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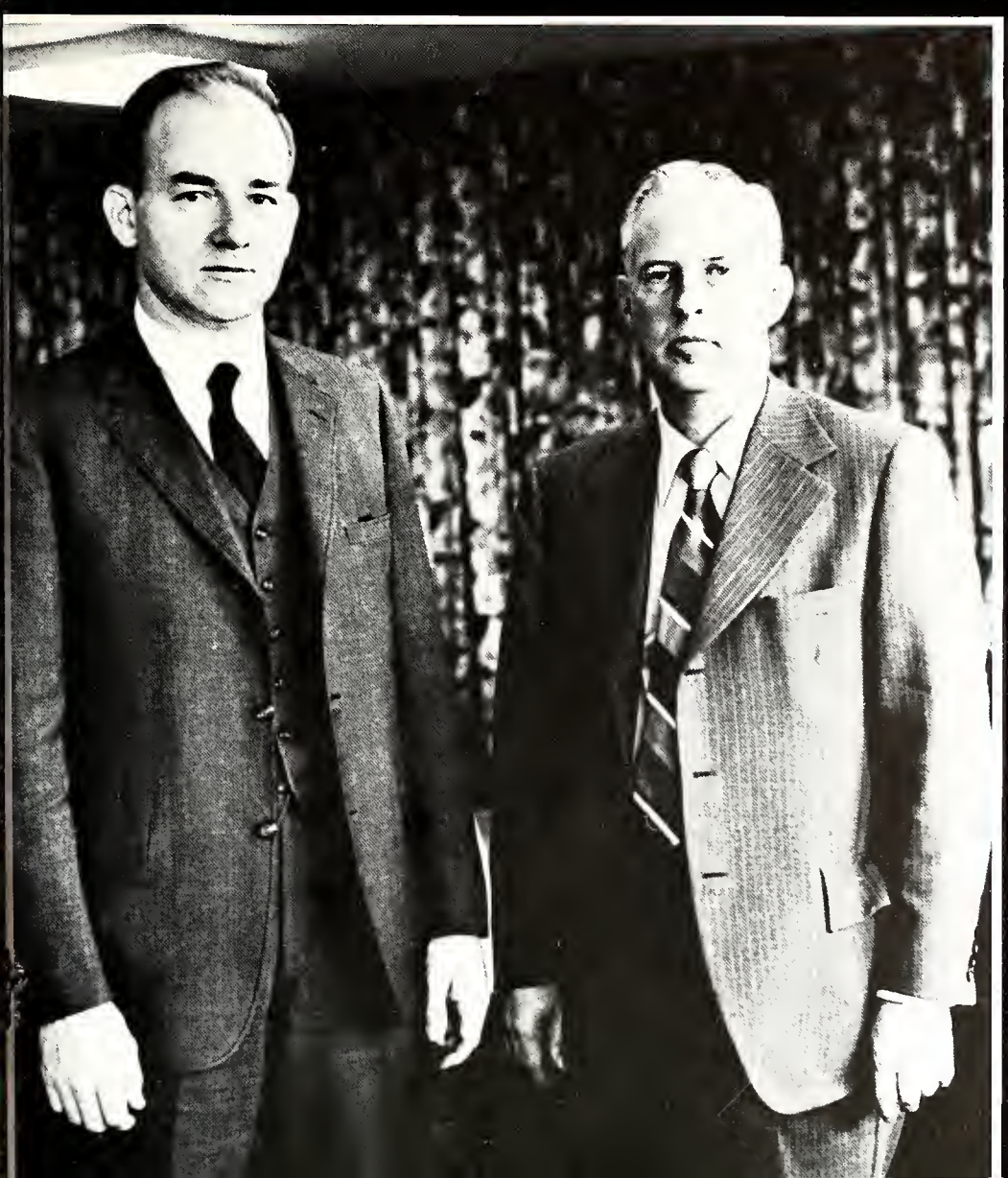

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Personal information and computers

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*The University of North Carolina at Chapel Hill has a new chancellor. This month's cover shows Chancellor Ferebee Taylor on his first official visit to the Institute of Government. John L. Sanders, the Institute's director, is on the left. (All photos by Carson Graves.)*

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# Are OFFENSIVE ODORS controllable?

**by David G. Warren**

The poet may sing of "parsley, sage, rosemary, and thyme," but in our industrial age, we may be more likely to experience acrid smells, stenches, and odors than any such herbal essences. Many "essential" businesses and activities emit foul and noxious odors as by-products of technological advancement. The line from Shakespeare, "Lilies that fester smell far worse than weeds,"[1] can aptly be applied. Today combating environmental pollution is popular, but ironically one of the oldest pollutants, the offensive odor, has received little attention. This article will examine some legal tools that might be used to attack a noxious odor.

## The Nuisance Law

Since offensive odors have long been recognized as private nuisances,[2] this discussion begins at that point.

A *private nuisance action* is a civil action sounding in tort and defined as "any substantial nontrespassory invasion of another's interest in the private use and enjoyment of land by any type of liability forming conduct."[3] To constitute a private nuisance, the interference must be both substantial—that is, "more than (a) slight inconvenience or petty annoyance"[4]—and a proximate or legal cause of the alleged harm. A lawful business enterprise cannot be a nuisance per se or automatically, but it may be a nuisance *per accidens*, or within the particular surroundings.[5]

In North Carolina an offensive or nauseating odor may constitute a private nuisance, even though the source of the odor is a lawful business operating in a nonnegligent manner.[6] For example, a sewage plant,[7] an oil refinery,[8] and an animal by-products plant[9] have been declared odor nuisances by North Carolina courts.

Although private nuisance suits have occasionally been successful they are probably not an effective means of controlling offensive odors. There are obvious definitional problems: What is an offensive odor? Offensive to whom? Are the products more socially valuable than the odor is socially harmful? Allocating responsibility for the odor among several tort feasors would be difficult. The strongest objection to relying on the private nuisance cause of action as the principal means of odor control is that private citizens very probably will be neither willing nor able to invest the required time, effort, and money needed to pursue court action successfully.

Besides these practical roadblocks, North Carolina courts have established several legal obstacles that must be dealt with in seeking court action. Mere annoyance or occasional inconvenience is not a substantial inconvenience. For example, the normal escape of gasoline odors from a service station does not amount to a private nuisance.[10]

Also, "[a] fortiori, courts have been slow to grant injunctive relief where the purported nuisance is merely anticipated and not an actual, existing one."[11]

1. *Sonnet 94.* Another more common phrase, however, may be equally applicable to some industrial odors: "It smells like money to me!"
2. See Note, *Liability for Injury Caused by the Emission of Noxious Gases,* 28 MD. L. REV. 33 (1968), for a collection of some old English cases.
3. Morgan v. High Penn Oil Co., 238 N.C. 185, 193, 77 S.E.2d 682, 689 (1953).
4. Watts v. Pama Manufacturing Co., 259 N.C. 611, 619, 124 S.E.2d 809, 815 (1962).
5. *Id.*
6. Causby v. High Penn Oil Co., 244 N.C. 235, 93 S.E.2d 79 (1956).
7. Grory v. High Point, 203 N.C. 756, 166 S.E. 79 (1932).
8. Morgan v. High Penn Oil Co., 238 N.C. 185, 77 S.E.2d 682 (1953).
9. Aydlett v. Carolina By-Products Co., 215 N.C. 700, 2 S.E.2d 881 (1939).
10. Holton v. North Western Oil Co., 201 N.C. 744, 161 S.E. 391 (1931).
11. Dorsett v. Group Development Corp., 2 N.C. App. 120, 124, 162 S.E.2d 653 (1968).

In the *Dorsett* case, the owners of residential property sought to prevent a lot in their neighborhood from being used for an asphalt plant. They alleged that the odor, smoke, and noise thereby created would be a nuisance. The court denied relief, concluding the prospective damages were merely anticipated and not seriously threatened. A similar decision was reached in a case involving construction of a hog-buying station near a church and parsonage.[12] These cases also indicate that the familiar pig farm—a profit to some, an annoyance to others—probably could not be abated absent special circumstances (e.g., violation of zoning laws or municipal ordinances).

Also, in several successful suits[13] the plaintiffs were awarded only small permanent damage awards. Without substantial recoveries or injunctive relief, odor pollution may cost a little more, but it will not be controlled.

The possibility of using the *public nuisance law* is more remote because a public nuisance by definition affects the public as a whole:[14] its maintenance is an offense against the State.[15] Interferences with public health, safety, morals, peace, comfort, convenience, thrift, or economy may be public nuisances,[16] but only a private citizen sustaining *unusual special damages* has standing to maintain a private action on a public nuisance.[17] Generally damages must differ in kind rather than merely in degree.[18]

The General Assembly has delegated authority to attack nuisances to municipal corporations,[19] county commissioners,[20] and local public health directors.[21] Whether odor constitutes enough of a nuisance for these officials to act is another question, often fraught with political and economic considerations. The sources of odor pollution might be attacked in an indirect and prospective fashion through municipal[22] and county zoning powers.[23]

## Local Ordinances

Under general ordinance-making powers, several North Carolina cities have passed ordinances that in part attempt to deal with odor pollution. For example, the Charlotte Code reads, "It is hereby declared that the emission of . . . noxious gases into the atmosphere in the City of Charlotte creates a menace to health, comfort, and well-being of the citizens of Charlotte and that it is the purpose of this article to regulate and control the emission of . . . noxious gases so as to minimize their injurious effects."[24]

"Polluted Lady Justice" was created by Paul Szep for *Environmental Affairs*, a new quarterly journal published by Environmental Affairs, Inc., Boston College Law School, Brighton, Massachusetts.

The immediate problem is enforcing such an ordinance, and part of that problem is establishing what constitutes a noxious odor. A Kansas City ordinance recently adopted takes this approach: "No person may cause, permit or allow the emission of odorous matter in such concentrations and frequencies or for such durations that such odor can be perceived when one (1) volume of odorous air is diluted with seven (7) volumes of odor-free air for two (2) separate trials not less than 15 minutes apart within the period of one (1) hour."[25] The measurement device used there is a "Scentometer" (approved by the American Society for Testing and Materials and by the National Sanitation Foundation). It is a small plastic box with carbon-filled chambers and various channels, and it is held to the inspector's nostrils. However, despite the "Scentometer's" ingenious de-

*(Continued on page 14)*

12. Moody v. Lundy Packing Co., 7 N.C. App. 463, 172 S.E.2d 905 (1970).
13. *E.g.*, Gray v. High Point, 203 N.C. 756, 166 S.E. 79 (1932) ($2000); Aydlett v. Carolina By-Products Co., 215 N.C. 700, 2 S.E.2d 881 (1939) ($1000). Contra, Morgan v. High Penn Oil Co., 238 N.C. 185, 193, 77 S.E.2d 682, 689 (1953).
14. Carpenter v. Boyles, 213 N.C. 432, 196 S.E. 850 (1938).
15. Dickey v. Alverson, 225 N.C. 29, 335 S.E.2d 135 (1945).
16. W. PROSSER, LAW OF TORTS, § 89, 605–6 (3d ed. 1964); State v. Brown, 221 N.C. 301, 20 S.E.2d 286 (1942).
17. Barrier v. Troutman, 231 N.C. 47, 55 S.E.2d 923 (1949).
18. *See, e.g.*, Prosser, *Private Action for Public Nuisance*, 52 VA. L. REV. 997 (1966).
19. N.C. GEN. STAT. §§ 160–55 and 160–200(6).
20. N.C. GEN. STAT. § 153–9(55).
21. N.C. GEN. STAT. § 130–20.
22. N.C. GEN. STAT. §§ 160–172 through –181.2.
23. N.C. GEN. STAT. §§ 153–251 through –266.22.
24. Charlotte Code § 10–103 (1956). See also Asheville Code § 3–10 (1950).
25. Missouri Air Conservation Commission, Regulation VI, February 25, 1970.

# *SERRANO v. PRIEST*

## IMPLICATIONS FOR FINANCING PUBLIC SCHOOLS

### IS NORTH CAROLINA'S SYSTEM OF FINANCING PUBLIC SCHOOLS CONSTITUTIONAL?

by John W. Dees

ON AUGUST 30, 1971, the California Supreme Court dropped a bombshell on the largely unsuspecting world of public education. *Serrano v. Priest*[1] overturned the California system of public school financing, a system followed to at least some extent in all states except Hawaii.[2] The financing systems of Minnesota[3] and Texas[4] also have been overturned by federal district courts taking *Serrano's* lead.[4a] The feature common to these systems upon which the courts have focused is the partial reliance upon locally raised funds in the support of public schools. Rich districts with wider tax bases could provide high quality education more easily than could poorer districts. Thus school children in poor districts were being deprived of a right to equal opportunity of education in their public schools in violation of the equal protection clause of the Constitution's Fourteenth Amendment.

Although a number of educators and legal commentators[5] had anticipated the equal protection argument made in *Serrano,* its success surprised those who were aware of *McInnis v. Ogilvie,*[6] a summary decision of the United States Supreme Court that held the Illinois state financing plan to be valid when a similar attack was made. The lower California court[7] had followed *McInnis* in dismissing the *Serrano* suit but nonetheless the state supreme court reversed.

The *Serrano* decision was nearly unanimous—only one of seven justices dissented. Thus it stands as a solid decision by probably the most highly respected state supreme court in America. It seems inevitable that the United States Supreme Court will reconsider in depth its decision in *McInnis,* especially in light of the federal district court decisions following *Serrano.* If the Court takes the position of the California court, the ramifications will be extensive.

This article will first direct itself to concepts involved in general equal protection analysis. The *Serrano* fact situation will then be examined and the rationale of the California court developed. The suit then will be projected into the United States Supreme Court and problems with the *Serrano* result will be discussed on that level. Last, the *Serrano* rationale will be applied to the North Carolina financing system and the system's validity measured.

## The Web of Equal Protection[8]

Any evaluation of a statute (or a state constitutional provision) attacked by plaintiffs demanding "the equal protection of the laws" should begin with the identification of the statute's purpose. If its purpose discriminates between "similarly situated" people, then the statute is constitutionally invalid.[9]

1. — Cal. 2d —, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971).

2. Coons, Clune, and Sugerman, *Educational Opportunity: A Workable Constitutional Test for State Financial Structures,* 57 CAL. L. REV. 305, 312 (1969). "Except for Hawaii all state systems of education depend in one degree or another for fiscal support upon taxes which are approved, levied, and collected within the several school districts."

3. Van Dusartz v. Hatfield, 40 U.S.L.W. 2228 (Oct. 26, 1971).

4. Rodriguez v. San Antonio Indep. School Dist., 40 U.S. L.W. 2398 (Jan. 4, 1972). This decision of a three-judge panel may be appealed directly to the Supreme Court.

4a. Superior courts in two states have split. A New Jersey court overturned that state's scheme. Raleigh News and Observer, Jan. 20, 1972, at 8, col. 8. A New York superior court rejected *Serrano* in finding the New York system constitutional. Spano v. Bd. of Educ., 40 U.S.L.W. 2475 (Feb. 1, 1972). Thirty-six similar suits had been brought by early February, 1972.

5. *E.g.,* Kurland, *Equal Educational Opportunity: The Limits of Constitutional Jurisprudence Undefined,* 35 U. CHI. L. REV. 583 (1968); Horowitz, *Unseparate But Unequal—The Emerging Fourteenth Amendment Issue in Public School Education,* 13 U.C.L.A.L. REV. 1147 (1966).

6. 394 U.S. 322 (1969); *accord,* Burrus v. Wilkerson, 397 U.S. 44 (1970).

7. Serrano v. Priest, 10 Cal. App. 3d 1110, 89 Cal. Rptr. 345 (1970).

8. For a generally excellent treatment of the subject of equal protection, see *Developments in the Law—Equal Protection,* 82 HARV. L. REV. 1065 (1969).

9. Tussman & ten Broek, *The Equal Protection of the Laws,* 37 CAL. L. REV. 431, 436 (1949).

Most statutes have several identifiable purposes. If one purpose is constitutionally sound and another purpose impermissible, then under traditional equal protection analysis the former is automatically placed in the forefront, i.e., a presumption exists in favor of the sound purpose. *Goesaert v. Cleary*,[10] involving Michigan's prohibition against female barkeepers, illustrates the point. One arguable purpose of the legislation was the impermissible one of shutting off female competition solely to benefit those males who were barkeepers or who intended to become barkeepers. The Supreme Court, exercising the presumption in favor of constitutionality, deemed the purpose instead to be the avoidance of possible inflammatory situations occasioned by the employment of women in bars. Under this analysis, the redeeming purpose must merely have a rational link to the legislation.

A more active test of equal protection, commonly called the *new equal protection*, or the "color-blind Constitution," has also evolved. Whereas the concept of traditional equal protection is typified by judicial restraint, the new equal protection analysis strives to involve the Court more deeply by subjecting fact situations to new inquiries. The primary concern is in identifying the type of classification. When based on race, lineage, or alienage, the classification is immediately "suspect," and the court demands "rigid scrutiny" in its examination of the circumstances. Purpose is still at the heart of the analysis, but the state must now carry a very heavy burden of justifying the classification. Under the traditional analysis a merely rational connection between the classification and the legitimate purpose is sufficient; under the new analysis, the "suspect" nature of the classification forces a showing that the avowed purpose could not be achieved in any way other than by making the classification and that public policy overrides any detrimental effects experienced by those in the disadvantaged class.

This rigorous examination also might be triggered by an inquiry into the nature of the rights or interests being denied the deprived class. If a "fundamental interest" or "basic right" is at stake, then the Court's posture is similar to that required by the existence of a suspect classification. For example, any restriction on certain basic protections afforded the accused in the criminal process leads to strict scrutiny, as does the denial of the right to vote.

The Court has not altogether given up the traditional analysis, which is still in vogue in regulatory and fiscal matters. However, in virtually all other areas, its analysis is the new one, with inquiries into type of classification and degree of interest at stake. The key to the new analysis is the point of decision at which rigid scrutiny is invoked and the very heavy burden of justification falls upon the state. A graphic presentation may illustrate. Figure 1 arranges along one axis "a hierarchy of classifications, with those which are most invidious—suspect classifications based on traits such as race—at the top. Along the second [axis], arranged in ascending order of importance, are interests such as employment, education, and voting."[11] When the rank of classification and the nature of the interest are both known, a point can be projected on the graph which accurately represents the particular fact situation. The concern of the analysis is whether the particular point falls into an area or zone of strict review by the Court. Any point mapped out with one coordinate being a suspect classification will be in the zone of strict scrutiny even if the interest at stake is weak. For example, consider the situation in which the state denies blacks the right to purchase liquor at the state-controlled liquor stores (see point 1 in Figure 1). Likewise, when the interest is fundamental, little emphasis is given the type of classification for mapping into the zone of strict review. Thus the denial of the right to vote because of residence in a certain geographical area would invoke strict scrutiny in the equal protection area (point 2 in Figure 1). When the examination of discrimination reveals neither suspect classification nor fundamental interest, then the judicial review generally is not of the strict variety, as perhaps when the state licenses liquor stores only in certain geographic areas (point 3 in Figure 1). The argument exists, however, that when the classification ranks close to suspect and affects a substantial interest very near to fundamental, the test will be the strict one. Perhaps the refusal to admit certain religious minorities to state-supported universities might qualify in this category (point 4 in Figure 1).

The graphic presentation (Figure 1) immediately makes the difficulties in ascribing positions to classifications and interests clear. The safest way to project a fact situation into the zone of strict review is to assess the classification as suspect *and* the interest as fundamental. This is exactly what the *Serrano* court did.

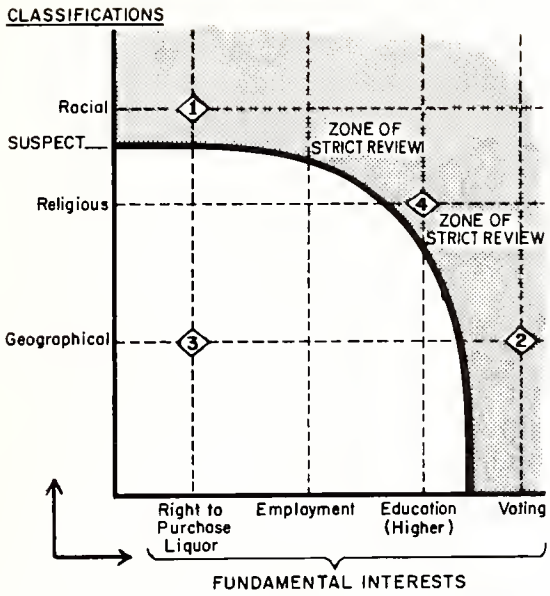
## *Serrano v. Priest* in the California Supreme Court

John Serrano, Jr., and the other plaintiffs in the action were students and the parents of students who attended school in the Los Angeles County public school system. The students claimed to represent that class of students consisting of all public school pupils in California except those in the school district afford-

*The author is a third-year student at the UNC law school. This article was written as a paper for a course in school law offered in the law school and taught by Robert E. Phay of the Institute's faculty.*

10. 335 U.S. 464 (1948).

11. *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1120 (1969). The writer there spoke in terms of gradients rather than axes; I trust that my expansion of his idea does not greatly distort it.




ing the greatest educational opportunity in the state. The parents claimed to represent the class of all parents who have children in this class and who paid real property taxes in the county of their residence.

The financing scheme under attack relied on the local property tax as its major source of revenue. The local units had autonomy in selecting both an assessment ratio and a tax rate. However, state aid was based on the projection of a hypothetical property tax raised at the rate of $1 on each $100 assessed valuation in elementary school districts and 80 cents per $100 in high school districts. If the projection fell below a minimum standard of dollars per pupil in the district, then state aid was given in the amount to bring the district up to the minimum. In addition, the state provided a flat grant of $125 per pupil. A third form of state aid gave a further $125 grant per student to those especially poor districts willing to make an extra local tax effort. Thus each district received on top of what could be raised by operation of the hypothetical formula at least the flat grant. Those districts that qualified also could count on the equalizing grant based on the state's projection and possibly the supplemental grant if they were willing to shoulder an additional tax burden.

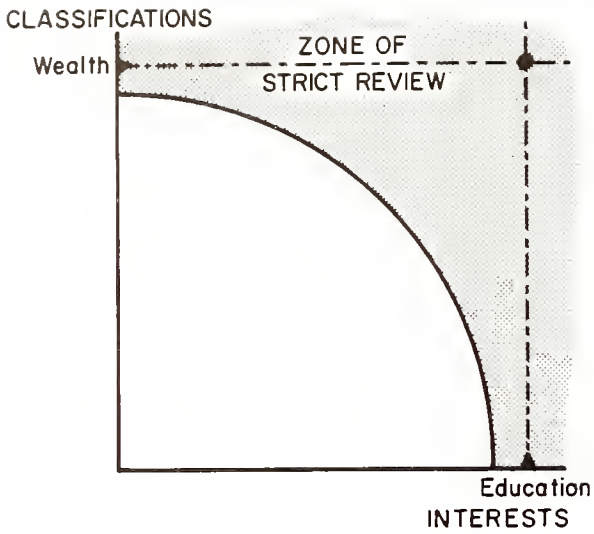
While the equalization and supplemental aid did have a leveling effect, the flat grant and the local property tax merely carried forward discrepancies in community wealth. For example, the assessed valuation per pupil of the real property in the richest district in Los Angeles County, Beverly Hills, was thirteen times the assessed valuation per pupil in the poorest district in the county, Baldwin Park. The flat grant projected the disparity on a higher plane. The inequality existed because those parents living in wealthy districts could pay at a much lower rate of taxation while providing their children with high quality education than could parents in poor districts. Equalization and supplemental aid did not substantially alter the situation; even with this aid, Baldwin Park citizens paying taxes of $5.48 per $100 assessed valuation were reaping only half as much in educational dollars per child as were Beverly Hills residents paying at $2.38 per $100. Thus children in areas of little wealth were discriminated against because their districts did not have the chance that rich districts had to provide high quality education.

The California court cited these conditions and then approached the issue of whether the particular arrangement merited strict review under the equal protection clause of the Fourteenth Amendment. In this vein, it first considered whether wealth is a suspect classification. Its conclusion was affirmative, reached after a brief analysis of United State Supreme Court holdings. For direct support the court cited strong language in the recent decisions of *Harper v. Board of Elections*[12] and *McDonald v. Board of Elections*[13] which indicated that discrimination on the basis of wealth is as suspect as that on the basis of race. As indirect support, the court provided a string of citations, the most important of which concerned the rights of the indigent accused in the criminal process.[14]

Next, the court moved to the question of whether education is a fundamental issue. Actually this discussion would be surplusage in the theoretical sense if the court's first conclusion that wealth is a suspect classification were invulnerable to attack, because a finding of suspect classification invokes strict review regardless of the interest involved. As a practical matter, all decisions that seem to hold wealth a suspect classification involve fundamental interests as well. To conform to this pattern and in an effort to buttress the ultimate outcome, the court thought it necessary to develop the issue. Not being a court of final resort on federal constitutional issues, the California court wisely bottomed its decision on additional finding. Futhermore, the graphic presentation of the model analysis of the new equal protection shows that a fact situation with coordinates of both suspect classification and fundamental interest projects into the loftiest parts of the zone of strict review (Figure 2).

The California court acknowledged that the contention that education is a fundamental interest "is not supported by any direct authority." Factors calling for finding education a fundamental interest were listed by the court as follows: education is the main hope for the poor and oppressed who want to improve their position in life; everyone benefits from education, not just a few people; the public educational process is long—up to fourteen years; a child's personal development is molded in a manner chosen by the state;

12. 383 U.S. 663 (1966).
13. 394 U.S. 802 (1969).
14. *E.g.*, Tate v. Short, 401 U.S. 395 (1971); Williams v. Illinois, 399 U.S. 235 (1970).




education is compulsory for all children. In short, since education is a major social and political determinant, it must be a fundamental interest for all students being processed through the system.

The right is not to some minimum standard of education; rather it is to a standard of education equal to that enjoyed by those in the school unit enjoying the greatest educational opportunity. The standard of education is measured in terms of dollars available per student in the respective school districts.

Having projected the facts into the zone of strict review, the court considered the merits of the state's justification in imposing such a system. The compelling interest offered by the state consisted of the policy "to strengthen and encourage local responsibility for control of public education." First, the court reasoned that fiscal control is independent of administrative control. Decisions concerning whom to hire and how to schedule educational offerings were still left on the local level. Second, the court probed into the desirability of fiscal control on the local level. Since poor districts willing to tax themselves in the interests of quality education were inhibited by low tax rolls in attaining their goal while rich districts with the same willingness were not so inhibited, the choice of whether to tax was too tainted for the California court. Thus local control failed as justification for fiscal control, and the state could not sustain its burden of proof.

The final important matter for the court to resolve was the precedental value of *McInnis v. Ogilvie*,[15] a case in which the United States Supreme Court summarily approved a three-judge district court decision that had dismissed a similar suit arguing that the financing system in Illinois violated the Constitution. Since the review of three-judge court decisions is mandatory, the California court felt that the Supreme Court might have given the *McInnis* case merely cursory examination before disposing of it. When the plaintiffs in *McInnis* argued that a fair system must administer equally to the educational needs of students,[16] in essence they were asking the district court to pinpoint needs and direct public expenditure toward those needs. While the California court agreed that the educational needs standard was nebulous, it felt however that the test based on relative wealth asked for by the *Serrano* plaintiffs was clear and that disparities in revenue provided sufficient cause for investigating their constitutional claims. The precedental value of *McInnis* was deemed nil.

The California Supreme Court then remanded the case to the trial court with instructions to overrule the demurrers that had led to dismissal. The trial court is now to determine whether indeed the quality of public education in California is a function of wealth other than the wealth of the state as a whole, but the outcome is already foreshadowed, and California will certainly be in search of a new financing scheme.[17]

## Hurdles in the United States Supreme Court

Should *Serrano* or a similar case arrive for full consideration in the United States Supreme Court, the primary issue to be resolved is the extent of review under equal protection reasoning. The Court might fail to find a suspect classification in existence or a fundamental interest involved and thus prefer the traditional equal protection analysis. The search would commence for a legitimate purpose rationally linked to the legislation. Almost certainly the avowed purpose in *Serrano* of local control would suffice under this standard. However, the Court might detect a suspect classification or a fundamental interest and resort to the new equal protection analysis. Then local control, or any other justification offered, must be evaluated in the rigid posture of strict review. The state would have to show that the purpose could not be achieved in any way other than by making the classification or by detrimentally affecting fundamental interests of some people and that public policy overrides any undesirable effects experienced by those in the disadvantaged class. It could be that the Court might impose strict review when the classification is almost as invidious as a suspect classification and is

15. 394 U.S. 322 (1969).

16. *See* McInnis v. Shapiro, 293 F. Supp. 327, 336 (D.C. Ill. 1968).

17. California will continue the search, even if the United States Supreme Court reverses and finds the system compatible with the federal Constitution, because, as the California court has indicated, it would have reached the same conclusion under its own state constitution. Serrano v. Priest, —Cal. 2d—, —, 487 P.2d 1241, 1249, 96 Cal. Rptr. 601, 609 n. 11 (1971).

coupled with a substantial interest approaching a fundamental nature. These possibilities must be investigated in the Supreme Court perspective.

## ● Suspect Classification

The Court has at times indicated that a classification based on wealth is suspect. In *Harper v. Board of Elections* this language appears:

> Wealth, like race, creed, or color is not germane to one's ability to participate intelligently in the electoral process. *Lines drawn on the basis of wealth or property, like those of race . . . are traditionally disfavored. . . . To introduce wealth or payment of a fee as a measure of a voter's qualifications is to introduce a capricious or irrelevant factor.* The degree of discrimination is irrelevant. In this context—that is, as a condition of obtaining a ballot—the requirement of fee paying causes an "invidious" discrimination . . . that runs afoul of the Equal Protection Clause.[18] (Emphasis added)

In *McDonald v. Board of Elections* the Court states:

> [W]e have held that because of the overriding importance of voting rights, classifications "which might invade or restrain them must be closely scrutinized and carefully confined" where those rights are asserted under the Equal Protection clause [citing *Harper*]. And *a careful examination on our part is especially warranted where lines are drawn on the basis of wealth or race,* [citing *Harper*], *two factors which would independently render a classification highly suspect and thereby demand a more exacting judicial scrutiny.* . . .[19] (Emphasis added.)

If one excerpts merely the italicized language in these two quotations, as the California court did, the conclusion that the Supreme Court views wealth as a suspect criterion, independently able to invoke strict review, appears sound. However, presented in true context, the italicized language is not quite so revealing because both *Harper* and *McDonald* concern the alleged denial of voting rights. Since the right to vote constitutes a fundamental interest in itself, strict review is triggered in any event. Any illusion to wealth in this context is surplusage. Second, following from the first, examining the sentence in *McDonald* immediately preceding the italicized portion makes it clear that the *McDonald* court itself could read *Harper* to hold that threatened impingement of voting rights triggers strict review. Third, *McDonald* is even weaker dictum than *Harper* because upon examination of the facts the *McDonald* court found neither discrimination on the basis of wealth nor denial of voting rights. Thus, the threshold question of whether the state must bear the heavy burden of justification was never reached.

Aside from dealing with decisions with weak though favorable precedental value, the Court must reconcile other recent decisions if a classification based on wealth is to be deemed suspect. In *James v. Valtierra*,[20] decided last term, low-income persons had successfully argued before a three-judge panel that a California constitutional amendment violated the equal protection clause by mandating local referendums before federal grants for low-income housing could be accepted by local governing bodies. Praising the democratic nature of this mechanism, the Supreme Court reversed and never mentioned the possibility that the class characterized by poverty constituted a suspect classification sufficient to invoke strict review.[21]

A 1970 opinion, *Dandridge v. Williams*,[22] at least acknowledged the presence of the rigid posture in the equal protection field when a group of federal welfare recipients protested a ceiling imposed on their benefits by the State of Maryland. Yet the majority of the court could find no reason to impose a standard different from the traditional one and in a footnote said: "It is important to note that there is no contention that the Maryland regulation is infected with a racially discriminatory purpose or effect such as to make it inherently suspect."[23] Racial taint was clearly the only focus for the *Dandridge* Court when it looked for suspect classification.

If decisions affecting the indigent caught up in the criminal process can be distinguished as touching basic rights, the Court's most recent pronouncements cannot fairly be said to accord classifications based on wealth the same status as those based on race. Thus any decision that relies upon special treatment of such groups as the basis for imposing rigid scrutiny will be a bold one.

## ● Fundamental Interest

It is possible that the Court might find education to be a fundamental interest and the allegation of deprivation of equal educational opportunity sufficient to invoke strict review. As the California court admitted, however, no direct authority supports such a position. The argument is drawn in the case law primarily from *Brown v. Board of Education*,[24] which contains language aptly describing the importance of educational opportunity:

> In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the

18. Harper v. Board of Elections, 383 U.S. 663, 668 (1966).
19. McDonald v. Bd. of Elections, 394 U.S. 802, 807 (1969).
20. 402 U.S. 137 (1971).
21. But see the dissent, which calls the classification "an explicit classification on the basis of poverty—a suspect classification which demands exacting judicial scrutiny . . . ." *Id.* at 142.
22. 397 U.S. 471 (1970).
23. *Id.* at 485
24. 347 U.S. 483 (1954).

> state has undertaken to provide it, is a right which must be made available to all on equal terms.[25]

However, *Brown* has been restricted by the Court to discriminations purely racial in nature, and its broad language concerning education has been disregarded and almost refuted in at least one later case.[26]

The two recent decisions mentioned with regard to classifications, *James* and *Dandridge*, are also stumbling blocks in any attempt to broaden the realm of fundamental interests. The interest at stake in *James* could be phrased as the right to decent housing. In many eyes this is as important an interest as equal opportunity for education, but the Court did not consider the possibility of its fundamental nature. *Dandridge* dealt with "the administration of public welfare assistance" which involves "the most basic economic needs of impoverished human beings."[27] Yet since this was "state regulation . . . not affecting freedoms guaranteed by the Bill of Rights,"[28] the Court saw no necessity to go beyond the traditional analysis.

If the Bill of Rights is the proper source of fundamental interests or basic rights, then the Court must perform the difficult task of locating education within the ambit of the first ten amendments if it is to be declared fundamental.[29] If the Bill of Rights is not viewed as limiting by the Court, still new ground must be broken if strict review is to be invoked in cases in which the plaintiffs allege the denial of equal opportunity for education.

## • The Combination of a High Classification and a Nearly Basic Right

A third possibility exists when the question of strict review is raised. The discussion of equal protection above developed the idea that a classification almost invidious enough to be suspect in combination with an interest ranking very near to fundamental would project into the zone of strict review.[30] The problems encountered in trying to ascribe a fundamental nature to education are somewhat reduced if the object is to show education to be a very important interest, substantial but not quite fundamental in nature. *James* and *Dandridge* do not undermine an argument based on close proximity. Even though it is not mentioned in the Bill of Rights (drawn up, incidentally, long before public education was a reality), education today undeniably rests as the cornerstone of modern democratic society.

While the suggestion that a classification based on wealth is inherently suspect and therefore tends toward invalidity independent of other factors is supported by the dicta in *Harper* and *McDonald*, the argument that the classification is almost suspect does rest more easily. As a pure and independent criterion for strict review, a classification based upon wealth has few proponents; most authorities add the major qualification that the classification is suspect only when it bears adversely upon important rights. Yet *any* qualification weakens the placement of wealth in the suspect category.

In short, the most appropriate means for the Court to use in imposing strict review apparently is to recognize the idea that a combination of high-ranking factors might trigger strict review whereas the factors are not sufficient to trigger strict review when considered independently.

Two problems emerge in this analysis. First, the analysis could have been used in *James* with its classification based on wealth and its interest of decent housing, but was not. Perhaps the Court's preoccupation with the democratic nature of the procedure involved obscured this route. But, also, perhaps this analysis has no place in the modern Court's thinking. Second, the *Dandridge* case contains a caveat. Although the Court there treated at least minimally the fundamental interest and suspect classification ideas, it eventually found that constraints on the allocation of welfare benefits were on the order of state economic or social policy and therefore within that pocket of state action exempt from new equal protection analysis.[31] Thus the combination of "high-ranking factors" must also avoid this trap, but one doubts whether *Serrano*, with its financing scheme, could escape this newly enlarged pocket of economic and social action.

## • The Burden of Justification

If the *Serrano* fact situation cannot project itself into the zone of strict review, the Court will probably find the rational link between the state financing scheme and legitimate purpose. For example, local control would serve this end as a purpose. If strict review is imposed, it is doubtful that any avowed purpose could withstand rigid scrutiny. The Court's analysis would parallel the California court's analysis on this issue.[32]

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25. *Id.* at 493

26. *See* Griffin v. Prince Edward County School Bd., 377 U.S. 218, 231 (1964), in which the Court implied that states were free to administer their schools as they pleased except as to policies racially motivated.

27. Dandridge v. Williams, 397 U.S. 471, 485 (1970).

28. *Id.* at 484.

29. The right or interest need not be explicitly recited, since it might come within the ambit of the Ninth Amendment: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." Or the right might emerge from the penumbra theory of Griswold v. Connecticut, 381 U.S. 479 (1965).

30. See text, pp. 4-5, and Figures 1 and 2.

31. Dandridge v. Williams, 397 U.S. 471, 485 (1970). The text discusses the economic realm at p. 4.

32. See Serrano v. Priest, —Cal.2d —, —, 487 P.2d, 1241, 1249-53, 96 Cal. Rptr. 601, 619-23 (1971). This is discussed in the text at p. 6.

## • Other Considerations

Other factors can be isolated that bear consideration in predicting the Court's ultimate product. The most important of these is certainly the composition of the present Court. By the end of his first term, President Nixon will have appointed at least four persons to the Supreme Court. Most commentators are predicting a conservative trend in the Court's decisions.[33] The conflict that might cause the change is fundamental in nature:

> It is the issue of whether adjustments in the political fabric of the nation are to be fashioned in major part by the Supreme Court or by instrumentalities more directly responsive to political processes; it is the issue of whether substantial, redirectional alterations in the content of the Constitution are to be made by the Court or by a formal constitutional amendment and what the character of that content will be.[34]

Will this new Court affirm a decision that is potentially "the most far-reaching court ruling since *Brown v. Board of Education* in 1954, which held that separate public educational facilities were inherently unequal?"[35]

A second factor is the measure of weight that the Court will give to the consequences of a result identical to the *Serrano* result. Not only will virtually all states have to revamp their educational financing systems but also ramifications extend into other areas. The rationale followed in *Serrano* may be applied to practically any service rendered by a local unit of government. The Fifth Circuit in *Hawkins v. Town of Shaw, Mississippi*,[36] recently invoked strict scrutiny because of suspect classification (race) and held that the Town of Shaw had an affirmative duty to extend the same municipal services to blacks as it did to whites. The court intimated that a similar result would be appropriate if a municipal government favored rich areas over poor in allocating services.[37] Shaw was unusual in that funds for street paving and sanitary sewers came from general funds primarily raised through ad valorem taxes instead of from special assessments. Yet even services contingent upon the payment of assessment might be affected. Assessments are more easily paid by the rich, but are the poor not equally entitled to adequate streets and decent sanitary facilities? This argument must have currency in light of *Serrano*.

In its broadest application, a *Serrano* result might upset other previously tested taxing methods. This is possible when the fundamental interest is viewed as the right to regain from the state in the form of services according to one's ability to contribute to the tax coffers but only in proportion to his annual income or to his property holdings. Such a broad principle would undermine all regressive taxes. For example, consider a family of five with an annual income of $20,000 and another family of five with income of $5,000. If both families consumed roughly the same amount of food, they would pay approximately the same amount in food taxes each year. As a percentage of income, the poorer family pays several times the taxes paid by the richer family. These tax dollars produce the same services for each family, perhaps in the area of police protection or increased educational facilities, but the poorer family is paying more as a percentage of income and, under the previously stated principle, is being deprived of a fundamental interest. Yet taxes that are regressive in this way are a concomitant of our way of life.

The search for standards is yet another problem. If the degree of wealth as translated into ability to raise a certain number of dollars per pupil is the sole standard for equalization, then inequality of educational opportunity must still result. For example, a public school situated in a ghetto might pay many more times the money for police protection against vandalism and violence than a school in a well-to-do residential area. With that portion of the educational dollar paid by the pupil in the ghetto school for extra protection, the pupil in the peaceful school is paying for additional learning aids. Thus the ability to produce X dollars per pupil does not mean that X dollars spent provides equal opportunity between districts. Such realities have caused educators to propose other standards. One of the more enlightened of these is based on achievement,[38] i.e., a minimum standard of achievement is set before a state is free of its educational burden. For example, if the acceptable level were set at ninth grade in reading, the state would be required to spend resources until the average high school student could read at that level. In regard to the search for standards, suffice it to say that the lower court in *McInnis* refused to deal with the Illinois system of financing for lack of discernible standards.

## The North Carolina System Under *Serrano*

North Carolina's system of educational financing differs greatly from those in other states, at least in basic administration procedures. The state has cast itself since the Great Depression in the role of stabilizer by providing the bulk of current operating expense (primarily teachers' salaries) each year for the

33. Note, however, that on the specific issue of poverty as a suspect classification, Justice Blackmun, President Nixon's second appointee, sided with the dissenters in *Valtierra*. James v. Valtierra, 402 U.S. 137, 142 (1971).

34. Strong, *Whither the U.S. Supreme Court?*, Chapel Hill Weekly, October 17, 1971, § 2 at 1, col. 6.

35. TIME, Sept. 13, 1971, at 47.

36. 437 F.2d 1286 (5th Cir. 1971).

37. *Id.* at 1287, n. 1.

38. A. WISE, RICH SCHOOL, POOR SCHOOLS 151 (1968).

**Table I**

Educational Revenue—Sources by Percentage[39]

| | North Carolina* | California |
|---|---|---|
| Local Moneys | 28.4% | 55.7% |
| State Moneys | 60.1% | 35.5% |
| Federal Moneys | 11.5% | 6.1% |
| Miscellaneous | — | 2.7% |
| | 100.0% | 100.0% |

*Includes contributions for all purposes (current operating, capital outlay and debt service).

public schools. In this scheme the local units are responsible for capital improvements. Local contributions do form a small but significant part of the fund for current operating expense just as state aid is minimally provided for capital outlay. Also, the voters of any school administrative unit or district or county may approve the levy of a special tax to operate the schools in the area at a higher standard. To this mix are added funds from the federal government.

## ● The Problem

The North Carolina system must now be measured against the standard enunciated in *Serrano v. Priest* that the quality of public education may not be a function of wealth other than the wealth of the state as a whole. Table I compares the sources of educational revenue in North Carolina and California. The glaring difference between the two systems is California's primary reliance on local aid and North Carolina's primary dependence upon state aid. However, this does not obscure the fact that North Carolina relies heavily upon local support for its public school system just as California relies significantly upon state aid for the same purpose.

Since the major contribution to public education in North Carolina comes from the state government, perhaps this factor should first be scrutinized. Ninety-eight per cent of the state contribution is for current operating expense, and most of this support is distributed on the same basis to all units. Although in the fiscal year 1969-70 the state expenditure fluctuated from a low of $373.95 per pupil in Newton-Conover City School District to a high of $491.41 in the Clay County School District, the disparity was due to such factors as greater heating requirements, higher teacher payrolls because of teachers with greater length of service, and vocational education offerings that have greater state support rather than to an attempt to provide more funds to poorer districts. The statewide average per pupil of state contribution to current operating expense was $410.26. One must note, however, that since most state revenues derive from state income and sales taxes some inherent equalization occurs in the basic per pupil grant from state coffers. That is, commercial centers with citizens in high-income brackets are contributing in some measure to state services, including education, provided in other less well-to-do areas of the state.

As to the critical factor of local aid, almost 90 per cent of the local aid for schools in North Carolina comes from the local property tax[40] while the figure is 100 per cent in California. Since the tax base and the rate of taxation are the two determinants for amount of money available, the local portion of school revenue in both states is "primarily a function of the value of the realty within a particular school district, coupled with the willingness of the district's residents to tax themselves for education."[41] One key ratio that tests this factor in the educational context is the appraised value of taxable property per pupil per district. Table II compares the high and low ratios in North Carolina and California:

**Table II**

Per Pupil Property Value in Districts[42]

| | North Carolina (Statewide) Countywide School Districts | California (Statewide) Elementary School Districts | California (Statewide) High School Districts |
|---|---|---|---|
| Low | $16,393 | $ 103 | $ 11,959 |
| High | $34,980 | $952,156 | $349,093 |

While the state contribution in California was designed to minimize the immense differences in wealth between districts, its effectiveness was limited. Consequently the California court was affronted at the relative ease with which the wealthier districts financed superior educational opportunity while the poorer districts strived mightily with higher tax rates and extra state aid without approaching the same

39. In North Carolina, contributions break down into three funds (figures in millions of dollars):

| | *State* | *Local* | *Federal* | *Total Fund* |
|---|---|---|---|---|
| Current Operating Expense | $453.0 | $119.7 | $82.9 | $655.6 |
| Capital Outlay Expenditure | 2.1 | 64.5 | 4.1 | 70.7 |
| Debt Service Expenditure | | 30.8 | | 30.8 |
| Total Contribution | $455.1 | $215.0 | $87.0 | $757.1 |

This information was taken from the annual financial report for 1969–70 of the North Carolina public school system. The report was prepared by the Division of Management Information Systems, Comptroller's Office, North Carolina State Board of Education. The California percentages are 1968–69 figures and come from the opinion in Serrano v. Priest, —Cal.2d—, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971).

40. Phay, *Public Education*, in COUNTY GOVERNMENT IN NORTH CAROLINA 361–62 (J. Ferrell ed. 1968). This figure is changing somewhat with the new reliance by some localities on the 1 per cent local-option sales tax.

41. —Cal.2d at —, 487 P.2d at 1246, 96 Cal. Rptr. at 606.

42. North Carolina data on valuation come from a report on the fiscal year 1969-70. STATISTICS OF TAXATION—STATE OF NORTH CAROLINA 300–303 (1970). The number of pupils per school district in North Carolina is for the year 1969-70 and comes from the State Department of Public Instruction, Raleigh, N.C. In the interests of simplicity, only countywide districts were examined and those counties that enclose city units were ignored. Thus, it might be expected that higher ratios would appear in Wake (Raleigh) and Guilford (Greensboro and High Point) counties. The data from California appear in the *Serrano* opinion, — Cal.2d —, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971).

success. In North Carolina, despite the slight equalization tendency in the basic grant, local wealth does control to some extent the quality of education, especially when districts that show equal willingness to tax are compared. For example, both Pasquotank County and Mecklenburg County levy well over 2 per cent of assessed valuation for county taxes, both have assessed valuation of 60 per cent of appraised value, and both contribute the same fraction of taxes raised to their schools. Yet Pasquotank contributes only $116.72 per school pupil whereas Mecklenburg contributes $248.04. This as attributable only to the fact that Mecklenburg has $34,980 in appraised value of property per child while Pasquotank has but $18,796. Better educational opportunity results that is conditioned only upon the difference in wealth. *Thus the California objection is applicable to the North Carolina situation.* North Carolina's special supplement would be especially offensive since it is raised entirely from a special property tax.

Three considerations might possibly mitigate North Carolina's violation of the *Serrano* standard. First, North Carolina's system is not as statistically offensive as California's. As noted, only a little over a quarter of educational funds are raised locally in North Carolina whereas over half are so raised in California. Almost 90 per cent of the locally raised funds come from property taxes in North Carolina; fully 100 per cent do in California. The worst variation in local wealth per pupil in North Carolina is 2 to 1, while in California it is almost 10,000 to 1. Such comparison means little, however, in the arena of constitutional law. If the Constitution demands that opportunity not be a function of local wealth, then the courts must ask whether opportunity is, in fact, a function of local wealth. The comparison must be made with the principle rather than with the practices in another state. While significant deviations from a principle are occasionally tolerated, usually when public policies come into conflict, the Supreme Court seeks to minimize such deviations. When equality is measurable in mathematical terms, the Court holds the line at close to exactitude. For example, in the field of voting rights and reapportionment, the first major case overturned a scheme in which one representative came from a district with over 600,000 population while another came from a district with 15,417.[43] The broad principle applied there was recently used to invalidate a district plan that placed about 420,000 in one district and 445,000 in another, each district varying *less than 3 per cent* from the ideal.[44] The plea that North Carolina's financing system is less unjust than California's comes to no avail; the crucial factor is whether it is unjust at all.

The second consideration involves the concept of initiative in revenue-raising. A community decides the quality of its local services by demonstrating a willingness to tax itself to provide these services. A school district desiring excellence will tax itself to achieve excellence. Yet the California court claimed that "such fiscal freewill is a cruel illusion for the poor school district."[45] The comparison of Mecklenburg and Pasquotank, two counties that show extraordinary interest in education, makes it obvious that Mecklenburg has an inherent advantage because it is much wealthier, although there will be some compensating factors such as higher cost of operation in Mecklenburg due to higher property costs, higher cost of living, etc. It is true that willingness to tax is a key factor when counties of comparable wealth are considered, as when Pasquotank, which raises $116.72 locally per child, is compared with Graham County, which raises but $20.06. However, since discrepancies in relative wealth do exist, the willingness to tax can be an illusory touchstone.

The third consideration that might be offered in behalf of the North Carolina financing system is that the statutes that implement the system are neutral on their face and this neutrality blunts any Fourteenth Amendment argument concerning state action. The school finance statutes enumerate the parts of the school program that will be supported by state funds. They include most of the current operating expenses, such as teacher salaries and transportation, and the state pays for these in all school units on the same basis. However, the statutes also enumerate several school areas that the school district must finance from local funds such as buildings, maintenance, and insurance; and these areas of the school program constitute approximately 25 per cent of the total cost. Since local districts have different abilities to support these areas of local responsibility, the North Carolina school finance statutes appear not to meet the Serrano test.[46]

## • Some Solutions

Although the principle announced in *Serrano* seems to beckon for complete state support of the public schools, prominent commentators have proposed two possible methods of decentralized control: district power equalizing and family power equalizing.[47] These depend upon local effort, one based upon the wealth of the district and the other upon the income of the family whose child is involved. The former contemplates the spending in some districts of a portion of local taxes raised in others, a principle that probably violates the North Carolina Constitution as

43. Reynolds v. Sims, 377 U.S. 533, 545 (1964).

44. Kirkpatrick v. Preisler, 394 U.S. 526, 528-9 (1969).

45. — Cal. 2d at —, 487 P.2d at 1260, 96 Cal. Rptr. at 620.

46. In any case, a neutrality argument meets difficulties in the face of strict review because the Supreme Court demands that all the facts be sifted and circumstances weighed even if state involvement is "nonobvious." Reitman v. Mulkey, 387 U.S. 369, 378 (1967); Burton v. Wilmington Parking Authority, 365 U.S. 715, 722 (1961).

47. Coons, Clure, and Sugarman, *Educational Opportunity: A Workable Constitutional Test for State Financial Structures*, 57 CAL. L. REV. 305, 319–22 (1969).

interpreted by the State Supreme Court.[48] Complex administration procedures would appear to cripple the family system. The system is based on a scrip system that is keyed to individual family earning capacity with appropriate adjustments reflecting cost of living and other factors. In addition, the family system anticipates that different schools would be available in the same locality that offer educational programs of measurably different quality. Duplication of effort would result.

In the other direction, complete state support means that more revenues must be raised on the state level by imposing a statewide property tax or by increasing state income and sales taxes. Administering a state property tax would be a mammoth task, although it is done in some other states. For example, every single piece of property would have to be appraised on a uniform basis at the outset. Stringent policing would be a necessity since artificial depression of valuation by an official in one district would create a burden for the taxpayers in another district whose appraiser reported true value. The increased income tax is more desirable from an administrative standpoint since the mechanism is already in existence, but such an increase poses numerous legislative difficulties. For instance, a constitutional amendment probably would be necessary to eliminate the 10 per cent ceiling in the State Constitution. A proposed increase in sales tax also would encounter legislative hurdles, and the regressive nature of the tax would appear to make it less desirable than an increased income tax. Complete dependence on state revenues likely would mean that other state-supported services would decline.

The North Carolina system also permits a third possibility—a variation on the statewide and district power plans. Wealth is not nearly so concentrated in school districts in North Carolina as it is in California. Primarily because the districts are large and encompass both rich and poor elements, a leveling effect occurs and the ratio between rich and poor districts is at worst 2 or 2½ to 1. A second peculiar characteristic of the North Carolina system is the presently large 60 percent contribution by the state. The combination of these factors makes feasible a weighted matching program at the state and local levels.

The program has three stages that parallel stages in the present system. First, the state would continue the basic contribution from state collers to current operating expense. Second, the state would require by law a minimum level of participation by the localities similar to what the school districts are now doing but at a consistent level statewide. This would insure that all the necessary financial expenses in operating the public schools would be met. Third, the state would condone supplemental programs on the local level by those districts willing to bear additional local taxing.

At levels two and three the state would provide matching funds according to a table of "effort" levels, "effort" being that effort necessary for raising locally a certain number of tax dollars. The wealthiest district's effort would be set at one while the poorest district would require about two (being roughly twice as poor, about twice the effort would be necessary to provide the same services as provided by the wealthiest county), with the remaining districts somewhere in between. Using the property tax as an example, suppose Mecklenburg County could raise $100 per school child by assessing a tax of $1 per $100 of assessed valuation if assessed valuation were set at 50 per cent of appraised value. On the same assessment ratio, suppose, then, that Cherokee County would have to tax $1.99 per $100 to raise $100 per school child. Mecklenburg, the wealthiest county, would have an effort level of 1. Cherokee would have and effort level of 1.99 since it must make 1.99 times the effort that Mecklenburg must make to raise the same amount of money per school child. Actually, the effort table would be keyed to some indicator of relative wealth other than property to avoid the statewide appraisal problem previously mentioned. Income might be appropriate, for example, since consistent statewide figures are readily available. Depending upon a district's effort level, the state would match each dollar locally raised according to the increment over 1 that the level is. Thus, Mecklenburg would get no matching funds. Cherokee, on the other hand, with an increment over one of .99 would get 99 cents from the state in matching funds for every dollar locally raised. The availability of matching funds satisfies the *Serrano* standard that variations in local wealth not affect the spending for the education of any child.

Thus, in a hypothetical situation suppose the basic state contribution to be $400 per child in Cherokee and Mecklenburg counties. At the second stage the state mandates that counties provide an additional $100 per child. Since Mecklenburg has an effort of 1, it would have to raise the complete $100 per child on its own. On the other hand, Cherokee, receiving matching funds of 99 cents for each dollar it can raise, need raise only $50.25 per child since the matching funds will be $49.75 for a total of $100 per child. The third stage is one of pure initiative. If Mecklenburg wants to raise more than $100 per child as it has in the past, it certainly may. It keeps every nickel of the supplemental taxes levied. If

*(Continued on page 29)*

48. A series of cases seem to hold that one community may not be taxed through a local tax for the benefit of another community. *See* Comm'rs v. Lacy, 174 N.C. 141, 93 S.E. 482 (1917), and Comm'rs v. Boring, 175 N.C. 105, 95 S.E. 43 (1918). If the portion of the tax revenues spent outside the district could be classified as revenues from a state tax, the scheme would still probably be invalid for lack of uniformity in the mode of assessment, as well as in the rate of taxation. *See* Hajoca Corp. v. Clayton, 277 N.C. 560, 178 S.E.2d 481 (1971).

*Recently the author received an inquiry about the law concerning where canoeists might legally go. Since this subject will have some interest to all who enjoy the outdoors, we reproduce the substance of his reply here.*

# Where can you paddle your own canoe?

**By L. Poindexter Watts, Jr.**

1. What are the owner's rights in prohibiting a canoeist from passing down stream where he owns land on both sides of that stream?

If a person owns land over which a nonnavigable stream flows, he owns the land under the stream and has the right to control use of the water's surface. (He may not, however, use more than his share of the water flowing across his land or exert ownership control over fish that are free to swim across property lines.)

If the stream flowing across an owner's land is navigable, the State of North Carolina owns the bottom and it would be a misdemeanor for the riparian owner to block use of the stream for navigation or fishing.

2. Can the canoeist carry around on the bank or lift over a privately owned low water bridge too low to float under?

If the low bridge is over a navigable stream, it probably violates the law. A canoeist would then have the right to go to court to have the obstruction removed or altered so as not to block navigable water. If a canoeist encounters such an obstruction in the course of a journey, it is not entirely clear whether he can take self-help action or whether he must wait and go to court. In my opinion a canoeist in navigable water would have the immediate right to go around or over an obstruction in a peaceable manner that would not cause any damage to the owner's land or structure.

If the stream is not navigable, it would be a civil trespass to go on the water flowing over the owner's land without permission. It would be a continuation of the civil trespass to go around or over the low bridge without permission. (It would be a criminal trespass only if: (a) one goes onto another's property with force or as part of a large, intimidating group; (b) one goes onto another's property after having been forbidden to do so by one in control of it; (c) one remains on another's property after being asked to leave; (d) one willfully and wantonly damages, injures, or destroys another's property; or (e) one willfully goes on "posted" property of another to hunt, fish, or trap without written consent of the owner or his agent.)

3. Can a canoeist paddle across a lake and carry across a dam that has been constructed by an individual or corporation for private use when said lake and dam are formed by and blocking a navigable, formerly free-flowing stream?

If a stream was ever navigable, it retains this legal character even if dams or other artificial obstructions to navigation are added later. (I am not sure what the law is if the stream loses its navigable character through natural causes.) Therefore, in my opinion, anyone traveling on a lake covering the site of a previously navigable stream would have the right to continue his journey on navigable waters by necessary portage around or across the dam or obstruction. If,

in making portage, the canoeist willfully or negligently causes any injury to property, he could be held liable for the damage.

4. What qualifications determine a "navigable stream"?

Whether water is "navigable" under the laws of North Carolina is a question of fact. The general idea is that watercourses suitable as highways for commerce are "navigable" and the public has a right to use them. The cases on this subject are highly confusing, because recent courts have usually been more liberal than earlier ones in declaring waters navigable. The water need not be suitable for large engine-powered vessels; apparently a trapper's canoe or other smaller craft that use it for commercial transportation or fishing would qualify. Once the water is determined navigable, it is open to all vessels —including pleasure craft. Under the highway-for-commerce concept, the watercourse would probably have to connect two or more public or semipublic docks or launching areas. One old case found a stream used by loggers to float timber to be navigable, but I believe the case defined a limited type of navigable purpose and may not have opened that stream to canoeists. Incidentally, if a *customary* portage has been established, an otherwise inaccessible stream is considered navigable if it is used for continuation of a journey.

Many problems are posed when streams flow intermittently or when coves or ponds are subject to tidal action or other rising and falling water levels, and therefore are usable by vessels only part of the time. Apparently, whether the waters in question can be used often and predictably enough by vessels of commerce to constitute a "highway" is a question of fact; if they can be so used, the waters are navigable.

My discussion of navigable waters has been essentially under the law of North Carolina. There is a federal concept of "navigable waters of the United States" used to determine any federal interest or jurisdiction over certain waters. Waters are classified as navigable waters of the United States if they form a highway for commerce to the sea or across state lines. This federal definition should be of little or no interest to canoeists; I mention it only because canoeists may come across discussions of navigability going into this matter and they should not be confused by them.

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## *odor pollution* *(Continued from page 2)*

sign, measuring smell is still a subjective determination made by the "sniffer" and obviously prone to evidentiary challenge in court.

### Air Pollution Control Laws

In North Carolina the statutory definition of the term "air contaminant" is "particulate matter, dust, fumes, gas, mist, smoke, or vapor or any combination thereof."[26] Specific mention of odors is absent. "Air pollution" is the "presence in the outdoor atmosphere of one or more air contaminants in such quantities and for such duration as to be injurious or detrimental to health or human safety, animal or plant life, or property." Note the tie to health, safety, and economics. Some other states have added "odor" to their definitions of "air contaminant" or "air pollution," and the Council of State Government's Model State Air Pollution Act includes "odorous substances."

The North Carolina Department of Water and Air Resources is directed to spell out in regulations the characteristics and amounts of air contaminants that constitute "air pollution."[27] While the Department has considerable latitude in adopting air quality standards, emission control standards, and classification of air contaminant sources, it must relate its regulations to controlling air pollution as defined. Odor *per se* is outside the scope of control; an unsophisticated approach to concentrated odors (as with a "Scentometer") is not contemplated by the North Carolina air pollution laws. Since odor is not expressly included in the statutory definition, any enforcement action against a pollutor for odors must be based on the specific presence of recognizable air contaminants.

### Conclusion

At present the most accessible tool to fight odor pollution is educating the public and citizens' groups to stimulate concern and encourage voluntary abatement of industrial and residential odors. The nuisance laws are difficult and inefficient but not totally unworkable as a device. The ordinances of several North Carolina cities are possibly helpful but probably deficient in enforcement effectiveness. The state's air polution control laws could be broadened to include odor as a controllable contaminant. Of course the problem with all the legal approaches is that a supportable definition of offensive odors is needed—one that will find general acceptance as restricting those smells that are unwanted as well as unhealthful, unsafe, or nonesthetic. In addition, new scientific techniques and devices, developed in harmony with legal requirements, are needed to detect and measure the presence of odors deemed offensive to the public. Until effective and acceptable new tools are developed by both the engineering and legal professions, there will be many smells, stenches, and odors left uncontained by governmental regulation.

26. N.C. GEN. STAT. § 143–213.
27. N.C. GEN. STAT. § 143–215.

The author is a new Institute of Government staff member whose fields include criminal law.

# Enforcement of Parking Laws

## ——————drawing valid arrest warrants

By William B. Crumpler

Despite the generally casual regard for parking tickets by most citizens, in North Carolina violations of municipal ordinances regulating parking are punishable as misdemeanors.[1] Prosecution of a parking offense, therefore, entails following the procedure normal for any criminal offense. One of the first requisites of criminal prosecution is the issuance of an arrest warrant that is sufficiently detailed "to give the defendant notice of the charge against him to the end that he may prepare his defense and be in a position to plead former acquittal or former conviction in the event he is again brought to trial for the same offense. . . ."[2]

Recently in Raleigh a successful challenge to the standard warrant form used for parking violations, on the ground of insufficient detail, resulted in a temporary suspension of in-court prosecution of parking offenses.[3] Subsequent collaboration between the city attorney's office and the solicitor's office (with assistance from the Institute of Government) produced new warrants that should meet the requirement of particularity but facilitate handling. This response in the capital city may serve as a guide to other municipalities.[4]

### *The otd warrant system*

In Raleigh, computer cards are used as parking tickets, with space provided for recording pertinent information—date, time, and automobile license number, etc.—and the type of violation is indicated by marking the appropriately labeled box from a series of boxes numbered from 1 through 17. If a prescribed civil penalty is not paid within forty-eight hours of a violation,[5] a warning letter is mailed to the presumed offender. Further lack of payment results in the issuance of an arrest warrant.[6]

1. N.C. GEN. STAT. § 14-4 (1969). Of course municipal officers also enforce state parking laws.

2. State v. Dorsett, 272 N.C. 227, 229-30, 158 S.E.2d 15, 17 (1967).

3. Raleigh News and Observer, Oct. 28, 1971, at 56, col. 3.

4. This article is limited in scope to the problem of drafting satisfactory warrants for parking violations. Other matters related to the enforcement of parking laws have previously been examined in POPULAR GOVERNMENT. Warren, *Municipal Parking: Regulation and Enforcement*, 34 POPULAR GOVERNMENT 23 (Dec. 1967); Ashman, *Parking, Penalties and the Public: the Dilemma of the Dollar*, 32 POPULAR GOVERNMENT, 13 (Nov. 1965).

5. Raleigh, N. C., Code § 21-12 (1959) (as amended) establishes a traffic violations bureau and sets up the admioistrative procedure for settling parking violations.

6. A statutory rule of evidence facilitates prosecution for parking offenses: "[I]t shall be prima facie evidence . . . that [an illegally parked] vehicle was parked and left upon [the] street, alley or public way or place by the person, firm or corporation in whose name such vehicle is then registered and licensed . . . ." N.C. GEN. STAT. § 20-162.1 (1965). A $1 penalty is prescribed for anyone convicted pursuant to this section. *Id*, Query whether a city (or the state) can impose vicarious liability on the registered owner for a parking violation involving his vehicle if he had permitted the actual violator to use his car? Raleigh, N. C., Code § 21-49(1) (1959) (as amended) appears to be such an imposition as to overtime parking.

At trial an objection based on the hearsay rule may well be sustaioed if an officer attempts to

File # _____
Film # _____

STATE OF NORTH CAROLINA
County of _____

In The General Court of Justice
District Court Division

The State of North Carolina Vs.

_____
Defendant

COMPLAINT FOR ARREST

_____
Age Race Sex Occupation

_____
Address

The undersigned, _____, being duly sworn, states that he is informed and believes and therefore complains and says that at and in the County named above and on or about the _____ day of _____, 19____, the defendant named above did unlawfully and wilfully Violate City Ordinances (Art. IV of Chapter 21 of the City Code of Raleigh 1959) as amended and Sections 46-47-48-49 of Chapter 21 of the City Code of Raleigh 1959 as amended, and "An ordinance creating parking meter zones on certain designated Streets in the City of Raleigh" adopted by the City Council on August 3, 1959, as amended

| | DATE | TIME | LOCATION | CIT # | LICENSE # | MAKE | VIOLATION |
|---|---|---|---|---|---|---|---|
| 1 | | | | | | | |
| 2. | | | | | | | |
| 3 | | | | | | | |
| 4 | | | | | | | |
| 5 | | | | | | | |
| 6. | | | | | | | |

(Fill in caption and section number of municipal ordinance and/or General Statutes if known.)

Sworn to and subscribed before me this

_____ day of _____, 19____

_____
Complainant

_____
Magistrate/Assistant Deputy Clerk of Superior Court

_____
Address or Rank and Department

WARRANT FOR ARREST

To any officer with power to execute an arrest warrant for the offense described above:

It appearing from the accusations recited in the above complaint, which is made a part of this warrant, that a criminal offense has been committed, you are commanded forthwith to arrest the defendant named above and bring him before _____ to be dealt with according to law.

This the _____ day of _____, 19____

_____
Magistrate/Assistant Deputy Clerk of Superior Court

**Raleigh's old arrest warrant form**

The old arrest warrant form used in Raleigh essentially mirrored the parking ticket: it contained columns for recording the basic information and a special column to indicate the violation. Unfortunately, this column usually reflected the conclusory statement of the offense as found on the parking ticket and did not set forth all the elements of the offense.

### *The new warrant system*

To provide complete statements of the offenses, five separate standard warrant forms were devised to correspond to five generic groupings of the seventeen violations listed on the parking ticket. The captions on the warrants name the generic groups descriptively: (1) Overtime Parking; (2) Parking In An Improper Manner; (3) Parking In A Prohibited Area; (4) Loading, Bus, and Taxi Zone Violations; (5) Parking Violations of the General Statutes. The affidavits of the first four warrant forms allege a violation of Chapter 21 of the Code of the City of Raleigh; the affidavit of the fifth warrant alleges a violation of Chapter 20 of the General Statutes of North Carolina.

A box is set beside each of the several offenses stated on each warrant. The number beside each box corresponds to the numbered violation on the parking ticket itself, and the particular charge is indicated by marking the appropriate box.

However, in some cases, a violation shown on the ticket may occur in more than one way. If that happens, letters beside the applicable number on the warrant indicate the alternative possibilities. For example, number 6 on the ticket shows a violation in regard to crosswalks. Such a violation may occur under either of two ordinances: first, by parking within twelve feet of a crosswalk[7] and, second, by blocking the crosswalk with a vehicle during movement with the flow of traffic.[8] Note the reproduced warrant: 6A and 6B on the warrant respectively cover each situation.

As North Carolina law[9] requires, the specific section number and caption of the applicable ordinance are set forth for each charge. Where different sections or paragraphs of a section must be read together in construing an offense, each section or paragraph is cited.

To avoid confusion, the warrants were designed to preclude multiple counts.[10] A single warrant must be issued for each charge against an individual faced with prosecution for more than one violation. Room is provided at the bottom of each warrant for the particularities of time, place, and

testify concerning in whose name a vehicle is registered; however, a certified copy of the records of the Department of Motor Vehicles showing that information could be introduced as a means to avoid the objection. N.C. GEN. STAT. § 20-42 (1965); D. STANSBURY, NORTH CAROLINA EVIDENCE §§ 153, 154 (2d ed. 1963).

If a defendant is acquitted by virtue of his claim that another person was operating his vehicle at the time of a parking violation, he could be compelled to testify against that individual in a subsequent prosecution. But what if the defendant claims his spouse was operating the vehicle? Apparently an acquittal would be the end of the line for the state in view of the marital privilege that precludes a spouse from testifying against his mate in a criminal action (except for certain offenses). N.C. GEN. STAT. § 8-57 (1969); STANSBURY, *supra*, at § 59.

7. Raleigh, N.C., Code § 21-35(2) (1959) (as amended).

8. Raleigh, N.C., Code § 21-43 (1959) (as amended).

9. N.C. GEN. STAT. § 160-272 (1964); State v. Wiggs, 269 N.C. 507, 511, 153 S.E.2d 84, 87-88 (1967). N.C. GEN. STAT. § 160A-79 of the new Cities and Towns Act that becomes effective on January 1, 1972, retains the requirement of alleging in a criminal warrant either the caption or the section number and caption of an applicable municipal ordinance.

10. The defendant's name and allegations as to date and place must be repeated for each count if additional counts are used.

vehicle identification with respect to a given violation.

### *Relating charge to ordinance*

Expressing the material elements of each offense was a matter of converting the prohibitions of a specific ordinance into correlated assertions of fact in the form warrant.[11] In this regard the instruction of the North Carolina Supreme Court must be heeded:

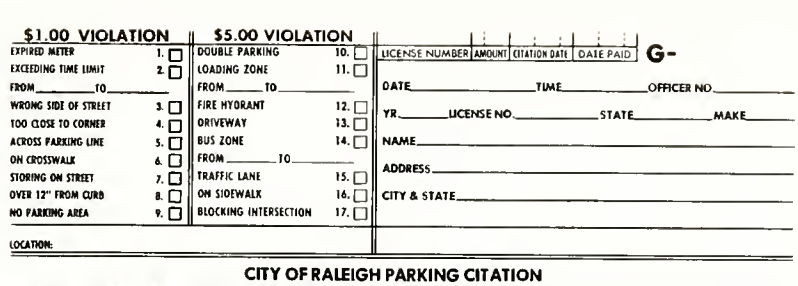
> In a criminal prosecution for a statutory offense, including the violation of a municipal ordinance, the warrant or indictment is sufficient if and when it follows the language of the statute or ordinance and thereby charges the essentials of the offense "in a plain, intelligible, and explicit manner" . . . . If the words of the statute fail to do this they "must be supplemented by other allegations which so plainly, intelligibly and explicitly set forth every essential element of the offense as to leave no doubt in the mind of the accused and the court as to the offense intended to be charged."[12]

Thus, not only must the charge relate to the proscription of the ordinance, but it must also relate in an understandable manner.

### *Parking meter violations: a special problem*

The ordinances relating to parking meters proved troublesome, which was not surprising considering the troubled history of parking meters.[13] Two distinct offenses were established: failing to activate the meter initially, and parking in the metered space beyond the period of time allowed.[14] However, when an officer sees an apparently expired meter, he is seldom able to determine which of these two possibilities arises (or whether both arise together); the meter merely shows the existence of a violation but not the type of violation. To resolve this evidentiary dilemma, a section of the Code of Raleigh[15] was amended to read as follows:

> It shall be unlawful and a violation of the provisions of this article for any person:
>
> • • •
>
> (2) To cause or allow a vehicle to be stopped, left standing, or parked in a parking meter space while the meter for such space is displaying a signal indicating that the meter is not active.[16]



| $1.00 VIOLATION | | $5.00 VIOLATION | |
|---|---|---|---|
| EXPIRED METER | 1. ☐ | DOUBLE PARKING | 10. ☐ |
| EXCEEDING TIME LIMIT | 2. ☐ | LOADING ZONE | 11. ☐ |
| FROM ____ TO ____ | | FROM ____ TO ____ | |
| WRONG SIDE OF STREET | 3. ☐ | FIRE HYDRANT | 12. ☐ |
| TOO CLOSE TO CORNER | 4. ☐ | DRIVEWAY | 13. ☐ |
| ACROSS PARKING LINE | 5. ☐ | BUS ZONE | 14. ☐ |
| ON CROSSWALK | 6. ☐ | FROM ____ TO ____ | |
| STORING ON STREET | 7. ☐ | TRAFFIC LANE | 15. ☐ |
| OVER 12" FROM CURB | 8. ☐ | ON SIDEWALK | 16. ☐ |
| NO PARKING AREA | 9. ☐ | BLOCKING INTERSECTION | 17. ☐ |

LOCATION:

LICENSE NUMBER | AMOUNT | CITATION DATE | DATE PAID | G-

DATE ____ TIME ____ OFFICER NO. ____

YR. ____ LICENSE NO. ____ STATE ____ MAKE ____

NAME ____

ADDRESS ____

CITY & STATE ____

**CITY OF RALEIGH PARKING CITATION**

FOR YOUR CONVENIENCE, YOU MAY MAIL THIS CITATION AND PENALTY TO P. O. BOX 590, RALEIGH, N. C. OR YOU MAY PAY AT EITHER THE CASHIER'S WINDOW ON THE SECOND FLOOR OF THE MUNICIPAL BUILDING, 110 S. McDOWELL ST., OR AT THE DRIVE-IN WINDOW AND THIS CASE WILL BE CLOSED. THIS PENALTY MUST EITHER BE PAID OR YOU MUST CLEAR WITH THE DIRECTOR, PARKING VIOLATIONS BUREAU, ROOM 201, MUNICIPAL BUILDING WITHIN 48 HOURS OF ISSUANCE OF THIS CITATION.

IF NOT CLEARED WITHIN 48 HOURS A WARRANT WILL BE ISSUED

**Computer cards used as tickets**

In the correlated part of the arrest warrant form, the preprinted charge reads that the defendant violated the section "by causing and allowing a vehicle to be stopped, left standing and parked in a parking meter space while the parking meter for such space was displaying a signal indicating that the meter was not active."

### *Duplicity and surplusage*

Finally, the general rules as to duplicity and surplusage had to be considered in drafting the new warrants.[17] An arrest warrant is duplicitous and subject to a motion to quash if it charges two or more offenses in one count or avers the commission of a crime in two or more inconsistent ways. This problem frequently stems from expressing elements of the offense in the alternative by use of the word "or."

For instance, G.S. 20-162 states:

> No person shall park a vehicle or permit it to stand . . . upon a highway . . . within twenty-five feet from the intersection of curb lines *or* if none, then within fifteen feet of the intersection of property lines at an intersection of highways. . . . (Emphasis added.)

An offense under this statute may occur in one of two ways, depending upon the presence of curb lines; but connecting these two possibilities in one count by "or"

11. Obviously, how well the charge reads depends on how well the ordinance is written. In this regard, several of the Raleigh ordinances were amended to clarify, amplify, or simplify the proscriptions desired.

One nagging problem in drafting parking ordinances is how to describe the location of specified places such as loading zones and no parking areas. Referring to streets, distances, and direction seems to be more exact and stable than referring to specific street number addresses. For example, a particular no-parking area might be accurately described as being "in the 200 block of E. Jones St. starting at a point on the south side of the street forty feet east of N. Macon St. and extending thirty feet east along the edge of the roadway."

Query whether *every* no-parking area or loading zone or other restricted area must be specifically enumerated in the city code? Compare the language of N.C. GEN. STAT. § 160-200(31) (1964), with that of N.C. GEN. STAT. §§ 160A-301 and -77 (effective Jan. 1, 1972); and consider, as one possible alternative, whether the city council could approve use of a map to show restricted areas in lieu of enumeration in an ordinance.

12. State v. Dorsett, 272 N.C. 227, 229, 158 S.E.2d 15, 17 (1967).

13. *See, e.g.*, State v. Scoggin, 236 N.C. 1, 72 S.E.2d 97 (1952).

14. Raleigh, N.C., Code § 21-47 (1959) (as amended).

15. Raleigh, N.C., Code § 21-49(2) (1959) (as amended). The section before amendment read as follows:

> It shall be unlawful and a violation of the provisions of this article for any person:
>
> . . .
>
> (2) To permit any vehicle to remain or be placed in any parking space adjacent to any parking meter while such meter is displaying a signal indicating that the vehicle occupying such parking space has already been parked beyond the period prescribed for such parking space.

The old wording conceivably avoided the evidential dilemma, mentioned in the text, that would arise if Section 21-47 of the Code stood alone (see note 14, *supra*); however, that "signal" related only to overtime parking in the former wording left the draftsmen somewhat uneasy, notwithstanding that "indicating" modified "signal." *Cf.* State v. Scoggin, 236 N.C. 1, 72 S.E.2d 97 (1952). It was felt that the amendment provided a more clear-cut, precise statement of the desired parking restriction and would facilitate enforcement.

16. The term "not active" was chosen based on the definition of "active" in Webster's NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE (College ed 1968). "Active" seems to cover the situation more succinctly and precisely than the other terms considered, including variations of "operational," "in operation," "functioning," and "inactive." Compare N.C. GEN. STAT. § 160A-301 (effective Jan. 1, 1972), which provides in part: "To enforce an on-street parking ordinance, a city may install a system of parking meters and make it unlawful to park at a metered location unless the meter is kept in continuous operation."

17. Much of the discussion in the text derives from the introduction to *Arrest Warrant Forms* (Temporary Abridged Version) (Institute of Government, Nov. 1970).

STATE OF NORTH CAROLINA

County of _____

File # _____

Film # _____

In The General Court of Justice

District Court Division

The State of North Carolina Vs.

_____

Defendant

_____

Age Race Sex Occupation

_____

Address

COMPLAINT FOR ARREST FOR PARKING IN A PROHIBITED AREA

The undersigned complaintant, _____ (NAME), being first duly sworn, states that he is informed and believes and therefore complains and says that at and in the city of Raleigh, North Carolina, county of Wake, and on or about the _____ day of _____, 19__, the defendant named above did unlafully and willfully violate Chapter 21 of the Code of the City of Raleigh, North Carolina, and the sections thereof designated by a marked square below;

(Charges opposite unmarked squares are to be disregarded as surplusage.)

☐ 6A. Section 21-35(2), **Parking prohibited in specified places,** by stopping, standing and parking a vehicle within twelve feet of a crosswalk;

☐ 6B. Section 21-43, **Stop when traffic obstructed,** by entering a marked crosswalk when there was not sufficient space on the other side of the crosswalk to accomodate the vehicle he was operating without obstructing the passage of pedestrians;

☐ 9A. Section 21-34(a), **Parking prohibited in certain places,** by stopping, standing and parking a vehicle upon a street and alley so as to obstruct the free movement of vehicular traffic;

☐ 9B. Section 21-34(b), **Parking prohibited in certain places,** by parking a vehicle on the lot owned by the City of Raleigh, North Carolina, a municipal corporation, and located along the west side of McDowell Street and along the north side of Hargett Street;

☐ 9C. Section 21-34(e), **Parking prohibited in certain places,** by parking a vehicle within an area designated as a "NO PARKING" zone by erected signs and signs painted on the street, which signs provided notice that parking was prohibited in that area;

☐ 16. Section 21-35 (1), **Parking prohibited in specified places,** by stopping, standing and parking a vehicle on a sidewalk;

☐ 17A. Section 21-35(3), **Parking prohibited in specified places,** by stopping, standing and parking a vehicle within an intersection,

☐ 17B. Section 21-43, **Stop when traffic obstructed,** by entering an intersection when there was not sufficient space on the other side of the intersection to accomodate the vehicle he was operating without obstructing the passage of other vehicles;

Under the following circumstances

TIME LOCATION CITATION NO. VEHICLE LICENSE NO VEHICLE MAKE

Sworn to and subscribed before me this

_____ day of _____, 19__

_____

Complainant

_____

Magistrate/Assistant Deputy Clerk of Superior Court

_____

Address or Rank and Department

WARRANT FOR ARREST

To any officer with power to execute an arrest warrant for the offense described above:

It appearing from the accusations in the above complaint, which is made a part of this warrant, that a criminal offense has been committed, you are commanded forthwith to arrest the defendant named above and bring him before _____ to be dealt with according to law.

This the _____ day of _____, 19__

_____

Magistrate/Assistant Deputy Clerk of Superior Court

**One of Raleigh's new arrest warrants**

would be pleading in the alternative, which, of course, constitutes duplicity.

On a form warrant, these two possible violations can be expressed in separate counts, or the charge could be made in one count with duplicity avoided by changing the "or" to "and." That is, the count could allege that the defendant violated the statute "by parking and permitting a vehicle to stand upon a highway within twenty-five feet from the intersection of curb lines *and* within fifteen feet of the intersection of property lines at an intersection of highways."

Under the rule of surplusage, which says essentially that unnecessary words in an arrest warrant can be disregarded, the inapplicable words can be ignored in a given case. For example, if curb lines are present, the words "and within fifteen feet of the intersection of property lines" can be treated as surplus. This single-count method was adopted in Raleigh for this particular offense.

It can be argued that the 25-feet and 15-feet situations are so inconsistent that the single-count charge is still duplicitous.[18] Faced with such an argument, however, a solicitor could readily move to amend the warrant to strike the inappropriate words. With form warrants, motions to amend should be kept to a minimum.

### *Conclusion*

While the law with respect to parking on public streets is surprisingly complex,[19] drafting adequate warrants for violations is not difficult: it simply requires a close reading of the applicable ordinances and attention to detail. Raleigh has several times been the focus of legal controversies over the regulation of on-street parking. Perhaps this city's experience will continue to guide other North Carolina municipalities in this small but sensitive facet of governmental administration.

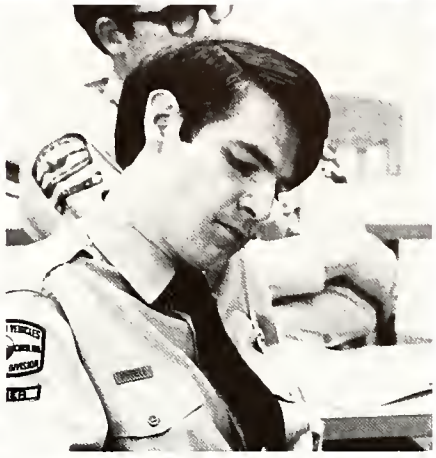
18. Some defense attorneys may argue that combining "stop" with "stand" and "park" is duplicitous. The latter two words connote a break in the continuity of travel, but "stop" implies only a temporary pause during the travel. Whether a vehicle is "stopped" or "parked" probably turns more on the length of time it remains stationary than whether the driver remains behind the wheel. The distinction between the words is vague, and it seems unlikely that combining them in an allegation would be so inconsistent as to be misleading. This duplicity argument, therefore, is quite tenuous. *See* LOEB, MOTOR VEHICLE LAW—RULES OF THE ROAD (Institute of Government, 1969).

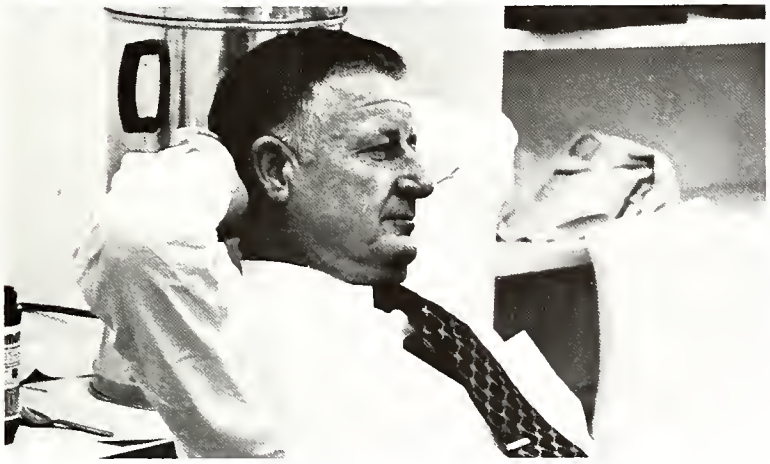
19. *See, e.g.*, State v. Scoggin, 236 N.C. 1, 72 S.E.2d 97 (1952), which is a primary source for understanding North Carolina law concerning the regulation of parking on public streets.

## *Computer data*

*(Continued from page 28)*

ment. A mere governmental employee is ordinarily held individually liable for negligence in the performance of his duties. These principles may have some application in determining the amount of discretion to be accorded various city offices in making decisions about the collection, use, and dissemination of public and private information.





# people

# PERSONAL INFORMATION GATHERED BY COMPUTER

## Legal Considerations Regarding Its Collection, Use, and Dissemination

by Robert B. Tucker, Jr.

The numerous and complex policy decisions that must be made regarding a municipal information system are challenging and perhaps even crucial to maintaining a proper relationship between the government and its citizens. This article aims to set a backdrop of the legal issues and principles against which such decisions must be made and not to provide solutions or answers or even to describe all the issues and questions. It presents a beginning point for discussion.

---

A discussion of constitutional and legal constraints on collecting, using, and disseminating computerized data must begin with the recognition that no decided cases deal specifically with the subject. However, although in some ways computerizing data presents unique problems—for example, the computer can bring together previously scattered bits of information about a person—in other respects the privacy issue is essentially the same whether the data are computerized or stored in mechanical files. In either case the data must be collected, and the act of collection may constitute an invasion of privacy. Also, several decided cases that deal with the right to privacy in other settings (e.g., doctor/patient relationships) reflect judicial concern over the public's right to know socially important information. Several areas of constitutional law—such as the First Amendment guarantee of free speech and the Fourth Amendment prohibition against unreasonable searches and seizures—embody well-defined principles that may be applied with some confidence to computer/privacy situations. Finally, broad general principles regarding due process and equal protection afford some guidance in dealing with the collection, use, and dissemination of information, whether by computer or by traditional means.

### CONSTITUTIONAL CONSIDERATIONS

The Fourteenth Amendment to the Constitution provides that "No *State* shall . . . *deprive any person* of life, *liberty*, or property, without *due process* of law; nor *deny to any person* within its jurisdiction the *equal protection* of the laws." (Emphasis added.) A municipality is a political creation of the state and as such is subject to the Fourteenth Amendment. Virtually the entire Bill of Rights—the first eight amendments, which embody specific prohibitions such as the Sixth Amendment right to confront one's accuser in a criminal trial and the Fifth Amendment ban against coerced self-incrimination, and which originally applied only to the federal government—has been held enforceable against the states through the due process clause. In addition, due process embodies broad principles: a state may not engage in unreasonable, arbitrary, or capricious actions. Determining whether particular state action is unreasonable involves balancing the personal and governmental interests affected. Also when the state action substantially infringes upon a fundamental right, such as the right to free speech, the state must justify the infringement by showing a compelling interest in the action taken. Applied to the data-privacy issue, these principles would mean, for example, that a city may not gather data wholly unrelated to governmental functions. More specifically, the due process clause is often thought to embody a general right to privacy, and this is discussed below.

The equal protection clause is a basic consideration in any municipal function that treats different citizens differently. Generally, it guards against invidious discriminations and requires that there be a rational or reasonable relationship between governmentally imposed classifications and a legitimate gov-

ernmental purpose. Arbitrary classifications—for example, "persons who own dogs shall not work in department stores"—are not permitted. Also, when the classification affects a fundamental right, the classification must be not only reasonable but also necessary to promote a compelling governmental interest. Thus if a city treats all its citizens in the same manner, the equal protection clause would not be relevant. If a city gathers a certain type of data concerning each of its citizens, all citizens have been treated in the same way. If, without legitimate justification, a city singled out a certain class and collected the data only on them, the equal protection clause might be relevant; if the city gathers and disseminates highly personal data concerning only the employees or the residents of one neighborhood or one company when there are other similar companies or neighborhoods in the city, and, as a result, some of those employees lose their jobs or the neighborhood receives newspaper attention, the city will have violated the principle of equal protection and be subject to suit. (Obviously, considerably less flagrant cases could constitute a violation.)

In addition, employment is held by some courts to be a fundamental right and has recently been accorded special protection by the Supreme Court. If employment is a fundamental right, the city would have to demonstrate a compelling interest in the collection of data on a particular class of employees when the result would be a substantial deleterious effect on the employment right of that class. Other fundamental rights may also be affected by data collection: for example, the First Amendment right of free association may be infringed upon in violation of the equal protection clause if, without a compelling reason, a city gathers and disseminates personal data respecting the members of only one of several similar secret but harmless associations. However, as mentioned above, it is doubtful that the equal protection clause will play a significant role in the privacy issue: presumably the city would never engage in activities even remotely resembling the blatant illustrations set out above; practically, the *fundamental* rights of a class will seldom be so seriously affected by the collection and use of data for benign municipal purposes; and presumably the city could not justify the effort and expense required to collect and store data respecting a certain class unless there was a rational relationship between the classification and a legitimate municipal purpose.

## The Role of Consent and Waiver

Constitutional rights may be voluntarily, knowingly, and understandingly waived. Waiver may be express—for example, a person may give written permission for the collection and use of data concerning him—or it may be implied—for example, an individual relinquishes his right to keep private his political views by publicizing them himself. However, waiver may not be coerced. Thus a welfare recipient may not

The author was a research assistant at the Institute of Government when he prepared this memorandum for the Charlotte Municipal Information Review Board last fall.

be coerced into a "waiver" of his right to privacy and compelled (by threat of losing welfare benefits) to answer sensitive personal questions unrelated to welfare administration. A city could not condition police protection upon a total surrender of privacy.

Governmental collection and use of personal data, especially its centralized computerization, pose special waiver problems. To the extent that persons consent with understanding and without coercion to the collection, centralized computer storage, and subsequent free use and dissemination of personal information concerning themselves, they have waived their right to privacy. However, realistically no such consent would ever be given: even though a person is told by the government representative asking him a question that he is completely free to refuse to answer, the fact that authority is asking comprises an element of coercion, either real or imagined. Also, individuals may not realize that the data they surrender will be centrally stored in a computer. The problem is like that presented when government pools previously collected data in a computer bank: the whole of the data may be said to be greater than the sum of its parts, so that an individual's consent to the fragmentized collection and use of data concerning him may not amount to consent that the data be pooled. Moreover, to the extent that data have been or will be collected and used without the knowledge of the individual concerned, waiver is impossible. Finally, it can be argued that at this point in the computer age no blanket waivers of the right to privacy are possible, because ordinary citizens cannot fully appreciate the enormous *potential* of computers, if *improperly used*, to harm "subjects" by the compilation and dissemination of personal data.

Thus in the context of data computerization, a municipality would be unwise to rely wholly upon waiver as a shield against a constitutional prohibition of invasions of privacy. Nor would that practice be feasible, since not all individuals would be willing to waive their right to privacy, and thus some necessary data would not be forthcoming. Therefore, although the waiver concept will always be relevant, the better approach would be to conduct the data program in such a way that there is no unreasonable invasion of privacy and hence no need for reliance upon waivers.

## The Right to Privacy

Although the Constitution contains no specific mention of a right to privacy, several amendments guard against specific types of privacy invasion: The Third Amendment forbids the quartering of soldiers in homes in times of peace, and the Fourth Amendment prohibits unreasonable searches and seizures of "persons, houses, papers, and effects." Also, the

First Amendment has been held to protect associational privacy; privacy as to political, religious, and other beliefs; and privacy in the form of anonymous public expression. In *Griswold v. Connecticut*,[1] decided in 1965, the Supreme Court specifically recognized a right of marital privacy emanating from the penumbras of the various amendments. Before and after *Griswold*, a few courts have flatly denied the existence of a general constitutional right to privacy; but several courts have also announced that those amendments are but specific forms of an underlying constitutional right not to be subjected to *unwarranted intrusions* upon and *arbitrary invasions* of privacy. Lower courts have also characterized the right as being against *unreasonable invasions* of privacy. Some Supreme Court justices have written that there is a "right to be let alone" and against "unjustifiable intrusions." The consensus is that the right is not absolute but is subject to a balancing of the governmental interest in the intrusion against the severity of the breach of privacy.

Although it is not yet certain that there is a *general right to privacy*—because the Supreme Court has not yet so held—the trend of thought among the lower courts seems to be in that direction; and seldom have the legal commentators been so united in the advocacy of a legal cause. Those considerations—the fact that some *state* constitutional provisions protecting personal liberty have been held to include a right to privacy, and the growing public and congressional concern over privacy—will probably result in the future recognition of the right, even if it does not now exist.

If a *fundamental* right to privacy is specifically recognized, government will have to demonstrate a stronger interest—a "compelling" interest—in its invasion than if privacy is protected merely by the broad due process principle requiring only that the governmental action be reasonable. In either event, the legal analysis would involve balancing the governmental interest being served against the personal interest being sacrificed. Remembering the uncertain state of the law, the pertinent inquiry at present is whether there is an *arbitrary, unreasonable* governmental invasion of privacy. Hence, a brief consideration of the parameters of governmental action follows.

## The Right of Privacy and EDP Generally

It is now impossible to predict precisely how many specific privacy issues that may arise in operating an EDP-integrated municipal information system (IMIS) will be resolved. However, by identifying some of the variables in the balancing process by which the reasonableness and arbitrariness inquiry will be carried out, a framework for evaluating the issues may be developed.

- *Governmental Interest.* The first task is to identify the governmental interest in collecting and using the data. Clearly a city cannot collect personal data solely to satisfy curiosity; rather, there must be some legitimate municipal purpose sought to be served, and the data must be rationally related to that purpose. One relationship in the reasonableness test is readily apparent: as the data become more and more necessary to achieving increasingly important municipal purposes, an increasingly serious breach of privacy would be required to support a finding of unreasonableness.

Necessity itself is, of course, relative: the existence and cost of alternative means to achieve the same end must be considered. In this regard, the technological superiority of the computer is important in that the computer may prove the most economical and secure means of handling data. (In fact, it has been argued that corporate directors may be responsibly negligent in their failure to bring about the use of computers in their businesses.)

In addition, the accuracy of the data is pertinent. Clearly a city has no interest in using totally inaccurate data, and the city's interest in obtaining data would seem to vary roughly in proportion to its reliability. (In this regard, one of the more persuasive arguments in favor of the individual's right to know of and correct inaccurate data concerning him is that the city's interests would be furthered thereby.) Obviously the probability of the data's remaining accurate is pertinent. (If computers are prone to scramble or distort data, that fact should be considered.)

Another consideration is whether the failure of the governmental purpose that would follow a failure to secure data respecting an individual would affect only that individual or others as well. If, for example, the purpose is to determine whether the individual qualifies for a particular benefit which the city has no independent interest in conferring upon him, the individual may possibly preclude the collection of the data by foregoing the benefit. This consideration may not be as simple as it first seems. Perhaps an undue burden would be imposed on the city by requiring it to deviate from standard data collection and usage procedures in order to afford an individual the option of declining the benefit. In addition, a measure of legal paternalism would be permitted so that in some instances the city might be able to compel the individual to "take the medicine for his own good."

### The Private Interest

First it should be noted that individuals properly may have to "give in order to get"; that is, a reasonableness test surely will consider the fact that through the government's use of data centers, the totality of human liberty may experience a net increase, albeit at the expense of some privacy. Also, individuals have an interest in having governmental decisions concerning them be informed ones, and computers may contribute substantially toward this goal. The govern-

1. Griswold v. Connecticut, 381 U.S. 479, 14 L.Ed.2d 510, 85 S. Ct. 1678 (1965).

mental task is, of course, to strike the proper balance and minimize the expense.

The principal areas of inquiry respecting the legal impact of data handling upon privacy are the nature of the data; the manner in which they are collected; their use, dissemination, and consequent effect upon the individual concerned; and the public interest in the data. The handling of particular data may be unreasonable because of only one of the several concerns; for example, data concerning religious beliefs may not be coercively collected at all. Or, each component concern may contribute to finding the transaction as a whole unreasonable.

• *Nature of the data.* The coerced collection without legitimate justification of certain types of data is per se *verboten.* At present these include information respecting political and religious beliefs and similar matters of conscience. The mere forced surrender of other types of sensitive personal information would probably constitute per se unreasonable intrusions upon privacy. For example, the *Griswold* case, mentioned earlier, suggests that some data concerning marital intimacies may be beyond the permissible collecting ken of government.

Regardless, the nature of the data is important in several respects. First, there will be some variance in the personal toll exacted by the disclosure of different types of information. Also, the utility of different data for the furtherance of governmental purposes will vary, as will the effect upon the person caused by their dissemination and the public interest in their dissemination.

"Accuracy" may be intimately related to the nature of the data. When the information pertains to the results of psychological testing, it may be factually unimpeachable but still misleading because its proper evaluation requires professional skills. On the other hand, the data may consist of a professional judgment when there is a considerable inherent margin of error. Or, the data may be factually correct and yet misleading because incomplete. To the extent that efficient use of computers requires abbreviated records of events, this may be a special problem. One federal court has indicated that when an innocent person is unjustifiably arrested, the court may choose between expunging the record of arrest from the police files or causing the full story to be recorded in them. To the uncertain extent that this result flows from potential harm to the person, this reasoning could presumably be applied to computerized data files concerning matters other than arrests.

In legal analysis, the nature of data depends in part on whether they are correlated after collection with the individual to whom they pertain. Indeed, the question whether the data are or can be "personalized" in the files marks a crossroads in legal analysis; for if the answer is *no,* the invasion of privacy could lie only in the method of collection or the collection itself unless the individual's identity is disclosed between the collection and filing (by the collector, for example). And, if the answer is *no,* whether the data are computerized is irrelevant. Of course, identification of the "owner" of the information would not have to be by name; it could occur when the data are identified by city block number if only one or few people live on that block.

In closing the discussion of the nature of the data, it should be noted that in the face of challenges to the census, which involves the collection of some personal data identified by name, courts have upheld the federal government's right to gather reliable data for statistical usage reasonably related to governmental functions and purposes. However, those cases did not deal with specific types of information, and the census is a special function specifically authorized by Article I of the Constitution.

• *Manner of collection.* Apparently this inquiry does not differ in kind in regard to traditional and computerized data handling. Also, the inquiry is moot as to data already on hand.

Familiar principles govern discovery of information by governmental "searches and seizures." The basic rule is that to be reasonable, searches and seizures must be executed pursuant to a warrant issued by a warrant-issuing official upon showing of "probable cause" (i.e., some good reason). *Wyman v. James,*[2] decided by the U.S. Supreme Court in 1971, deserves special mention because it deals specifically with a "search" in a sensitive area and may indicate the general approach that will be adopted by the Court respecting such privacy issues. Before the *Wyman* case, the Court held in cases involving inspections by city officials for violations of an occupancy permit and a fire code that the warrant requirement applies to such administrative searches. In the *Wyman* case the Court held that AFDC benefits may be terminated upon the recipient's refusal to permit warrantless home visits by a case worker even though the recipent offered to meet with and supply "reasonable and relevant" information to the case worker outside the home. The Court held that the visit was not a "search" in the traditional sense and even if it were, it would not be unreasonable. The Court stressed the *interview nature* of the visit, the *public interest* in the welfare of child, the need to ensure that the benefits were applied as intended, the fact that the entire program was geared to close personal contact with the home, the fact that *notice* of the visits was given in advance, the fact that measures were taken to *protect privacy* (for example, outside information sources were used only with the recipient's consent), and the fact that the visit was not by uniformed officers and was not a criminal investigation.

The manner of data collection is related to the reasonableness of the transaction not only because the act of collection may be offensive but also because

2. Wyman v. James, 400 U.S. 309, 27 L.Ed.2d 408, 91 S. Ct. 381 (1971).

the government's burden and costs may vary with different collection methods. Thus when one governmental unit badly needs crucial data that is extremely expensive to gather but is available from another governmental unit, it may be reasonable for the first unit to buy the data from the second or to secure the data by trading other data for it. Of course, in such a transaction the nature and reliability of the data involved, cost of independent collection, need for the data, safeguards against further dissemination, potential impact upon the concerned individuals upon dissemination, whether the individuals are afforded notice of the transfer and a chance to correct erroneous information, and other similar factors would have to be evaluated. (It may be noted that data swapping could obviate the need to duplicate intrusive interviews and thus conceivably could result in less net invasion of privacy in the collection stage than if the data were collected independently.)

● *Usage, dissemination, and impact of data.* A principal issue concerns a municipality's right to use data previously collected for one purpose for a wholly different purpose(s). Again, there is no authority on this issue, and the effect of such additional usage would have to be evaluated. For example, it is possible that the individual originally surrendered the data because it was highly advantageous for him to do so while the new use would do him harm. And, information that is highly reliable for the original purpose may be incomplete or otherwise inaccurate and therefore unreliable when used for another purpose. However, it seems clear that a city may use previously collected data for any purpose for which it could reasonably have been collected originally, except to the extent that the pervasiveness and aggregate effect of the multiplicity of uses renders the additional uses unreasonable. In a sense, "other-purpose" usage may be likened to a collection issue: the city may assert that each use of the data should stand or fall alone depending on whether it would be unreasonable for the city to collect, store, and use the data for that particular purpose. If it would not be unreasonable, then the city could argue that using it is more reasonable because the data are already stored, eliminating the intrusion occasioned by collection. However, the city would probably not be permitted to fragment the evaluation of the whole transaction in this way.

As would be expected, the courts have indicated that the extent and effect of dissemination of personal data will be a major factor in determining whether there has been an unreasonable invasion of privacy. Several important variables have already been discussed above. For example, the accuracy and nature of the data will have a great deal to do with whether an individual is unjustifiably harmed by their dissemination.

The control exercised over the data will be crucial. In that regard, three major concerns are (a) accidental or intentionally wrongful access to the data, (b) intentional dissemination of the data by the governmental unit, and (c) the extent to which individuals are afforded an opportunity to counteract the data's impact upon them.

Regarding the probability of data theft, physical security appears to be the same whether or not the data are computerized, except to the extent that the increased mobility of computer files might facilitate their removal. Also, centralization in computer files would permit more data to be stolen in one attempt, thus increasing the severity of the theft. However, computer technology apparently offers an opportunity to make some means of theft more difficult than if the data were stored in paper files.

Probably the most important aspect of dissemination control concerns restriction of permissible users. The possible combinations of restrictions are too numerous to recount, but computer technology would probably aid through access codes and the creation of corresponding sensitivity levels of data. Access could be restricted according to the level of the user's need for the data in connection with a municipal function. One factor that would contribute to the probability that the data would be publicized involves the form in which some data are delivered to the user; if the user is given a computer printout (or "makes" his own), control of some nature will have to be exercised over the printout. In all of this it should be remembered that the pertinent inquiry is whether the level of precautions is constitutionally reasonable in light of the burden on the city and the potential detriment to the individual.

A high probability of disclosure may require that old, useless, or inaccurate records be destroyed, since their utility would be slight compared to the potential detriment to the individual that could flow from their disclosure. Whether constant updating of files is facilitated by computerization is a relevant inquiry.

The potential detriment to the individual may be mitigated in part by affording him notice that sensitive data concerning him are in the files, an opportunity to correct inaccurate data, notice of data-based municipal decisions that affect him adversely, and perhaps notice of disseminations in general. Conceivably it may be per se unreasonable to fail to adopt these measures if their cost is very slight and the potential harm to the individual in their absence is very great. Obviously the city's interest in accurate data would be furthered by permitting the corrections. And, the Sixth Amendment right to confront one's accuser in a criminal trial seems to parallel a situation in which a person must stand helpless and be harmed without his knowledge by the dissemination of inaccurate data from a computer bank. Although in an unrelated context, the Supreme Court has stated in dictum that where state action seriously injures a person and its reasonableness turns on facts, the evidence on which the state based its action must be disclosed to the individual so that he may have a chance to

prove it untrue. This statement is not presented here as being the law; rather, it simply demonstrates that the Court is not wholly unmindful of the problem.

• *Public interest in the dissemination of the information.* Although in some instances the First Amendment protects privacy, it also protects the public's interest in the free flow of information and restricts the legal liability of one who publishes personal information concerning another. The common law has long afforded recovery through an action for libel or defamation in some instances when one person is injured by the publication of inaccurate information by another. As a general proposition, the common law also affords protection against unreasonable invasions of privacy. In *Rosenbloom v. Metromedia*,[3] decided in 1971, the United States Supreme Court culminated a line of similar cases by holding that a person involved in a newsworthy event may recover from one who published inaccurate and damaging information respecting the person in connection with the event only by proving that the information was published with knowledge of its falsity or in *reckless disregard of the truth*. Earlier decisions indicate that facts regarding public officials or figures are much more likely to be "newsworthy" than those concerning ordinary citizens.

The scope of this doctrine and its implications for situations in which the published information is accurate is as yet unclear, although one case in which the Court applied the same reckless-disregard standard involved an action against the publisher because the plaintiff had been portrayed in a degrading false light to the public. A recent decision by the California Supreme Court probably sheds some light on the problem. In *Brisco v. Reader's Digest Association, Inc.*,[4] a magazine published a story concerning a non-recent hijacking (11 years earlier), naming a then reformed hijacker and thus invading his privacy. Weighing the social value of the information published, the depth of intrusion into private affairs, and the extent to which the plaintiff had acceded to a position of public notoriety, the court concluded that a jury could find that the identification of plaintiff as a former hijacker was not newsworthy and held that the plaintiff could recover for the invasion of privacy if he could prove it had been done "with reckless disregard for the fact that reasonable men would find the invasion highly offensive."

Thus these cases afford some assurance of a public right to know of newsworthy events. However, this doctrine probably will not play a significant role in the privacy issue in the context of data computerization, because seldom would disseminated information concern a newsworthy event.

One extreme argument that has been brought to bear on this area is that because government should be visible, the public has a right to know and the press has a right to publish any and all information relating to governmental functions. Thus, the argument runs, government files and meetings must be open. No court has so held, and at least one court has flatly rejected this argument, relying heavily on the facts that all organizations (including governmental ones) need a measure of privacy to function properly, that individuals would not be disposed to surrender personal information required for governmental decisions if automatic disclosure would follow, and that governments have an overriding interest in protecting the privacy of their citizens, and holding that a state is free to determine disclosure policy for itself, subject, of course, to constitutional limitations upon invasion of privacy. Regardless, it is clear that "visible government" is a far different concept from "visible subjects of government."

In North Carolina a policy requiring open meetings has been adopted for all government agencies. While proceedings and their records must thereby be public, other information collected by an agency need not be considered public records. Another statute does express the state policy that all records received by a public office "in pursuance of law" and "in the transaction of public business" are open for public inspection. Again it is obvious that not every piece of information a municipality may have collected need be considered a public record. Each document or file must be considered separately.

## II. THE COMMON LAW

The common law has long manifested a felt need to protect privacy. For example, the cause of action for trespass protects the private enjoyment of land, and nuisance-case opinions are replete with the phrase "quiet enjoyment." Many confidential relationships such as attorney/client, physician/patient, and husband/wife are protected through a privilege not to disclose confidential communications flowing out of them. Protection is afforded against the disclosure of business or trade secrets and against the unjustified commercial exploitation of one's personal name or likeness. In a related area, the United States Supreme Court recognized in one case the interest of the Associated Press in securing a just return for its efforts in gathering news and thus the possibility that information may be "property" subject to the control of its "owner." Some legal writers would base a general quasi-property right in information on the case, although that is probably stretching the case holding.

### Right of Privacy

In 1890 Warren and Brandeis wrote a landmark article[5] in which they advocated the "right to be let alone." Although there has been some debate over whether they spawned the concept, their article has

3. Rosenbloom v. Metromedia, 397 U.S. 904, 25 L.Ed. 85, 90 S. Ct. 917 (1971).

4. Briscoe v. Reader's Digest Association, 483 Pac.2d (Calif. 1971).

5. Warren & Brandeis, *The Right of Privacy*, 4 HARV. L. REV. 193 (1890).

had a great influence on the development of the law: today a clear majority of the states recognize a common law right to privacy.

In broad terms, the right prohibits unreasonable intrusion upon privacy and giving unreasonable publicity to private facts when the intrusion or publicity would be offensive to a person of ordinary sensibilities. More specifically, Dean Prosser[6] has identified four specific privacy torts for which one citizen may sue another citizen or agency in a civil action: (1) *intrusion*—the act of intruding upon an individual's private affairs, his solitude, or his seclusion; (2) *disclosure*—the act of making public any embarrassing private facts about an individual; (3) *false light*—the act of placing an individual in a false light in the public eye or of publicizing misrepresentative statements concerning him; (4) *appropriation*—the act of appropriating an individual's name or likeness for the appropriator's advantage. When the action is based on publicity, the information must have been accurate, and truth is no defense. If the information is inaccurate, the plaintiff is left to an action for defamation or libel.

The right is not yet developed to the point where predictions are at all certain. However, two general trends are identifiable: plaintiffs have a better chance of winning their case if there is an element of commercial exploitation underlying the instrusion or publicity, and defendants have successfully contended that the interest in privacy is outweighed by society's need or right to know the particular information involved.

The plaintiff's consent to the invasion or publicity will defeat his recovery. The general principles discussed with respect to waiver of the constitutional right to privacy also apply to the common law right, except that consent is much more easily found in the latter than is waiver in the former; consequently, many writers feel that the consent doctrine has emasculated the common law right to privacy. In fact, most writers agree that in its present state the right is inadequate to afford any real protection to individuals in the computer context. One principal reason is the failure of courts to evolve a meaningful definition of the word "privacy."

The state of the common law right to privacy in North Carolina is problematic. In a 1937 case, *Flake v. Greensboro Daily News*,[7] the North Carolina Supreme Court held that a cause of action exists for the unauthorized publication of a person's photograph in connection with a commercial enterprise. The court indicated that the person could recover only nominal damages unless special damages were proved and that an injunction would issue if the defendant persisted in the wrong. Although the opinion seems to rest on the appropriation of the value of the endorsement, the court did mention the public's "right to know" and quoted with approval from an earlier case from another jurisdiction which had recognized the right to privacy. No other North Carolina case considers the point.

### Defamation

The common law condemns the "publication" of false defamatory information about a person by permitting civil recovery of both actual and punitive damages for libel (written) or slander (oral). The publication (communication of the statement) need only be to one third party. Defamatory statements are those that tend to injure the reputation of and excite adverse, derogatory feelings toward the person to whom the statement relates. It is no defense that the statement is accidentally innocent and defamatory: for example, in one case it was no defense that because of a typographical error a man intended to be described as "cultured" was stated to be "colored." However, the publication of the defamatory statement must be reasonably foreseeable: for example, that a whisper is accidentally overheard by an eavesdropper is not foreseeable, but speaking loudly in a crowd would constitute a foreseeable publication. When an otherwise unforeseeable publication recurs and the publisher has notice of that fact, subsequent publications may well be held reasonably foreseeable.

Truth is an absolute defense to an action for defamation. Another defense is a privilege to have published the defamation. When the publisher acts in furtherance of a socially important interest, generally the defamation is absolutely privileged. Thus when a governmental executive officer defames another in the discharge of his official duties, he is afforded an absolute defense. In certain other situations, the defamation may have qualified privilege, i.e., it is privileged so long as the publication was in a reasonable manner and primarily for the purpose of furthering the interest that gives rise to the qualified privilege. Communications by one public employee to another in an effort to discharge his public duty are qualifiedly privileged.

In North Carolina an absolute privilege exists only when the public service or the due administration of justice requires it (e.g., a judge's remarks or a witness's testimony in court). Otherwise a qualified privilege may exist where the speaker has an interest or duty in the subject matter of the communication and the hearer has an interest or duty in it as well.

The law of defamation may pose problems when personal data are computerized. Since it is irrelevant that the defamation is accidental, that an objectionable characteristic (venereal disease, for example) was falsely ascribed to an individual because of a technical failure would be no excuse. If a computer technician intended to procure a printout captioned by the individual's name and to deliver it to another city employee, publication of the defamation would be intentional, not just reasonably foreseeable. Therefore, the technician's liability would depend on wheth-

6. W. PROSSER, THE LAW OF TORTS 839-51 (3d ed. 1964).
7. Flake v. Greensboro Daily News, 212 N.C. 780, 195 S.E. 55 (1938).

er the publication was privileged.

In North Carolina some types of defamation are per se (e.g., false charges of infectious disease, mental illness, pregnancy for an unmarried woman), and malice is presumed. In other cases malice, or actual intent, on the part of the defendant must be proved.

## III. FEDERAL STATUTES AND POLICY

No federal statutes afford a general right of privacy enforceable against the states, although there is increasing interest in such a statute, and very possibly in the near future at least a token invasion-of-privacy statute will be enacted if for no other reason than to quiet the vociferous advocacy of a strong one. Hence, for the most part federal statutes serve only to illustrate federal disclosure policy.

### Census Bureau

The Census Bureau is one of the principal federal information collectors. Criminal sanctions compel citizens to surrender information to the census taker, but in turn it is a crime for census employees to use the information for a purpose other than the statistical one for which it was collected, to publish data in a form that identifies the individuals concerned, or to permit anyone other than authorized persons access to the records. Of course, statistical summaries of census data are published. Generally, the census has compiled an excellent record in preserving privacy.

### Department of the Budget, IRS, FBI

With a few exceptions, the Department of the Budget has the power to compel any federal agency to make available to any other federal agency any information that the first agency has obtained from any person if the information consists of statistical summaries, if the data are not confidential at the time of the transfer, if the persons who supplied the information have consented to its release, or if the transferee agency has the power to collect the same information. After transfer, the information is subject to the same confidentiality restrictions as it was when held only by the transferring agency. (One important exception is made for information held by the Internal Revenue Service.) Thus federal agencies can and do "swap" data. In addition, some federal agencies may transfer information to state and local agencies: for example, the Internal Revenue Code provides that upon written request by the governor, local tax authorities may have access to federal income tax returns, and states willing to reciprocate may also gain access to federal estate and gift tax returns. When the IRS thus receives tax information from the states, its employees who wrongfully disclose the information may be discharged, fined, or imprisoned.

The Federal Bureau of Investigation is directed by statute to compile and disseminate information that facilitates law enforcement to appropriate law enforcement agencies at all levels of government. It may also be noted that the FBI's National Crime Information Center, which is completely computerized, has recently come under attack from many fronts.

### Freedom of Information Act

Two major federal statutes embody apparently conflicting disclosure policies. The first is the Freedom of Information Act of 1967, which requires *federal* agencies to make their records "promptly available to any person" unless the agency is able to justify a refusal by showing that particular records are exempted by the act. Prompt judicial review of agency decisions not to disclose information is afforded. The act permits the agencies to delete identifying personal details from its publications (opinions, manuals, etc.) "to the extent required to prevent a clearly unwarranted invasion of personal privacy" so long as the agency explains fully in writing its justification for doing so. Specific exceptions are made as to information "required by Executive order to be kept secret in the interest of national defense or foreign policy," "related solely to the internal personnel rules and practices," or "specifically exempted by statute." Two other exceptions are probably the most important ones. The first concerns "trade secrets and commercial or financial information obtained from a person and privileged or confidential." (One writer has said that the act's legislative history indicates that Congress intended this exception to extend to any information for which the person who gave it had a reasonable expectation of confidentiality; if this is so, the agency can easily circumvent the act's force for this category of information simply by pledging confidentiality for all such information gathered.) The second is for "personnel and medical files and similar files the disclosure of which could constitute a *clearly unwarranted invasion of personal privacy.*" This latter stringent standard has been criticized as making disclosure of personal information too easy.

The most frequently criticized features of the Freedom of Information Act are (1) its requirement that agencies justify their refusal to disclose information and (2) that it does not forbid disclosure of any information but instead requires it except when refusal is excused.

### Fair Credit Reporting Act

The second major federal disclosure statute is the Fair Credit Reporting Act of 1971. This act, declaring a "respect for the consumer's right to privacy," lists specific purposes for which consumer-reporting agencies using the facilities of interstate commerce may release consumer credit reports without a court order or written permission of the person concerned. It also limits the dissemination of certain obsolete, adverse information after the lapse of a period of time. Upon request, the agencies must report to the concerned individual all information concerning him, its sources, and the identity of users to

whom the information has recently been distributed. When a user makes an adverse decision because of a report, the user must inform the person concerned and disclose the source of the report. Individuals may compel the deletion of inaccurate information and require their objections to disputed items to be included in the files and the reports. It is made a crime for anyone knowingly and willfully to obtain information from a consumer-reporting agency on false pretenses and for an employee of such agencies knowingly and willfully to give information to unauthorized persons. Thus the Fair Credit Reporting Act affords broad protection against invasion of privacy in the consumer context, while the Freedom of Information Act almost seems to foster it in order to serve the public interest in the free flow of information.

### Pending Federal Proposals—Criminal Information

One recent federal measure may indicate the nature of future federal action if the states do not themselves move to protect privacy. In September 1971, the Nixon Administration submitted to Congress legislation that would impose privacy-protection restrictions upon *state and local* criminal information systems *"funded in whole or in part"* by federal money. (The bill does not apply to the FBI and most other federal law enforcement agencies.) The bill would limit direct access to criminal information to law enforcement authorities and the use of such information to law enforcement purposes. It also provides that individuals may cause inaccurate criminal offender records (but not criminal intelligence records—informer's reports, etc.) concerning them to be corrected and may require the removal of criminal information from the active records after a reasonable period of time. Finally, the bill provides for a damage suit for the illegal maintenance, use, or dissemination of criminal information and for criminal sanctions for the willful misuse or illegal dissemination of the information.

Thus the federal government has shown an interest in the privacy issue. Certainly there is no lack of constitutional power by which Congress could assert controls over many local functions which infringe upon privacy. Control by conditioning federal funding upon compliance with federal standards is one obvious method. In addition, congressional power to regulate interstate commerce is far reaching; the Fair Credit Reporting Act, for example, is based on that power, and in recent years the Supreme Court has been quite willing to find the requisite degree of effect of the subject of regulation upon interstate commerce.

## IV. NORTH CAROLINA STATUTES AND POLICY

Many North Carolina statutes specifically protect the confidentiality of records. Many others provide that specific records shall be open to public inspection. Both types of statutes are too numerous to recite in detail here and will be compiled separately in bibliography form. Within federal constitutional and statutory limits—which now appear quite broad as to both permissible and compulsory disclosure of information to the public—disclosure of governmental records is a matter for state and local decision.

### Open Meetings

A recent statute (G.S. Chap. 143, Art. 33B) enacted by the 1971 General Assembly deserves special mention because it establishes a statewide policy regarding the public interest in open government: ". . . the hearings, deliberations and actions of [governmental] bodies [shall] be conducted openly." Such bodies are permitted to hold closed sessions only while considering certain employment matters; matters within privileged relationships, such as attorney-client; matters relating to patients and employees of hospitals; and disciplinary cases involving students. Some governmental units—law enforcement agencies, professional licensing boards, and juries, etc.—are exempted from the statute. The impact of the statute is not yet known, but certainly its net effect will be an increase in the visibility of government. In considering which information and records should be open to the public and which are confidential, the question to be asked is where the information was generated—in a meeting open to the public?

### Sovereign Immunity

In the absence of a statute waiving governmental immunity, no private action for damages can be maintained against the state or local governments. Immunity applies only to governmental, not proprietary, functions; but most computerized data handling in the MIS would probably be considered a governmental function rather than a commercial operation.

The benefits of the State Tort Claims Act are available only to persons who have been injured by the negligence of a *state employee*. Another statute provides that a *county* may waive its immunity by purchasing liability insurance for any tort of a county official or employee. By purchasing insurance a *city* can waive its liability only for negligent operation of the city's motor vehicles.

Since the city cannot in most cases be sued for damages resulting from some mishandling of computerized data, are city officials and employees thereby more likely to be sued in their individual capacity? The North Carolina courts distinguish between public officers and public employees on a case-by-case basis depending on the independence of the position, when determining liability for negligent performance of public duties. Generally, a public official is clothed with immunity when he is acting within the scope of his official duties in the honest exercise of his judg-

*(Continued on page 18)*

# book reviews

STATE AND LOCAL SALES TAXATION: STRUCTURE AND ADMINISTRATION, *by John F. Due.* Chicago: Public Administration Service, 1971. 340 pp., tables and bibliography. $11.95.

The retail sales tax is the single largest source of state tax revenue, bringing in over $14 billion a year or 29 per cent of all state tax revenue. Today forty-five states plus a growing number of counties and cities levy the sales tax on an increasing variety of consumer goods and services.

This trend toward broader coverage of the sales tax and increased rates is analyzed and evaluated in detail in *State and Local Sales Taxation.* This encyclopedic study traces the development of the tax and discusses in detail its structure, exemptions and exclusions, taxation of services, tax administration and personnel, registration of vendors and processing of tax returns, control of tax delinquents, auditing, use taxes, and local sales taxes.

The author, John F. Due, is an economist at the University of Illinois. P.A.S.

BUREAUCRATS IN COLLISION: CASE STUDIES IN AREA TRANSPORTATION PLANNING, by Melvin R. Levin and Norman A. Abend. Cambridge, Mass.: The MIT Press, 1971. 25p. $10.00.

Growth of the professions of public administration, planning, and the like has given rise to an assumption at all levels of government that the making of lengthy studies of complex problems is the path to vastly improved decision-making. Taking a cue from the academicians, the makers of such studies have further assumed that a "multi-disciplinary" study is better than a simpler one. And the appearance of the computer has added to the Holy Grail image. So countless dollars, man-hours, and other resources have been poured into elaborate studies. Now appears one of the first efforts to study the studies, to see how much influence they had on the decisions which were made, and to determine what went wrong (if anything).

While the authors examined a type of studies with which they had personal experience (region-wide studies by teams of planners and transportation specialists), they suggest that their results are applicable to many similar types (e.g., multi-agency studies of poverty problems and programs).

On the whole, this is a shattering and much-needed book, which anyone concerned with public administration (but especially one administering a study) could read with profit. It is a pity that the type size (8-point) makes it so difficult to read with pleasure. P.P.G.

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## *Serrano v. Priest* *(Continued from p. 12)*

Cherokee wants better educational opportunity for its school children, it too may levy additional taxes. However, its efforts are again rewarded by the matching funds.

On the first two levels of this program, the amount of state contribution can be calculated in advance once the basic state and local standards are set. At the third level, the state matching contribution depends upon the desire of the localities to "go the second mile." That is, local initiative would be the key variable. The availability of matching funds clearly would have an effect on the willingness of districts to tax themselves. Thus the initial appropriation at the third stage would have to be guessed at based on present local supplement efforts. However, after the operation began, the state should be able to predict fairly accurately the amount of state contribution needed to supplement local efforts.

### Conclusion

*Serrano v. Priest* has vast implications for North Carolina and other states in the field of educational financing. The decision has its own internal problems, primarily with the unrealistic standard of equating educational opportunity available with revenues. Although the United States Supreme Court will have difficulties in achieving the same result as the California court, since new precedent must be established by a group of basically concervative judges, the possibility is strong that *Serrano* will become the law of the land.

Since successful implementation of the formula that the quality of public education may not be a function of wealth other than of the state as a whole would seem to require the state to assume full control or reasonably full control of the public schools, important objections might be raised. Less local financial support presages less local involvement; sometimes a decrease in local autonomy means an increase in frustrations on the local level. It is also charged that the wealthy will retreat to private schools. Generally these problems must be dealt with when they arise. In one operating example of total equalization through central control in New Brunswick Province, Canada, such problems have been grappled with by making refinements in the system rather than by abolishing it altogether.

In the North Carolina context, assuming the validity of the *Serrano* principle, this state's financing system is constitutionally offensive in its present state. Since disparities in wealth between districts are not extremely harsh and since the state already provides most of the aid, North Carolina's adaptation to the standard should come easier than most.

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