legislation in society. 74

III. OTHER THOUGHTS AND CONSIDERATIONS ON LEGAL AND LEGISLATIVE REFORM

A. The Transaction and Emotional Cost Of Obsolete And Ineffective Statutes

At this juncture, I should define what I mean by “transaction cost”, because that term has triggered a volume of jurisprudential literature and economic theory centering on the Coase Theorem. 75 The nuts and bolts of Coase’s Theorem is that the framework of the law that allocates rights in property is not of consequence as long as transaction costs are nil. According to this theorem, an efficient outcome will result through the bargaining of the parties no matter who technically bears the burden of liability. One interpreter of the Coase Theorem observed: “The conclusion may be drawn that the structure of the law should be chosen so that the transaction costs are minimized, because this will conserve resources used up by the bargaining process and also promote efficient outcomes in the bargaining itself.” 76 Coase notes that “economists, and policy-makers generally, have tended to over-estimate the advantages which come from governmental regulation.” 77

77. See Coase supra note 74. Coase continues: “But this belief, even if justified, does not do more than suggest that government regulation should be curtailed. It does not tell us where the boundary line should be drawn. This, it seems to me, has to
It is not my intention here to re-plow the well-cultivated furrows of the law-and-economics/jurisprudence realm. Perhaps I should select a different descriptive term for purposes of emphasizing my point. Let's be practical and simply call it the "dispute price-tag." One commentator's term, "entitlement-determination costs," also describes with more eloquence and precision what I am concerned about. I should also add that the economic aspect of a real property dispute (or most disputes for that matter) can be over-emphasized. There is a personal and emotional "price-tag" that attaches to legal disputes that most commentators ignore. One author writing about disputes in a different area of law observed:

[L]itigation has a great deal in common with major surgery. Both are extremely unsettling in prospect, painful, prolonged, embarrassing, disruptive and inordinately expensive in execution, and somewhat unpredictable as to outcome. Each requires that the victim entrust matters of the most vital personal concern into the hands of a professional champion, who is not always regarded as being equal to the challenge of this monumental responsibility, even granting his or her sincerity and single-minded dedication to the case.

When the law is so obsolete and confused and the dispute price tag becomes greatly disproportionate to the value of the property right in dispute, what will happen? Who is favored? If A and B are engaged in a legal dispute concerning whether A has a common law or statutory right to an easement over B's land, what is the effect of the combination of confusing laws and the high cost of legal representation? The following example, based upon a fact situation with which I am personally familiar, might be helpful in assessing those questions.

Example. A purchases part of an old farm, a ten-acre parcel of land with a small farm house located to the rear of the parcel. The parcel has 360 feet of frontage on a state road located approximately 400 feet from the house at the front of the parcel, but the historic and far more convenient public road access to the farm house has been come from a detailed investigation of the actual results of handling the problems in different ways . . . ."

78. Thomas W. Merrill, Trespass, Nuisance, and the Costs of Determining Property Rights, 14. J. LEGAL STUD. [somewhere between pp. 13-26 or 35-48]. Merrill observes: "Entitlement-determination costs, in contrast to transaction costs, are the resources that must be expended in order to establish who has the property right that is the subject of the exchange." He defines "transaction costs" as consisting "of the resources that must be expended in order to enter into and enforce contracts for the exchange or modification of property rights."

79. Aiken, Adams & Hall, Legal Liabilities In Higher Education: Their Scope and Management (National Association of College and University Attorneys 1976).
over an unpaved driveway located in part over a thirty-foot strip along the western edge of the adjoining one-acre parcel owned by B. No document in the recent chain of title exists that expressly creates an easement over that strip. The attorney handling the closing for A correctly noted in the title report that the parcel had legal access. After purchasing the property, A accessed the farm house by traveling over the driveway for several months until B sold the adjoining parcel to C. C now objects to any use of the driveway by A. C explains that A should "use his own land" to gain access.

The central question in this example is not so much what the law is concerning legal access. Rather, it is how the dispute will progress and be shaped and resolved at the grass roots level in light of two factors: the confusing state of the law of access when it is applied to concrete fact situations and the relatively dear cost of employing a legal champion to negotiate the dispute and, if necessary, attempt to vindicate the rights of each party. While any number of scenarios can be envisioned, the path of this dispute (no pun intended) went through the following steps:

**Step One:** A and C exchanged several phone calls. C threatened to block the driveway and warned A that he better build his own driveway and access the state road over his own property. C pointed out that A had ten acres at his disposal, while C's parcel was only one acre in area. Why should C give up part of his property ownership?

**Step Two:** Because of what he perceived as the high cost of retaining an attorney, A went the often unreliable "free advice" route by checking with a fellow church member and lawyer just before Sunday school. A also jumped on America Online and found all kinds of information on the general law of easements from all over the nation. A also read a chapter in a book intended to be used by real estate agents to add to his knowledge of "the law."

**Step Three:** C, true to his word, blocked the driveway by plowing up portions of it and placing a locked gate at the entrance from the public road.

**Step Four:** A phoned the attorney who handled the closing. The attorney told him not to worry and drafted an excellent "legal" letter to C informing C that A claimed an easement right over the driveway on C's land.

**Step Five:** C retained an attorney, who responded with a letter denying the existence of any legal right-of-way benefiting A over C's land.

**Step Six:** A made another appointment with his attorney. At this meeting, the attorney explained that title insurance did not cover the
matter because the road frontage gave A legal access. Therefore, if A wanted to continue to use the driveway over C's land, A would have to prove that he had some kind of valid easement, and that could be expensive. Since no expressly created easement was found in the recent title records to which the most recent title search was limited, the land records would need to be searched much further back in time. The records would also have to be searched to determine whether some type of implied easement might have been created. The possibility of a prescriptive easement was also mentioned, as was a general reference to the possibility that A might have a "neighborhood public road." The attorney would also need to look into the General Statute books to ascertain whether A's fact situation qualified A for legal access under any statutory provision. A's attorney asked for a $2500 retainer and informed A that his hourly rate was $150/hour and that he had no idea how many hours this matter might take. When asked to guess, A's attorney offered a price tag of $5,000 to $10,000 to possibly clear up this matter, but wisely made no guarantees.

Step Seven: A told his attorney "that he would think about it" and made an appointment with another attorney.

Step Eight: Repeat in general terms with some variation in advice and legal fee steps six and seven.

Step Nine: A called a local contractor, had a new driveway bulldozed in from the main road over A's road frontage and had numerous loads of crush-and-run delivered and spread at a total cost of $4,000.

Step Ten: A is bitter about the dispute, has nothing to do with his neighbor, and harbors an intense dislike for the legal system and lawyers in general.

From one perspective, the above scenario demonstrates the deep chasm that exists between the theoretical realm of the law so revered in most law schools and the practical reality of what often takes place in real life fact situations. It and thousands of unreported daily scenarios like it demonstrate the irrelevance of "the law" of the statute books and appellate court decisions to a majority of citizens who simply cannot afford to engage in a dispute with proper legal representation.

There is no cost-effective way for the typical citizen, not to mention the citizen at the poverty level, to adequately enforce even the most basic of statutory property rights. As such, they have ceased to be "rights" in any realistic definition of that concept and instead appear to be mere facades or legislative statements without practical

80. Sometimes the "dispute price tag" will be covered by title insurance. The increasing cost of resolving legal disputes renders the "duty to defend" aspect of title insurance a practical and valuable benefit to the insured.
meaning, at least to the average citizen. To the extent that this observation is accurate, there has been a de facto disintegration of the institution of private property. For example, imagine that a farmer calls with a problem similar in practical effect to the one summarized above: a neighboring farmer and his son went out to one common boundary and moved a ditch and fence line several feet over. The land is optimistically valued at $2500 per acre, and the value of the lost property is about $4,000. No recent survey of the property exists. Unless the offending neighbor caves in upon receipt of one nasty letter from the innocent farmer’s attorney, it will cost the farmer more than the value of the lost land to restore it. This, in turn, encourages the innocent farmer to resort to self-help to restore his line. The sanctity of boundaries is an ancient concept, and the ancient law had its own alternative dispute resolution techniques.

B. A Tradition of “Top-Down” Evaluation and Reform

The legal profession has an understandable tradition of engaging in a “top-down” evaluation of policy issues, including the evaluation of existing and proposed statutes. In this “top-down” approach, the profession looks to appellate court decisions, the writings of law professors, the work of law reform groups, special committees, and bar sections. The question is: What does each source of “top-down” evaluation actually contribute to any meaningful assessment of a statute? Appellate court decisions, almost worshiped in law school and in the journals and newsletters of the profession, are really sources of statutory interpretation rather than evaluation. With roots in the political process, appellate judges are circumspect when it comes to discussing the need for or effectiveness of a statute. Members of the legal profession periodically gather at continuing legal education and related functions to read and hear summaries of what the North Carolina Court of Appeals and Supreme Court of North Carolina have to say about the meaning or effect of a given statute. Because these are the “appellate” or “high” courts, every opinion is dissected by some expert in order to assist in predicting how future matters might be interpreted. Because appellate courts can only react to the fact situations presented to them in the record on appeal, they carry serious limitations as a method of statutory evaluation. They often amount to

81. Among the references in Proverbs, see Proverbs 22:28 (“Do not move an ancient boundary stone set up by your forefathers”), and Proverbs 23:10 (“Do not move the ancient boundary stone or encroach on the fields of the fatherless”).

82. One Old Testament method was “casting the lot,” a procedure that might be considered in some disputes today. Proverbs 17:18.
nothing more than highly informed improvisations to solve existing disputes in society. They are emphasized in law schools because they constitute convenient and often interesting starting points for legal analysis and policy considerations, but frankly they do not deserve the emphasis that the profession and the legal academy accords them. In some respects, the disproportionate emphasis lavished on appellate decisions diverts attention from a more difficult, thorough, scientific analysis of the true meaning and effect of a statute.

The writings of law professors constitute another "top-down" method of evaluation. Law professors (including this one) love to evaluate statutes and suggest reform. The perspective of members of the academy is certainly an important one, but, like appellate decisions, they provide but one perspective of a matter—often a purely theoretical snapshot. Law review articles have value, of course, but they are undermined by a number of factors. First, the stark reality is that the majority of contemporary law professors have never practiced law in any meaningful fashion. Others, of course, practiced so long ago that the entire process now constitutes a distant dream. Too many, by the way, not only have never practiced law, but also exhibit a disdain for the practice. Theory is wonderful, but an appreciation of the nuts and bolts of the daily practice of law, of what it means to require a retainer from a client, of the mundane realities of overhead, postage, computer equipment, advertising, and law office management in general are seldom a foundational element in scholarly writing. Appreciation of what really goes on in the trenches is essential for an observer to be complete in assessing the effectiveness of an existing or proposed

83. For a good recent discussion of the relevance of legal scholarship to the judiciary, see Judge Alex Kozinski, Who Gives A Hoot About Legal Scholarship? 37 Hous. L. Rev. 295 (2000). Judge Kozinski has a number of astute observations on the relationship between judges and academics. One of his conclusions is that legal scholarship does matter, but it could matter more.

84. Judge Kozinski observes:
Finally, and most radically perhaps, maybe we should give a little more thought about who becomes an academic. One way to make academic scholarship more useful to the judiciary is to have academics who are more attuned to the practical aspects of lawyering and judging. But it's difficult to have a sense of the practical without some practical experience. Someone who becomes an academic directly out of law school—or perhaps after one or two years of clerking—may not be in the best position to identify topics that have practical significance or to come up with practical solutions to the problems they do tackle. I therefore propose that law schools adopt a standard policy that no one will be invited to be a faculty member without at least three years of nonacademic, post-graduate experience.
37 Hous. L. Rev. at 320.
statute. Second, there is the unfortunate tendency of law professors to talk down to the profession, discussing policy issues as if professors are the ultimate source of wisdom in the evolution of the law through the ages. Theory combined with arrogance is neither well received nor effective with the practicing bar. Law professors have much to contribute to the process of statutory evaluation, but no less important is the input of the daily users of the law. These daily users or "consumers" of the law are the clients and their attorneys.

Continuing legal education speakers prepare manuscripts, often quoting statutes and appellate court decisions, and then perform a "talking-head" presentation, sometimes with Microsoft PowerPoint or other visual aids, at the many CLE programs held throughout this state and the nation. Many CLE speakers are practicing lawyers, so these programs should in theory constitute effective opportunities for statutory evaluation and reform. While continuing education presentations and manuscripts offer an important addition to any dialogue related to statutory evaluation and reform, they also represent a "top-down" form of evaluation because the potential of the audience and the practical wisdom and insights that members might offer remain largely untapped.85 As noted above, CLE programs are too often preoccupied with recent appellate decisions, as if there is nothing else for a group of lawyers to talk about. Continuing education program speakers work hard and are volunteers, and this discussion is not intended to offend them. However, the CLE process itself cries for reinvention, and there is much going on by way of creative experimentation. Suggestions for reinvigorating CLE include making use of more organized methods of getting the audience involved as partners in the process. Input from those enrolled in a program received in advance of the presentation and manuscript preparation would be helpful. Instant feedback through electronic devices at each seat in the audience would be won-

85. In a recent ABA Journal article dealing with examples of the legal process becoming more friendly to pro se litigants, the following observations appear at end of the article:

At a recent conference in Massachusetts on pro se litigants, Mary K. Ryan, a Boston lawyer who chairs the ABA legal services delivery committee, was impressed most by the differences between theory and reality in the presentations. "It was really striking that on the first day people were speaking from on high, and the second day we heard from people who work in the courts, who weren't prepared to debate what the bar should do but instead spoke of what they were already doing," she says. "If you work in the court—clerk staff, interpreter, law librarian—you have a lot of people coming to you every day, and you want to be able to do something for them."

The technique used at some meetings of breaking into small groups, working on issues and problems, and then reporting back to the entire assembly works well if carefully planned in advance. It goes without saying that computer technology, Web pages, and e-mail should foster a more broad-based approach to continuing legal education. Some continuing legal education programs could also benefit from a work product, a brief (and I stress “brief”) report by way of electronic or conventional newsletter concerning matters of concern to both speakers and members of the audience.

“Top-down” evaluation of statutes and proposed legislation also has a source in the work of specialized sections of both state and national bar associations. Again, this is not to suggest that specialized sections are not making valuable contributions to the process; rather, it is again to emphasize that, somewhat surprisingly, the sections do not always speak for the rank-and-file members of the practicing bar. Additionally, sections are sometimes overpopulated by attorneys representing clients who dominate a field—lenders, for example, in the real property area—and these attorneys do not always take an altruistic approach to statutory evaluation.

The work of law reform committees and organizations, both on a state and national level, constitute yet another form of “top-down” evaluation. These committees, commissions, and institutes provide leadership and a perspective on current and proposed statutes, but they invariably approach the process with prejudices and preconceived notions of what is good for the legal profession and society. One highly regarded preconceived notion is that the law on any given topic ought to be “uniform” throughout the nation. Critics can argue that uniformity is not always in the best overall interests of the practicing bar or of the public in general. Uniform laws tend to be well drafted, but the Code Justinian approach to covering every conceivable possibility fails because all statutes raise new issues of interpretation. Clearing up one set of problems or ambiguities by statutory revision or the addition of new statutes inescapably results in new problems and ambiguities.

If the history of the ongoing development of the law is any guide, “top-down” evaluation will continue to be the dominant approach. This predictable state of affairs is largely due to the complacency of members of the rank-and-file practicing bar, including local bar associations. The current players in the realm of statutory evaluation and reform are there in part because of the vacuum—some would say the “black hole”—created by a lack of interest and effective participation by most members of the bar. These busy but apathetic soldiers of
the law appear more than willing to be led from on high. They have apparently abdicated their professional responsibility to continue to monitor and improve the legal system.

Last but not least, "top-down" evaluation too often fails to seek input from the day-to-day consumers of legal services. The "consumer"—as opposed to consumer and special interest groups—is rarely a part of any ongoing processes of statutory assessment. What does the "consumer" of legal services and statutes want? Consumer input should constitute an important addition to the process by which laws are evaluated and enacted. A focus on effective, user-friendly laws, citizen-based laws rather than laws for experts or lawyers, needs to be added to the framework for statutory analysis.

C. Disproportionate Reliance on Secondary Interpretation

While the following statement is overly simplistic, "the law" can be said to exist on two levels: there are primary sources of law, and then there are secondary interpretations of those sources. While I have a very favorable impression of the current generation of law students, an example based upon my observation of some of them may prove helpful. It strikes me that the last thing that some students coming through the American education system want is to focus on the primary source. If the language of a statute proves tricky or difficult, the student will seek out a study aid. Instead of trying to confront the meaning of a law at the primary source level, the student seeks a crutch, something to tell him or her what to think. A problematic court of appeals or supreme court decision that would make perfect sense if read two or three times with facts diagramed to assist in analysis will not be read two or three times. Indeed, the entire decision might not be carefully read once. Rather, the student will seek an interpretation of the primary source. What does somebody else say it says? If that makes sense or is at least comfortable, then the student's analysis is done.

Law students eventually become lawyers—at least most of them do. The comfort level and satisfaction with what others say the law is continues. Instead of reading and re-reading a new statute passed by the General Assembly, too many lawyers rely on newsletters and "experts" to tell them what the statute means and what to think about it. The problem with this approach is that "precedent" starts to become the interpretation of others rather than the language of the primary source. There is value in what experts and those with background in the law have to share with the practicing bar, but there is also much value in a first-hand look at the primary sources of law.
D. Evaluation in the Digital Millennium

One avenue that needs to be explored is the utilization of computer technology to assist in statutory evaluation. Except for appellate court decisions and a happenstance system of "top-down" statutory evaluation, discussed above, there is no organized system in place to take advantage of the ongoing revolution in electronic communications and computerized information processing. The collection and integration of data concerning litigation and the filing of public documents would provide an entirely different analysis approach. At present, the organized bar and state and local government units are not coming close to making effective use of computing resources to improve the system of laws and justice in North Carolina.

To assist in the proper study of the effect of a given statute or specific statutory language, attorneys and legislators must have a scientific method of evaluation and measurement. Technology can easily provide data from the "practicing law" level rather than just the appellate level of the legal system. It can be organized and integrated to assist in the process of statutory analysis. The data flow from county seats around the state can be placed in utilitarian and easily accessible databases. Technology can also be used to simulate and model the effect of statutory language on transactions and disputes. Representative simulations of legal disputes can be designed by analyzing existing data filed in public offices.

Computer technology can also be a resource to assist in the evaluation of proposed legislation. Through computer technology, we can envision likely scenarios of problems and disputes in light of the legislative proposal. What will people actually do if the new statute is passed? What legal arguments will their lawyers make? Will the new law be an expensive one in terms of the transaction cost of a dispute subject to the law? In plain English, will the typical client be able to afford justice under the proposed statute? Is there a more cost-effective alternative to the statute as proposed? What ambiguities in the law

86. For example, N.C. Gen. Stat. § 39-6, titled "Revocation of deeds of future interests made to persons no in esse," with its three provisos, has not been the subject of an appellate decision since the 1940s and has, like so many statutes, generated its own curative act, N.C. Gen. Stat. § 39-6.1 ("Validation of deeds of revocation of conveyances of future interests to persons not in esse"). Does N.C. Gen. Stat. § 39-6 have utility for the practicing bar? Is it used? How often? Effective use of computer technology at the courthouse level would reveal telling things about some of the statutes mentioned earlier in the "hit-list" portion of this article. To cite another example, in calendar year 2000, how many spouses asserted a right to the one-third life interest under N.C. Gen. Stat. § 29-30?
will lawyers exploit? Is the "problem" that prompted the proposal of new legislation really a widespread problem throughout the state? How is the "problem" now being handled in the absence of a statute or pursuant to an existing statute? Is the statute really necessary?

There is room in the framework for analysis to consider creative approaches to how laws actually affect people. In a recent article summarizing the "behavioral law and economics" perspective, the editors of the Green Bag ask basic questions: "How does law actually affect people? What do people do in response to the law? Why is the law as it is? How can law be enlisted to improve people's lives? What do people like, and what are they like?" Professor Sunstein writes:

In the last two decades, social scientists have learned a lot about how people actually make decisions. Much of this work requires qualifications of rational choice models, which have dominated the social sciences, including the economic analysis of law. Those models are often wrong in the simple sense that they give inaccurate predictions about what people will actually do. People are not always "rational" in the sense that economists suppose. But it does not follow that people's behavior is unpredictable, systematically irrational, random, rule-free, or elusive to social scientists. On the contrary, the qualifications can be described, used, and sometimes even modeled. We know, for example, that people dislike losses, even more than they like gains; that they are averse to extremes; that they have a difficult time in translating many harms into dollar amounts; that they care about fairness, like to be fair, and are willing to punish unfairness; that they tend to be unrealistically optimistic; that their own moral judgments are self-serving; and that they rely on heuristics, or rules of thumb, that can lead to systematic errors.

My suggestion is that, in addition to traditional "top-down" methods of statutory evaluation, the organized bar consider additional perspectives on how laws are interpreted and applied in the real world. My thought is that an organized approach utilizing the benefits of computer technology will allow evaluators to gain exciting insights into how statutes operate and how our whole system of justice works or does not work. Private corporations have engaged in market research at the grass roots consumer level for decades. Government, legal scholars and the organized bar should also embrace this approach.


89. Id. at 397-398.
One component of monitoring statutory use at the local level should include scientifically designed surveys to be voluntarily completed by both practicing attorneys and members of the public. These surveys could be on-line. Considering input from members of the public who are participants in some way in the legal system—a citizen driven focus in addition to the traditional lobbyist and special interest group driven focus—will provide yet another perspective on how laws really operate and affect humanity.

Web pages and e-mail are now being utilized to communicate proposed legislation to interested lawyers. Individual recipients of this information and local bar associations have an obligation to the profession and to the jurisprudence of this state to take an active role in responding to this information.

E. The Concept of Desuetude

Might a statute be judicially abrogated when it has fallen into disuse for a long period of time? The theory is that the ignored statute no longer reflects the goals and values of the community. Desuetude most often surfaces as a criminal law/constitutional law defense to criminal law statutes that have long gone ignored and unenforced. While the idea that a statute may be declared void for desuetude has with a few exceptions been generally rejected in the United States, it is my view that numerous civil law statutes, and those statutes affecting real property law in particular, can be considered void for desuetude in a practical, day-to-day practice of law meaning of that concept. As emphasized above, the incompleteness of most law review articles is that, for the most part, they analyze appellate court decisions to discern policy and law. This ignores what goes on in the proverbial

90. See David B. Cruz, "The Sexual Freedom Cases"? Contraception, Abortion, Abstinence, and the Constitution, 35 Harv. C.R.-C.L. L. Rev. 299, 334 (“Under the doctrine of desuetude, which generally has not been adopted in the United States, 'courts may abrogate statutes that have fallen into disuse.' Generally speaking, 'the doctrine of desuetude refers to judicial abrogation of a statute that has not been enforced for a long period of time, no longer reflects the goals and values of the community, and is thus widely ignored.'”). At footnote 197, the author refers to an article in the New York Times by William Safire titled "The Penumbra of Desuetude," in which Safire quotes Judge Bork's analysis of the statute invalidated in Griswold as stating: "I think you'd have a great argument of no fair warning, or sometimes what lawyers call . . . desuetude, meaning it's just so out of date it's gone into limbo.” Id. at n. 127 (quoting The Penumbra of Desuetude, N.Y. Times, Oct. 4, 1987, at 16, 18.

trenches. If, for example, lawyers involved in disputes over real property issues consistently ignore a statute that might have applicability to the dispute, and if trial judges consistently steer clear of certain statutes because they consider them archaic or hopelessly confusing and the cause of more problems than they purport to solve, then a de facto desuetude has taken place in a very substantial way. A statute that is uniformly ignored by practicing lawyers, trial court judges, and clerks of court undergoes atrophy almost as effective as legislative repeal.

Once again, I make my case for utilizing computer technology and "e-feedback" to provide evidence of de facto desuetude. The resources of the computer should be utilized to ascertain those statutes in the real property area (and certainly in all areas of civil and criminal law) that are consistently ignored at the grassroots level of the practice of law. Unused statutes should then be analyzed by a review board that includes general practitioners and trial court judges in addition to leading experts in the field.  

F. Challenges Facing the New Millennium Law Student

The prolific expansion and increase in complexity of statutory law combined with the arrival of the Internet and all of the capabilities of computer technology in recent decades have resulted in significant challenges to teaching and learning the law within the traditional three-year law school curriculum. During more than a decade of serving as a law school dean, I experienced what I considered unfair and inaccurate observations by some members of the practicing bar along the following lines: "today's law students have it too easy", "a third of my law school class didn't make it, but nobody flunks out anymore", "the quality of law students is not what it used to be", "the current generation of law students is composed of weak writers", and "law professors today are first-class wimps . . . nowhere near as tough as old Professor ________ was back at good old ___________ School of Law."  

92. The North Carolina General Statutes Commission provides an excellent existing entity for this systematic, periodic statutory review.

93. Years as a law school dean are somewhat akin to so-called "dog years": each year in fact represents seven years of a regular human being's life. Therefore, I was dean in "dean-years" for more than seventy years. But I digress.

94. For more than a decade, I have received feedback like this on literally hundreds of occasions. The reader is invited to fill in the name of the ornery old law professor (whose sheer meanness and intimidating demeanor seems to increase in intensity as the years since law school graduation allow memory embellishment to set in) and law school alma mater (which is not what it used to be).
In response, I asserted and continue to assert that the current generation of law students is faced with attempting to comprehend a body of federal and state law that is significantly more complex and voluminous than the now relatively quaint law school curricula of three decades ago. Let's use the basic real property law subjects by way of example. I have selected the basic, first-year real property courses as an example solely because of my long-time familiarity with them. What might a basic Property I course cover in the year 2001? What about Property II? How do these courses compare with the Property I and II courses of my student days?  

Let's start with the “basic” Property I course in the year 2001. Like those who suffered before, the student of the new millennium must grapple with estates in land and future interests. The capstone experience in this regard is the infamous common law Rule Against Perpetuities, that deceptively simple “lives in being plus twenty-one years” cruel invention of the common law that has spawned centuries of labyrinthine bewilderment in its application to even simple fact situations. One would have hoped and indeed prayed that reform would have completely obliterated that rule, at least prospectively. Unfortunately, the Uniform Statutory Rule Against Perpetuities and companion legislation recently enacted in North Carolina require that a law student (and lawyer) continue to understand the common law rule and actually complicate the area of estates in land and future interests by continuing to emphasize a distinction between contingent remainders and executory interests. Whatever the reader thinks of the reform, my point is simple: law students must now deal with a statutory overlay.

There is significantly more to learn, and the statutory reform has not simplified the area from the standpoint of a law student's attempt to study and comprehend to the extent possible the entire perpetuities conundrum.

When that first-year law student moves on to what was once the somewhat quaint law of landlord and tenant, she or he is confronted with a volume of the General Statutes abounding with so-called reform legislation affecting residential tenancies. The centerpiece reform,

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95. My law school graduation date was 1971. I was a student in Property I and II in 1968.
96. At Campbell's law school, students are introduced to the Rule Against Perpetuities in Property I and then study it in greater detail in the second year Wills course. Those who opt for the Estate Planning Seminar will once again confront the monster.
97. “So-called” because many of these reforms favoring the residential tenant provide little to the tenant in terms of meaningful remedies and attorney fees. But for a judicial gloss favoring tenants under some of the statutes and but for the ubiquitous
the Residential Rental Agreements Act, 98 produces an entirely new and somewhat comprehensive set of issues. (Indeed, every new statute, regardless of the skill of the drafter, is capable of producing numerous new issues of statutory interpretation.) Students must also deal with statutes aimed at prohibiting retaliatory eviction, 99 the Tenant Security Deposit Act, 100 statutes prohibiting self-help eviction, 101 special statutes dealing with the treatment by the landlord of the residential tenant’s personal property, 102 statutes dealing with condominium conversions of residential units, 103 statutes addressing public housing fact situations, 104 laws addressing lead-based paint hazards, 105 and last but not least, federal and state laws addressing housing discrimination. 106 One cannot study landlord and tenant law in a state famous for its resort properties without paying homage to the Vacation Rental Act. 107 As with every area of substantive law, discussion of the law of landlord and tenant law must now also address technology issues. 108

With landlord and tenant law out of the way, the first semester law student moves on to the law of concurrent ownership. Here, she or he is faced in North Carolina with the resurrection of the joint tenancy form of concurrent ownership. 109 In addition, one cannot ade-
quately deal with concurrent ownership without some cross-reference to the implications of the law of Equitable Distribution.  

The final subject of the first semester property law course is another nightmare in terms of the common law: the law of non-possessory interests in land. This includes the relatively fun areas of easements and profits, but even this area now has important statutory aspects in the form of laws authorizing conservation and historic preservation easements. The "rails-to-trails" movement also adds somewhat complex statutory and regulatory law to the formerly quaint law of easements. Once the student moves on to the common law thicket of covenants at law and equitable restrictions, she or he must now grapple with the comprehensive Planned Community Act, legislation that covers an entire chapter of the General Statutes. This is the case because restrictions in planned communities can be enforced by virtue of statutory authority. It should be always stressed during this discussion that statutory additions to the law of the land rarely eliminate the preexisting common law, especially in the area of real property. Hence new millennium students must learn every bit of the common law that has always been a part of legal education and, in addition, digest an ever-increasing amount of statutory law and interpretations of that law. Finally, it is not possible to adequately cover private rules that govern property ownership without some acknowledgment in class of the existence of the comprehensive North

113. See, e.g., Runyon v. Paley, 331 N.C. 293, 416 S.E.2d 177 (1992), the leading case nationally summarizing the enforceability of covenants at law and restrictions in equity. Justice Meyer's opinion is a masterpiece, and all first-year law students should study it.
115. The common law itself continues to burgeon as the advance sheets of appellate courts at the state and federal level demonstrate weekly.
Carolina Condominium Act\textsuperscript{116} and legislation addressing time-share ownership.\textsuperscript{117}

Now let’s move on to the second semester of real property. This semester deals with “the real estate transaction” and all that is included in that concept. Traditionally, the semester kicks off with a discussion of the common law statute of frauds. In North Carolina, of course, this brings the students to the unique “no part performance” view of the statute as it has in generations past. Once again, the law student of the new millennium must grapple with much more than his or her predecessor students. The advent of the Internet, World Wide Web, e-mail and computerized research has added a comprehensive new area of concern to the formerly quaint study of the statute of frauds.\textsuperscript{118} Students can no longer stop after reading N.C. Gen. Stat. § 22-2 and a handful of key appellate court decisions. The North Carolina Uniform Electronic Transactions Act\textsuperscript{119} and its federal E-Sign counterpart\textsuperscript{120} now increase in significant ways the amount of information that must be processed by each law student.

The law dealing with real estate brokers, once a relatively uncomplicated area of sellers’ agents and subagents and their duties under the law of agency, has been transformed into a greatly expanded field of law involving sellers agents, buyers agents and dual agents.\textsuperscript{121} Once again, more statutes and administrative regulations must be reckoned with by the new millennium law student. Indeed, almost every aspect of the real estate transaction has become more complex: title insurance coverage, formats for developing land beyond the simple fee simple transfer or ground lease,\textsuperscript{122} legislation dealing with interstate land

\textsuperscript{116} Chapter 47C of the North Carolina General Statutes.
\textsuperscript{117} Article 4, Chapter 93A of the North Carolina General Statutes.
\textsuperscript{118} The Internet information revolution has added an entirely new dimension and area requiring at least minimum competence to the law school curriculum. Law students must be able to accomplish legal research tasks using the Internet. Technological competence levels now expected was not required of law students of past generations. See, for example, two recent articles in the July/August ABA Probate & Property Journal: Patrick A. Randolf Jr., Has E-Sign Murdered the Statute of Frauds? (page 23), and William P. Gardella, E-commerce in Real Estate Transactions (page 44).
\textsuperscript{119} Uniform Electronic Transactions Act, Chapter 66, Art. 40 of the North Carolina General Statutes.
\textsuperscript{122} Synthetic leases as financing devices, for example.
sales, a comprehensive marketable title act with a multitude of exceptions (that rob it of much of its effectiveness), the proliferation of complex overlays of land use controls and zoning laws, environmental considerations, wetlands laws and issues, significant constitutional issues involving the question of takings, and, once again, fair housing legislation.

As suggested above, the Property I and II courses have been selected because I have taught them for almost three decades and am well aware of the transformation that has taken place in those courses. It is important to add that it is impossible to do much more than mention some of the many new laws and developments in real property law in the basic courses. Exploration of many issues must be reserved for advanced seminars. But my defense of the law student of the new millennium to the "old guard" of the practicing bar should at this point emphasize that what has been written above about the basic property courses can be written about any of the core curriculum courses in a law school curriculum. Things truly "ain't what they used to be"; they are significantly more complex and involved. My point in sojourning into a defense of the new millennium law student includes a thought that those who have the responsibility for the enactment and repeal of legislation should consider the impact of that legislation on the current system of legal education.

124. Chapter 47B.
126. Federal, state and local land use controls are legion. Citations to applicable laws and regulations could exceed the length of this article.
127. A basic understanding of the environmental considerations in real estate acquisition and development, including at least rudimentary coverage of due diligence, is important. Commencing with the 1986 amendments to the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), 42 U.S.C.A. § 9601 et seq., due diligence in environmental matters has become an important element in commercial real estate transactions.
128. See, for example, the many-faceted rules related to wetlands and the landmark decision of Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, 121 S. Ct. 675 (2001); the Clean Water Act, 33 U.S.C.A. § 1251 et seq.
130. Fair housing laws should be cross referenced and stressed throughout the property law courses during discussion of the areas of landlord and tenant, real estate brokerage, contracts to convey, and mortgage financing.
G. Empathy For The General Practitioner

If my discussion above might be summarized as the plight of the new millennium law student, it is equally applicable to what we might call the challenge to the new millennium general practitioner. While the current practicing bar of this nation includes more specialists than ever before, it remains bar dominated in numbers at least by general practitioners. In every area where law students must now consider this multitude of new statutes, the general practitioner must also tread. In this regard, I suggest that the general practitioner will become an endangered species because of trends in legislation that include the following: (1) there is a tendency not to repeal or clarify obsolete, archaic and confusing statutes; (2) there is an increase in the use of ambiguous words and terms in new statutes; (3) even well drafted statutes trigger numerous issues of statutory interpretation; (4) there is an increase in the comprehensive uniform act type of statute that often occupies an entire chapter of the General Statutes; and, (5) statutes appear to be drafted without regard to the transactional cost of utilizing the statute as a consideration.

H. Aunt Murphy's Attic

One of the fun things about old houses is that they have a feature rare in many modern ones: attics, and full-sized ones, not those sissy little crawl spaces of today. Aunt Murphy lived in a large, stone farmhouse only two blocks from our family home in Milwaukee. To the delight of the many Hetrick children, a narrow and steep span of ancient stairs led up from the second floor to a huge and wonderful attic and another world (or at least another era). On a rainy or sub-zero day, the attic was a top-of-the-list adventure for a bored kid. It boasted one of those floor-model radios that had long since ceased to work, but the dials made an excellent control panel for a spaceship or submarine. Trunks of various sizes and designs held mementos of the past—old photos, newspapers, certificates, and road maps. In and upon a dust-covered dresser an eclectic collection of things could be found, including an old hand-operated hair clipper, dented trombone, and a handwritten notebook of the “Nature Boys” club meetings of decades past in the north woods of the upper peninsula of Michigan. Old clothes hung on hangers attached to makeshift nail spikes hammered into the log-beams that supported the roof. Funny-looking shoes were everywhere, a waist-and-up mannequin on a wood pedestal sat in a prominent location with sewing pins and a few scraps of material still in place. Floor lamps and table lamps of all kinds also accounted for part of the attic inventory. Even years later during my
college days, an occasional trip up those stairs to the attic was therapeutic, as I would peek through the attic door and make a mental note: "Yeah, the stuff is still there."

The statute books of any state, certainly the voluminous tomes of federal laws, and the North Carolina General Statutes have their own versions of Aunt Murphy's attic. Because there is space available, laws that are not really needed are kept on the books. There is even a comfort level at retaining some of them. After all, there must be a reason why each is in there, and you never know when you might need a given law again.\(^{131}\)

Every state's set of laws includes an unfortunate accumulation of some really awful\(^{132}\) examples of statutes. Time to get rid of them! None but a few experts can comprehend their meaning. They add nothing to the day-to-day achievement of justice, they render the law a mysterious thing, and they occasionally result in time-consuming and expensive legislation. The Neighborhood Public Roads statute, discussed earlier in his article, should be repealed or at least placed in some type of "archive" status. The most effective way to interpret that statute is with a ouija board. The Cartway Statute gives itself away by its title.\(^{133}\) I picture myself walking some day through a jurisprudential junkyard where these and other statutes lie in repose, rusting well and disturbing nobody. Other statutes are crystal clear but irrelevant to modern society. N.C. Gen. Stat. 42-24, for example, makes Chapter 42 of the General Statutes applicable "to all leases or contracts to lease turpentine trees, or use lightwood for purposes of making tar."\(^{134}\)

### IV. Conclusion

Legislation, both existing and proposed, should be consumer-oriented. By this I mean client-oriented, efficiency-oriented, and user-friendly. By this I mean not pure theory-centered, lawyer-centered, government-centered or judge-centered. The client-consumer is inter-

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131. Aunt Murphy's attic stuff was eventually sold without her permission at a rummage sale by her month-to-month tenants. She quickly recovered from the loss.

132. Apparently the word "awful" once meant "awe-full" or inspiring awe. These statutes inspire awe only in the sense that they are incomprehensible no matter how many times one reads them.

133. Invariably, a first-year law student will ask: "What's a cartway?" "Full or empty?" I reply.

134. Samuel Johnson once astutely observed: "Laws are formed by the manners and exigencies of particular times, and it is but accidental that they last longer than their causes." M. Frances McNamara, 2,000 Classic Legal Quotations 388 (Lawyers Cooperative Publishing 1992) (quoting, of course, Samuel Johnson, *Boswell, Life of Johnson*: 1776).
ested in a prompt and cost-effective resolution of his or her problem or dispute. The consumer would be pleased to see less notices, warnings, and disclosures that supposedly inform and protect and more affordable justice. Clearly, "justice" as conceived in theory by an expert or scholar may not be "justice" to the citizen-user of the law in question. Legislation should be able to withstand a performance-based review at the grassroots, local, first level of a legal dispute or problem. The tremendous capabilities of computer technology should be utilized to assess the actual effect of statutes, including unintended consequences, and to monitor how statutes are used and construed at the trial court level. The General Statutes of North Carolina need a thorough and systematic housecleaning. Statutes provide the fundamental framework for much of our system of justice. To clutter the statute books with obsolete, confusing and unnecessary laws serves to trivialize the important, frustrate members of the public, confuse practicing lawyers, complicate the legal education of future lawyers, and add unnecessary expense to the process by which legal problems and disputes are resolved in society.