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Fallen leaves, barren trees, winter settles on nature . . . Photo by Carson Graves.

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What's the Best Way to Handle Public Drunks?

Michael Crowell

The Problem

Despite the attention now focused on drugs and the problems they create for the criminal justice system, alcohol continues to generate even greater difficulties. The relationship between intoxication and traffic fatalities is fairly well known, and some note has has been made of the high number of arrestees who are intoxicated at the time of apprehension,[1] but most people seem unaware of the impact simple public drunkenness has on the administration of criminal justice in this country. That offense is the source of almost one-quarter of all arrests made in the United States each year.[2] In North Carolina, about a third of the nontraffic and 10 per cent of all arrests are for public drunkenness—50,000 to 60,000 arrests a year.[3] Over 9,000 of these arrests, 25 per day, take place in Charlotte.[4]

What these statistics indicate is that a substantial portion of the resources of the criminal justice agencies in this state goes into enforcing the public drunkenness law. Many of those arrested plead guilty and are sentenced by magistrates, and the trials of those going to district court do not take long; however, the courts are burdened by the sheer number of people who must be processed. As for the police, the Charlotte department estimates that it takes 50 minutes of officers' time to make a drunkenness arrest; with 9,000 arrests a year in that city, roughly 940 eight-hour officer-days per year are consumed in making drunkenness arrests. Each of those arrests means that a warrant must be issued and processed, which involves police, magistrates, and clerks. A final and substantial expense is incurred by the correctional agencies, either local jails or the Department of Correction, holding those just arrested and those convicted. A local jail usually has up to one-quarter of

1. For example, a two-year (1951–53) study by the Columbus, Ohio, police department showed that 64 per cent of the persons arrested for felonies were under the influence of alcohol when arrested. Of those arrested for violations involving concealed weapons, cuttings, and shootings, 80 per cent were under the influence.

A five-year study in the early '50s in Philadelphia showed that alcohol was present in the victim, the offender, or both in over 60 per cent of the homicide cases investigated. The Chief Medical Examiner of North Carolina, Dr. Page Hudson, reports similar findings.

These and similar studies are summarized in D. GLASER & V. O'LEARY, THE ALCOHOLIC OFFENDER 11–12 (U.S. Dept. of Health, Education and Welfare, 1966).

2. Writings on public drunkenness usually state that the offense accounts for 2,000,000 arrests each year. That is the figure used in the report of THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: DRUNKENNESS (1967), which came originally from the 1965 FBI UNIFORM CRIME REPORTS. The 1970 FBI UNIFORM CRIME REPORTS shows, however, that the number arrested for drunkenness that year was only 1,825,500, or 22.5 per cent of the total arrests. The percentage has been gradually declining—from 33 per cent in 1960 and 24 per cent in 1969.

3. In 1967 the total was 58,538; and in 1968 it was 48,956. THE DIVISION OF LAW AND ORDER, DEPARTMENT OF LOCAL AFFAIRS, THE DISTRIBUTION, DETECTION AND DISPOSITION OF CRIMINAL CASES IN NORTH CAROLINA 4, 5 (Raleigh, 1969) and GOVERNOR'S COMMITTEE ON LAW AND ORDER, IMPROVEMENTS IN THE CRIMINAL JUSTICE SYSTEM: DESIGN FOR ACTION, Appendix A, 23 (Raleigh, 1969).

4. Statistics compiled for 1970 by the Charlotte Police Department and the Mecklenburg Alcohol Safety Action Project. During that year there were 9,682 drunkenness offenses committed by 6,350 individuals. Of those arrests, 23.1 per cent were for the second or subsequent offense.

its space regularly occupied by drunkenness offenders. On the weekends this figure may climb appreciably.

These statistics give some indication of the problem of public drunkenness in the administration of criminal justice. This display of public intoxication also represents a substantial social and health problem. Studies have shown the typical drunkenness offender to be a 40- to 50-year-old male, never married or now divorced, with less than a high school education and a long arrest record, mostly for drunkenness. Many suffer from alcoholism, which means that they have a number of medical and/or mental problems, such as brain damage, liver disease, lung disorders, and dental difficulties.[5] Thus many of these people have little to look forward to in life, and many have substantial physical barriers to whatever activities they might want to undertake.

Beginnings of Change

The last half-dozen years have seen a substantial change in the laws of public drunkenness in this country. This change can probably be traced to two events, in 1966 and 1967, that widely publicized the high cost of arresting drunks and indicated how little success arrest has in stopping offenders from becoming intoxicated time and time again. The 1966 decision of the Fourth Circuit Court of Appeals in *Driver v. Hinnant*[6] prohibited North Carolina from punishing chronic alcoholics for what the court considered to be an involuntary act of being drunk in public. The court reasoned that punishment would be cruel and unusual and violate the Eighth Amendment. Primary authority for the decision came from *Robinson v. California*,[7] a 1962 United States Supreme Court decision that held it is unconstitutional to punish a person solely for an illness—in that case, drug addiction. By using the illness rationale, the *Driver* court focused attention on the fact that many people arrested for public drunkenness suffer from the disease of alcoholism—and jail is no cure. Joe Driver himself exemplified the "revolving door" drunkenness offender; he had been arrested over 200 times for public drunkenness.

The *Driver* court questioned the propriety of putting alcoholics in jail; in 1967 the President's Commission on Law Enforcement and the Administration of Justice complemented that decision with evidence of the high cost of arrest and incarceration. Its report noted that drunkenness accounts for two million arrests each year in the United States. But more important, the commission publicized an alternative—the detoxification ("drying out") center, which seemed a better way to do the job at possibly less cost.[8]

As a result of the *Driver* case and the crime commission recommendations, many people who work in criminal justice were converted to the view that treating public drunkenness as a criminal offense was wrong and that the public moneys would be better spent detoxifying skid-row alcoholics who are the source of most arrests.

The Easter and Powell Decisions

After *Driver*, only two more court cases had any real effect on the laws of drunkenness. In the 1966 case of *Easter v. District of Columbia*,[9] the Circuit Court of Appeals for the District of Columbia also decided to bar the jailing of alcoholics, adding that an alcoholic has not enough control of himself to satisfy the common law principle that an act must be done voluntarily before it can be subject to criminal prosecution. The two jurisdictions affected by the *Driver* and *Easter* decisions were among the first to amend their laws on drunkenness. In 1967 North Carolina changed its statute, G.S. 14-335, to provide for acquittal if the defendant was shown to be an alcoholic. However, no change was made in pretrial procedures; the derelict alcoholic remained subject to arrest. The District of Columbia was somewhat more ambitious in its reform and repealed the drunkenness offense altogether. Its law will be discussed later.

The first real surprise to people seeking to change drunkenness laws came in the 1968 decision of the United States Supreme Court in *Powell v. Texas*.[10] The Court held, contrary to *Driver* and *Easter*, that constitutionally an alcoholic could be punished for appearing intoxicated in public. A five-man majority was not convinced that appearance in public was an involuntary act for Powell, who admitted being an alcoholic but also admitted that he could stay sober when he considered it necessary—such as on the day of his trial. The majority found the medical knowledge on the cause and effects of alcoholism inconclusive and was troubled by the absence of places, other than jails, where derelict alcoholics could be taken, and suspected that stopping arrests might actually cause a net decrease in services.

Despite the *Powell* decision, few of those who worked to stop the jailing of drunks let up in their efforts. It may even have benefited their cause that the court did not decide upon one method of dealing with public drunkenness. States remain free to experiment in handling this problem, which has not yet lent itself to a single solution.

5. For example, the Charlotte Council on Alcoholism made a study of the first 100 drunkenness offenders sent to the Huntersville unit of the Department of Correction after the law was changed in 1967 to permit sentencing repeat offenders to the Department. The average age was not quite 45 and the average education just over seven years, and only eight were married at the time.

The Department of Correction made a study in 1968 of 100 drunkenness offenders committed to its custody. Five per cent had severe heart disorders, 5 per cent had severe lung disease, 12 per cent had acute psychiatric disorders, 5 per cent had acute infections, and so forth. Sixty per cent of the group studied needed immediate medical attention.

6. 356 F.2d 761.

7. 370 U.S. 660 (1962).

8. The President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Drunkenness (1967).

9. 361 F.2d 50 (1966).

10. 392 U.S. 514 (1968).

The Detoxification Center

The "solution" to the drunkenness problem that has become most widely accepted is the detoxification center. This is a medical facility to be used instead of the jail to take in people who are intoxicated. "Detoxification" is no more than sobering up, something that most people can do unassisted. But the intoxicated person who is an alcoholic may not be able to detoxify without experiencing unpleasant side effects, the most severe of which would be delirium tremens. The "detox" center can provide treatment for such complications, and it can provide the good meals, cleaning, and minor medical treatment that are needed by the derelict alcoholics who are likely to get arrested for drunkenness.

For almost all alcoholics, this detoxification process takes only a few days. They become sober in less than 24 hours, and another day or so of rest and good food puts them in reasonably good condition to go back on the street. The procedure can be carried out reasonably well by nurses and nonprofessional aides, with a physician on call. For those whose alcoholism has led to more substantial physical ailments, the recovery period is longer and must be conducted in a more elaborate medical facility such as a general hospital.

Perhaps the best-known detox center in this country is in St. Louis, Missouri. It was this country's first center and has been the most publicized. When the President's crime commission recommended detoxification as the alternative to jail, the most prominent example given was St. Louis.[11]

The St. Louis center began as an experiment of the police department while the *Driver* and *Easter* cases were still in court. The procedure was to take the public drunks arrested in three of the city's nine police districts to the downtown center rather than to jail. If the person cooperated with the prescribed seven-day treatment program, the criminal charge against him was dropped.[12] The intent was to provide enough care to the derelict alcoholics that were brought in so that they would become drunk in public less often.

Despite its reputation, the St. Louis center has not been universally accepted as a model of what to do with drunkenness offenders. For one thing, it has been fairly expensive, primarily because the services offered are not limited to detoxification. After the patient sobers, he enters group therapy and other treatment activities. To offer this program the center must employ psychologists, psychiatrists, and caseworkers, among others; consequently the costs are higher than if the center did no more than sober its patients.

Some people have questioned whether the center has had as much success as it claims. The center's reports to the federal Law Enforcement Assistance Administration (LEAA), which partly funded the project, contended that up to half the patients had made significant improvements as a result of their stay at the center, and that the police had saved a good sum of money. Critics have challenged the method by which the success rate was computed, and have suggested that the cost of the detox center operation more than offset the savings to the police.[13] Still, the detoxification center, and in particular the St. Louis model, remains the most publicized alternative to jailing public drunks.

Statutory Changes

The St. Louis experiment was undertaken without benefit of any change in the law. Although charges might be dismissed, the derelict alcoholic was still arrested. In 1968 Hawaii became the first state to repeal its public intoxication offense—though it still allowed custody to be taken for emergency medical care.[14] Although the new procedure received some early criticism because hospitals were not fully consulted beforehand and turned away intoxicated people taken there by the police,[15] the first step had been made. A second statutory change in 1968 in the District of Columbia had greater impact—probably because it combined repeal of the drunkenness offense with establishment of detoxification services. This

11. *Supra* note 8, at 5, Appendix C.

12. Generally, see the St. Louis Police Department's project summary report to the Law Enforcement Assistance Administration, THE ST. LOUIS DETOXIFICATION AND DIAGNOSTIC EVALUATION CENTER (LEAA Grant # 284 (S.093) Government Printing Office, 1970), and the ADDENDUM TO THE FINAL PROJECT REPORT (no date).

13. Basically, the evaluations that were made as part of the project (*supra* note 12) indicated that 50 per cent of the patients were somewhat improved as a result of the center's help—in drinking less, working more, earning more, or living in a better place; that the program resulted in an over-all savings to the criminal justice system of $64,000; and that the individual police officer found the time it took him to process a single drunk cut almost in half. But these conclusions are questioned by Raymond Nimmer in a study funded by the American Bar Foundation. He found the improvement statistics inconclusive (1) because they were based on interviews with former patients, and the group of patients sampled excluded many less likely to show positive results; (2) because the interviews had been made only 90 days after the patients had been released; and (3) because the fact that the interviews were conducted by police officers might make the drunks feel obliged to report progress. Nimmer also doubts the over-all savings of the project; in the year in which the evaluation was made, the center had an operating budget of over $200,000. Finally, he notes that the reduction in handling time for police officers resulted largely from eliminating an unusual and time-consuming procedure of taking all drunks who were arrested to the hospital before jail. The results of Nimmer's work, which also included studies of Chicago, the Manhattan Bowery Project, and the District of Columbia detoxification center, are included in AMERICAN BAR FOUNDATION, TWO MILLION UNNECESSARY ARRESTS (Chicago, 1971).

Nimmer's book is useful reading for anyone interested in the problem of public drunkenness. He challenges what has become the standard learning in this field. One of his basic points is that in the places he studied the use of the drunkenness arrest depended not so much on the person's being intoxicated as it did on his being a skid-row bum. The actual reason for being taken into custody might be any one of several to keep him from being victimized by others, to give him a good meal, to give him a place to sleep, or to make the street more pleasant for other citizens. Thus, in not all drunkenness arrests was detoxification what the person arrested needed most. Rather than assume that, Nimmer says, we should look more carefully at those arrested, decide what they really need, and provide those services. He also seriously questions whether any of the "services" provided by arresting these people are so substantial that alternatives, detoxification or otherwise, must be provided before arrests are stopped.

14. HAWAII REV. STAT. § 334-54 (Supp. 1971).

15. See Koshiba, *Treatment of Public Drunkenness in Hawaii*, 7 AMERICAN CRIMINAL LAW QUARTERLY 228 (1969).

made the District of Columbia the first jurisdiction to follow the recommendations of the President's crime commission. Its law became something of a model for others.

District of Columbia Law

The District of Columbia no longer has an offense of simple public drunkenness. But any person who is incapacitated or in immediate health danger because of intoxication may be taken by a police officer to a detoxification center, where he may be held involuntarily until sober or a maximum of 72 hours. The officer may also take the person home or to a private treatment facility.[16] Those who are intoxicated in public and are endangering others are still guilty of a criminal offense but are also first taken to the detoxification center.[17]

Although almost all study commissions recommend establishing a detoxification facility before the police are barred from taking drunks to jail, the practice has almost invariably been to repeal the offense first and worry about new facilities later. The District of Columbia is one of the few exceptions. Its detox center is a 75-bed downtown facility operated by a staff of about 40, including a part-time physician but few other professionals. Over half of those brought in to the center leave after one day; the others are transferred at the end of the first day to an alcoholism rehabilitation center in Virginia for two more days of care. All are given referrals for further treatment, but there is no follow-up by the center's staff.[18]

The District's detoxification program is run at a cost per patient day ($20) about half that of the more ambitious St. Louis center ($40).[19] That St. Louis has apparently had no greater success than the District has been used by some to argue for minimal expenditures on detoxification. They believe that the St. Louis type of detox center is an expensive way of doing little good. That is, the derelict alcoholic has so many problems—physical, mental, and social—contributing to his alcoholism that a week or so of "rehabilitation" can make no real impact; and the only real good that is being accomplished, drying him out, can be more easily and much less expensively achieved by simpler facilities operated by nonprofessional personnel.[20] A full-fledged medical facility is not really needed. In fact, even a jail might do.

One final point should be made about the District's experience. The detoxification program has been manageable partly because the police have simply decided to have much less to do with drunks and therefore the detox program is not serving all the people who made up the 40,000 arrests the police department once made each year for public intoxication. In the first year after the change in the law, only about 6,000 intoxicated people were taken into protective custody, which means that most derelict alcoholics were probably either arrested for some different offense or simply left on the streets. There were two apparent reasons for this practice: confusion in police ranks over their authority to handle drunks and a reduction in the importance attached to drunks by the department, presumably in response to the change in the law. In any event, public drunkenness is now much less of a *criminal justice* problem in the District.[21]

Changes in Other States

The basics of the District of Columbia's law have been followed in the legislation of several states. With variations, Maryland,[22] Florida,[23] Washington,[24] California,[25] and Massachusetts[26] have copied the pattern of repealing the drunkenness offense, retaining police authority to provide assistance to publicly intoxicated persons, providing a brief period of involuntary emergency detention for treating those persons, and at least authorizing the establishment of some kind of new facility (usually called a detoxification center) to provide this service.[27] The model acts recommended by the National Conference of Commissioners of Uniform State Laws, the National Institute of Mental Health, the American Bar Association and others generally follow the same lines. They may, however, differ over the justifiable grounds for protective custody, the permissible period of emergency detention, the services to be provided and how they are to be paid for, and the extent to which long-term commitment laws for alcoholics are also to be altered.

16. D.C. CODE ANN. §§ 24–521 to –535 (Supp. IV, 1971).

17. D.C. CODE ANN. § 24–524 (Supp. IV, 1971).

18. This information on the District of Columbia detoxification center comes from several sources. Chapter 6 of the Nimmer book (*supra* note 13); an unsigned December 1969 report of the center, and PROJECT REPORT, ALCOHOL DETOXIFICATION CENTER, LEAA Grant #019 (The George Washington University Education Research Division, March, 1970).

19. Nimmer, *supra* note 13, at 126. Also see PROJECT REPORT, ALCOHOL DETOXIFICATION CENTER, II–131 through II–137, for a comparison of the District of Columbia, St Louis, and Manhattan Bowery projects.

20. This is the approach suggested by the San Francisco Committee on Crime. In its 1971 report on public drunkenness the committee expressed discouragement at the cost/benefit figures from the detoxification projects it had studied and suggested that money would be better spent on "alcoholic residential centers." Detoxification services would be provided there but at a minimal expense; the primary objective would be to give the derelict alcoholic a place to live for a while. The committee conceded that this procedure might be just as much a "revolving door" process as the jail but argued that it would be more humane and less expensive. THE SAN FRANCISCO COMMITTEE ON CRIME, A REPORT ON NON-VICTIM CRIME IN SAN FRANCISCO (1971).

21. Nimmer, *supra* note 13, at 99–127.

22. ANN. CODE OF MD., art. 2C, §§ 101–501 (Supp. 1971).

23. FLA. STAT. ANN. §§ 396.012–396.171 (Supp. 1972).

24. 1972 Session Laws (2d extraordinary sess.), Ch. 122 (Wash. Legis. Service 1972).

25. ANN. CALIF. CODE, PENAL CODE § 647 (Supp. 1972); WELFARE AND INSTITUTIONS CODE §§ 5170–5177 (1972).

26. ANN. LAWS OF MASS., Ch. 111B, §§ 1–12 (Supp. 1971).

27. The different statutes, of course, vary widely in detail. In Massachusetts the intoxicated person can be picked up by the police and taken to his home or a treatment facility. If those options are not practicable, the person can be taken to the police station but can be kept there only until no longer incapacitated or for a maximum of 12 hours. In California, before he may be picked up, a person must not only be intoxicated in public but also be a danger to himself or others or be gravely disabled. The only place he may be taken is an approved facility, where he may be held no longer than 72 hours. The statute also provides that any person who is picked up under its authorization has the right to at least two phone calls within three hours of his admission. The Maryland law also excludes taking the public drunk to jail but puts a limit of five days on his initial detention. In Florida the limit on initial detention is four days.

Generally, the schemes proposed by these study groups are more protective of the rights of the person picked up and more generous with public moneys for treatment than are the statutes that have been enacted.[28]

A more limited change has been tried by such other states as North Dakota, Maine, and Delaware. Their aim seems to be to reduce the involvement of criminal justice agencies without a substantial increase in the services provided for derelict alcoholics. For example, North Dakota[29] has repealed its drunkenness offense but still allows police to take custody of persons found intoxicated in public and keep them in jail until sober or a maximum of 24 hours. Since no crime has been committed, no prosecution follows; jail time is held to a minimum and courts are not involved at all. Detoxification in this context is a fairly natural process.

Under current Delaware law[30] drunkenness is punishable as disorderly conduct, but every person taken into custody for that reason is taken to a detox center rather than jail. A summons is left with the person, and when he becomes sober, he has a choice of remaining at the center or leaving. If he remains, he is tested for alcoholism, a defense to the criminal charge. Acquittal by reason of alcoholism does, however, mean that the defendant is subject to court-ordered treatment for up to a year.

Maine law[31] still provides for the arrest of anyone who is intoxicated in public but allows for release at the end of 18 hours if the person is no longer a danger to himself or others.

In addition to the changes in the states mentioned above and in other states like Minnesota[32] and Oregon,[33] there have also been a number of local detoxification experiments conducted over the last few years without benefit of statutory change. Although detoxification is the primary objective, many of the projects include additional services. Various cities have provided for half-way houses, long-term domiciliary units, outpatient clinics, and farms.[34]

One noteworthy project is in the Manhattan Bowery. No coercion is used to attract the patients. Instead derelict alcoholics in the area are simply asked by the project's street patrol whether they want to come to the center for help. Approximately two-thirds accept this offer.[35] Proponents of voluntary treatment sometimes point to this experience as grounds for believing that the compulsory detention and treatment statutes are unnecessary and that the public's interest in clean and safe streets can be satisfied without forcing drunks into detox centers. At least this is half of the argument for voluntary treatment. The other half is that most of the derelict alcoholics arrested for drunkenness appear in only one small section of the city, the skid-row area, and are not in any real sense a "public" problem. On this basis it is argued that the public is not enough affected by the drunkenness of these people to justify depriving them of their right to remain sick in their own way.

Evaluation

One uncertainty about the new ways of handling public drunkenness is how much better they are than the old ways. Sponsors of the changes all express satisfaction at the results, but few careful evaluations have been made. It is not too difficult to achieve what may be, in practice, the primary objective of drunkenness reform—decreasing the involvement of the criminal justice agencies. This can be done by giving the job of caring for drunks to someone else or by just not doing it. Most states which have changed their law have accomplished this. However, most jurisdictions have expressed other goals as well, namely to reduce the incidence of alcoholism among the poorer, middle-aged men that account for the bulk of drunkenness arrests and to reduce the over-all cost of servicing them when they do become intoxicated. It is not at all clear that either goal has been achieved with any regularity. There is little information on the over-all public cost of treating rather than arresting drunks.[36]

The police have consistently shown dissatisfaction with the new procedures. Invariably, when a drunkenness statute is repealed and the police are still authorized to provide protective custody (the same initial action as an arrest, but the drunk is taken to a different place), the number of people picked up drops dramatically. The difference in the District of

28. For example, the Uniform Alcoholism and Intoxication Treatment Act (approved and recommended for enactment by the 1971 National Conference of Commissioners on Uniform State Laws) emphasizes the use of voluntary treatment and notes in its commentary that only those people who "are unconscious or incoherent or similarly so impaired in judgment that they cannot make a rational decision with regard to their need for treatment" will be subject to the act's protective-custody provision for being "incapacitated." In addition, the act deals rather extensively with creating a division of alcoholism to provide a "comprehensive and coordinated program for treatment of alcoholics and intoxicated persons," including emergency treatment provided by "a facility affiliated with or part of the medical service of a general hospital." In 1972 Washington became the first state to enact the Uniform Act.

29. N.D. CENT. CODE §§ 5-01-05.1 to -05.4 (Supp. 1971).

30. DEL. CODE ANN., Title 11, §§ 471 (1953), 612 and 613 (Supp. 1970).

31. 1971 SESSION LAWS, Ch. 460, amending ME. REV. STAT. ANN., Title 17, § 2001.

32. MINN. STAT. ANN. §§ 340.961 (1972), 245.692 to -.694 (Supp. 1972).

33. ORE. REV. STAT. §§ 426.450 to -.470, -.305 to -.335 (1971).

34. For example, Monroe County (Rochester), New York, has a program that includes not only emergency treatment for three to seven days but also inpatient medical treatment, counseling, and therapy for another two weeks and long-term assistance in an open domiciliary unit. Houston, Texas, and Salinas, California, among others, have experimented with half-way houses. The proposed services for Dayton, Ohio, are to include detoxification, half-way houses, and a stay at the Correction Farm.

35. Nimmer, *supra* note 13, at 128–41.

36. To assist in consideration of the 1971 drunkenness bills, the Governor's Committee on Law and Order commissioned a study by The Institute of Human Ecology comparing the costs of detoxifying drunks with the cost of jailing them. The April 1971 report summarized a five-year computer simulation of the two alternatives and concluded that a program similar to that in the proposed legislation would result in smaller annual public expenditures. However, the study excluded the cost of any capital expenditures for new facilities. H. HOLDER & F. KENNEDY, PUBLIC COSTS FOR HANDLING CASES OF PUBLIC INTOXICATION—A FIVE-YEAR SIMULATION (The Institute of Human Ecology, 1971).

Columbia has already been mentioned—a decline from 40,000 to 6,000.

There may be any number of reasons for the police response, but the most likely is a decision by the police that, if they are no longer arresting the drunk, he is not worth as much of their time. Whatever the reason, some care must be taken in deciding whether the detox projects have been successful. If many drunks need the new service and are not receiving it, then noting only the good done those picked up may be a rather misleading method of evaluation.

North Carolina Law

North Carolina's statute on public drunkenness was rewritten in 1967. Under G.S. 14–335, it is a misdemeanor to be drunk in public, which, according to the case law, means more intoxicated than just "under the influence."[37] The first offense is punishable by a fine of up to $50 or imprisonment for up to 20 days in the county jail. The second conviction within a year may result in either the same penalty or commitment to the Department of Correction for an indeterminate sentence of 30 days to six months, all or part of which may be served on conditional release for treatment.

If the defendant can prove that he suffers from alcoholism—and he has the burden of raising that defense—he is to be acquitted; but acquittal for this reason means that he is subject to the court's jurisdiction for up to two years[38] and may be ordered into any one of several treatment regimens authorized by G.S. 122–65.8. The options include judicial hospitalization, private care, placement in the charge of a relative, treatment supervised by a social service agency, or "any other plan or arrangement which may be appropriate. . . ."

Several other sections of the General Statutes deal with involuntary treatment of alcoholics. Any alcoholic in North Carolina is subject to civil commitment under Article 7 of Chapter 122 if he is determined to be "in need of observation or admission. . . ."[39] This judicial hospitalization procedure may be initiated by any "reliable person" who files with the local clerk of superior court an affidavit alleging "inebriety."[40] If the affidavit initiating the process also alleges that the alcoholic is "likely to endanger himself or others," the clerk may have him detained in a suitable facility before the hearing on commitment.[41] The clerk may, after a hearing, order involuntary hospitalization or outpatient care for up to 180 days in a state hospital or a local mental health center.[42]

Another section of the General Statutes provides for emergency detention of a person for 20 days upon a sworn written statement from a physician that he has examined the person within the last 24 hours and that he is homicidal, suicidal, or dangerous to himself or others. This procedure, conducted without court action, is not limited to alcoholics.[43]

Treatment of Alcoholics in North Carolina

The state's treatment programs for alcoholics—and note that these are essentially "treatment" and not "detoxification" programs—are under the supervision of the division on alcoholism of the State Department of Mental Health.[44] The four state psychiatric hospitals accept over 5,000 alcoholics a year, and there are three alcoholic rehabilitation centers—at Greenville, Butner, and Black Mountain—with a combined bed capacity of around 300, each offering a 28-day treatment program.[45] In addition, there are about 50 mental health centers around the state, each intended eventually to offer a comprehensive program of emergency, inpatient, and outpatient services for alcoholics. Only about a half-dozen of the centers can currently be considered comprehensive. The state, through the Department of Mental Health, has been spending approximately $3,000,000 annually on the state facilities for alcoholics and channels about another $1,000,000 on a matching basis to local programs.

Local programs are more likely to meet detoxification needs than the state's efforts, and these vary widely from county to county.[46] The most common kind of local service available is probably the rescue mission that provides a bed to sleep off an alcohol bout and a kitchen in which to get a meal once sober. Some missions will provide a long-term home and a job as well.

For a person with more money, detoxification might be obtained in a more elaborate facility. For example, Charlotte has the privately operated Wilmith Hospital that offers a five-day inpatient detoxification service for about $150. The center has about 2,000 admissions a year, 10 per cent being charity cases.

North Carolina Experiments

Over the last few years different cities in the state have experimented with different ways of getting public drunks out of jail. The most common method is to have alcoholism court counselors interview those

37. See STATE V. PAINTER, 261 N.C. 332 (1964).
38. N.C. GEN. STAT. § 122–65.7 (Supp. 1971).
39. N.C. GEN. STAT. § 122–60 (1964).
40. *Id.*
41. N.C. GEN. STAT. § 122–61 (Supp. 1971). This section was amended in 1971 to provide that the detention could no longer be in a place used as a penal facility.
42. N.C. GEN. STAT. §§ 122–63, –63.1 (Supp. 1971).
43. N.C. GEN. STAT. § 122–59 (Supp. 1971).
44. N.C. GEN. STAT. § 122–35.13 (Supp. 1971).
45. For information on the programs conducted at the alcoholic rehabilitation centers see NORTH CAROLINA DEPT. OF MENTAL HEALTH, THE ALCOHOLIC REHABILITATION CENTER (1966), or a feature article on the Butner center in the Durham Morning Herald, Sept. 8, 1970.
46. For an example of the different services available in a single county, see DIRECTORY OF AGENCIES AND FACILITIES FOR ALCOHOLICS AND THEIR FAMILIES IN MECKLENBURG COUNTY, NORTH CAROLINA (Charlotte Council on Alcoholism).

arrested and make a recommendation to the sentencing official. This disposition will then be made a condition of a suspended sentence. Generally, the offender is directed to some local alcoholism service, such as a local clinic or Alcoholics Anonymous. Charlotte and Goldsboro have tried this kind of program.[47] The Seventh Judicial District (Nash, Edgecombe, and Wilson counties) has employed several court counselors for this purpose; judges may refer any defendant who is charged with any offense and who has an apparent alcohol problem to the counselors.[48]

Gastonia tried a detoxification program in its jail for a year. The unit was actually part of the jail but provided extra attention for those prisoners with drinking problems. Evaluation of the project was mixed, and its LEAA grant was not renewed in 1971.

During the last couple of years probably Charlotte has tried more substantial changes in handling drunks than any other place in the state. Currently, all those arrested for drunkenness who have not been arrested within the previous two months are released at the end of ten hours, and their cases are not prosecuted. Those who are repeaters and receive the usual 20-day sentence are taken from jail to nearby Huntersville, where one wing of an old school has been converted to a detention center for drunkenness offenders. Almost all of the average population of 65 work in the center's kitchen or laundry or on assignments outside the center—for example, in the town of Huntersville or the Charlotte Coliseum. The atmosphere is noticeably more pleasant than in the jail—television, pool, and baseball are available as recreation and, until recently, only one deputy was on duty. Those who run the program feel that the offenders get more from this than jail, and a burden on the jail has been eliminated, thus making space for more serious offenders.

1971 General Assembly

Several bills on public drunkenness were considered during the last session of the General Assembly. The one that came closest to enactment was H 318, a bill drafted for the Governor's Committee on Law and Order and introduced by Representatives Johnson (Wake) and DeBruhl (Buncombe). An identical bill, S 179, was introduced in the Senate by Senator McGeachy (Cumberland), but it was H 318, with its subsequent revisions, that received the most attention.

As rewritten by the House Judiciary I subcommittee of Representative Campbell (Mecklenburg), the legislation was fairly simple: it provided for repeal of G.S. 14–335, the public drunkenness offense, and G.S. 14–334, the drunk and disorderly offense. It also authorized peace officers to take protective custody to provide assistance to those found intoxicated in public. The assistance could take any of several forms: carrying the person home, taking him to a health-care facility, or taking him to a jail if no other place were available. The stay in jail would be limited to the period of intoxication or a maximum of 24 hours with no prosecution to follow. The bill authorized local governments to have persons other than peace officers provide the initial assistance to drunks, but it made no provision for new treatment facilities.

The legislation's intent was primarily to reduce the involvement of criminal justice agencies with drunks. It was generally left to the local governments to decide what sort of treatment derelict alcoholics would receive once they were taken into custody. At a minimum, however, they would no longer go to court or serve a jail sentence.

It was felt that the current compulsory-treatment statutes were adequate if the police were authorized to help the incapacitated person off the street, and even this kind of involuntary detention, without a hearing, was thought to be justified only for the period of incapacitation. The one revision the bill did make in current commitment procedures was to establish a process by which a magistrate and physician acting together could order a person held for five days to see whether judicial hospitalization was required.

The bill, as outlined above, passed the House by a fair margin and went to the Senate Corrections Committee. There it was rewritten once again, this time mostly along lines suggested by S 800, a bill introduced earlier by Senators Gudger (Buncombe) and Strickland (Wayne). It then passed the Senate. But the House would not concur in the changes, and no compromise could be reached in the short time remaining before adjournment.

The Senate version of H 318 differed from the House version mainly in that (1) it did not repeal the drunkenness offense—using the district court rather than the officer as the point at which possible alcoholics could be diverted into treatment, and (2) it provided long-term confinement at a proposed agricultural facility for those who did not comply with the initial commitment. The sponsors of the Senate's version felt that police could not handle people in the manner anticipated by the House legislation unless they were actually making arrests;[49] therefore, the diversion from the criminal process must come at some time after arrest, not before. The Senate's work also reflected the view that a certain amount of coercion was justifiable to make alcoholics accept treatment. House proponents of the legislation ques-

47. For a description of the Goldsboro program, see the Goldsboro News-Argus, Dec. 12, 1971, p. C1.

48. "Implementation of Court Sponsored Program for Alcoholics," memorandum of 9 August 1971 from Chief District Judge J. Phil Carlton to district judges and clerks of court.

49. This is an issue that perhaps should be examined more closely than it has been. The President's crime commission, The National Conference of Commissioners on Uniform State Laws, the draftsmen of the Model Alco-

tioned whether the Senate version had too many commitments with too few hearings and whether it might mean more, rather than less, involvement by the police and courts.

The differences in philosophy behind the Senate and House versions of H 318 are obvious, and it was the inability to reconcile those opposing views in a short time that meant the end of drunkenness legislation for 1971. In general, however, the response to the legislation was favorable. A majority of both houses did at least agree that the current method for handling public drunks was not doing the job.

It might also be noted that many legislators who backed the drunkenness bill, in the hope of improving the services available to alcoholics, also supported an amendment to the ABC statutes requiring local boards to spend at least 7 per cent of their profits on alcoholism education and rehabilitation.[50] After the session, however, the Attorney General issued an opinion that the provision in question applied only to those local ABC boards that had not already, by local act, set the distribution of their total profits.[51] This meant that most local boards were effectively exempted from the 7 per cent requirement. Despite objections, the ruling remains unaltered at this time, and less money than was expected was made available for local detoxification projects.

Future Prospects

Undoubtedly, new drunkenness bills will be introduced in the 1973 session of the legislature. This was assured when the United States Supreme Court decided in June that counsel must be provided for indigents before they can be jailed for even petty misdemeanors.[52] If the state must pay the cost of counsel, jailing drunks becomes even less desirable. In fact, to avoid the appointment-of-counsel problem, the Administrative Office of the Courts has already recommended to court personnel that no first-offender drunk be jailed.[53] If that policy works satisfactorily, a strong argument will have been made for the General Assembly to repeal the offense altogether.

When the drunkenness issue does come up in 1973, debate will probably center on what should be done with the public drunk instead of arresting him. The alternatives range from leaving him where he is, to taking him to jail to sober overnight, to building a detoxification center for him. The choice any one legislator makes will probably depend on what he sees as the basic objective of the legislation. If the objective is to reduce the criminal justice costs of public drunkenness, then it will be acceptable to do anything that accomplishes this without decreasing services for the derelict alcoholic. One possibility would be to repeal the public drunkenness offense but permit the police to continue to pick up people who are intoxicated, put them in jail, and allow them to leave as soon as they become sober. Because this procedure would not count as an arrest, police would be less likely to do it and their time spent with drunks would be noticeably reduced. The magistrate and other court personnel would have no involvement. The jail would still have some intoxicated residents, but presumably fewer and for a shorter period of time. And the person who was picked up by this procedure would not lose the one benefit he has had, a place to become sober. He might, in fact, be better off since he would not have acquired an arrest record.

If, however, one views the legislation as a means of "curing" derelict alcoholics, another solution is necessary, and the public expense is likely to be much higher. First of all, use of the jail would be inconsistent with this "health" approach, and some other place would have to take the drunk. This could be an existing facility or a new place, depending on the existing local resources. And, if this place were intended to do more than simply provide a place to become sober, it would need to have professional assistance and provision would probably have to be made in the law for committing alcoholics to its care. Even then, because of the nature of the illness and the special characteristics of those alcoholics who get arrested for public drunkenness, the number whose life can be significantly changed would probably not be great.

One might predict that the 1973 legislative solution to the problem will more closely resemble the first solution described than the second. This speculation is based partly on observation of the 1971 General Assembly. To most legislators the "problem of public drunkenness" meant the problem police have in dealing with the offense rather than the problem the offenders have in managing their lives. That is, more legislators seemed interested in relieving the burden of the police than in providing better services for drunks. Another substantial barrier to

holism and Intoxication Treatment Act, and the draftsmen of virtually all the recent state statutes have concluded that peace officers may be given the authority to take protective custody of a person who is intoxicated to the point of being incapacitated. However, there is little authority cited for this proposition. One case that is always mentioned is *Forsythe v. Ivey*, 162 Miss. 471, 139 So. 615 (1932), in which a warrantless arrest for public drunkenness was alternatively upheld under the officer's common law power to take an irresponsible person into custody and care for him "until he became mentally responsible and able to take care of himself. . . ." *Ortiz v. Brickman*, 196 F.2d 762 (D.C. Cir. 1952) is often cited for the same proposition, but beyond this the case law is slim. The main argument for this view of the power of protective custody appears to be the logic that if an officer may assist someone who has had a heart attack, then he may pick up someone who is in danger because of drinking too much.

To avoid exceeding the constitutional limitations on involuntary "assistance," any legislation on protective custody of people who are intoxicated should clearly limit that power to use on those who are incapacitated or unable to make a rational decision about their need for care—which should be fewer people than are arrested for public drunkenness. It also helps assuage police fears to add a proviso exempting officers from civil liability so long as they perform this chore in a reasonable manner.

50. N.C. GEN STAT. § 18A-17(14) (Supp. 1971).

51. Letter of 3 November 1971 to Mr Terry R. Hutchins.

52. Argersinger v. Hamlin, 40 U.S.L.W. 4679 (12 June 1972).

53. Memorandum of 28 June 1972 from the Administrative Office of the Courts to superior court judges, district court judges, solicitors, public defenders, and clerks of superior court.

the second solution is that it will initially cost more money. These are not good years for large new appropriations. Finally, objection to any mandatory detoxification program will come from the rural areas. In these areas, the number of local drunks does not justify the expense, and transportation to any new facility is likely to be much more burdensome than just taking offenders to the local jail.

It seems likely that local governments will be given a great deal of discretion in whether substitute services should be provided for derelict alcoholics and what those services will be. This is probably the easiest way to let the state's cities make changes and allow rural areas to continue in much the same way as before, except for a change in procedure of arrest and conviction. After all, the cities are the places that really have the problem. If the legislature wants to provide any financial assistance, the most likely source will once again be an add-on to liquor prices or a required distribution of ABC profits.[54]

54. The 1965 General Assembly used an add-on of 5 cents per bottle to raise $2,750,000 to build the alcoholic rehabilitation centers. In 1967, however, the proceeds from the add-on were diverted from that special use into the state's general fund, to be appropriated by the legislature for whatever purpose it sees fit. The provision for the extra 5 cents per bottle is now found in N.C. GEN STAT. § 18A-15(3) (Supp. 1971).

The ABC statutes authorize local boards to spend part of their profits on alcoholism treatment programs. Before the 1971 session, the law allowed county and municipal boards to spend up to 5 per cent of total profits for that purpose. The Mecklenburg board received local-act authorization to spend an even higher amount. In a typical year about a third of the boards would make such expenditures. In 1967-68 the total set aside was $740,000, but about half of that was in Mecklenburg. As mentioned earlier, an effort was made in the 1971 General Assembly to require local boards to spend up to 7 per cent of their profits on alcoholism programs.

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TRAINING COURSE IN THE UNIFORM ACCOUNTING SYSTEM FOR LOCAL GOVERNMENT OFFICIALS

The Local Government Commission has developed a new uniform accounting system for cities and counties. Beginning in January, 1973, the Community College system will provide special training courses in the new system on an extension basis. Everyone who participates in the financial management of a local unit is encouraged to attend. For further information, contact the Local Government Commission in Raleigh, the Institute of Government, or the accounting department in the following institutions:

Southwestern Technical Institute, Sylva
Asheville-Buncombe Technical Institute, Asheville
McDowell Technical Institute, Marion
Wilkes Community College, Wilkesboro
Western Piedmont Community College, Morganton
Catawba Valley Technical Institute, Hickory
Central Piedmont Community College, Charlotte
Davidson County Community College, Lexington
Guilford Technical Institute, Jamestown
Sandhills Community College, Southern Pines
Vance County Technical Institute, Henderson
Wilson County Technical Institute, Wilson
Fayetteville Technical Institute, Fayetteville
Robeson Technical Institute, St. Pauls
Southeastern Community College, Whiteville
Wayne Community College, Goldsboro
Coastal Carolina Community College, Jacksonville
Pitt Technical Institute, Greenville
College of Albemarle, Elizabeth City

DEFINING DEATH

Todd D. Christofferson

Death carries with it a variety of consequences in addition to the unique phenomenon experienced by the deceased himself. For those who "remain behind," the fact and time of death may be critical in such matters as inheritance rights, remarriage, homicide charges, insurance payments, legitimacy of offspring, estate taxes, and human organ transplantation. Courts throughout the United States are well acquainted with instances in which these issues arise. A California case,[1] for example, illustrates the importance that might be attached to the time of death. The problem was to determine whether one deceased person inherited from another who had died in the same accident. That problem, in turn, depended upon who survived longer. The jury found that one person survived the other by 1/500,000th of a second. By contrast, the time of death held little significance for a 1954 Pennsylvania controversy,[2] but the *fact* of death was crucial. In this case, the petitioner's husband had been drafted into the German Army during World War II. He wrote weekly until August 20, 1944, then was not heard from again in spite of inquiries. The court held that the husband was presumed dead as of August 31, 1944, and the marriage license that the petitioner sought was directed to be issued.

1. Case of Rowley, 257 Cal. App. 2d 224, 65 Cal. Rptr. 139 (1967).
2. Tilton's Petition, 46 Birks 265 (Pa. Orphan's Court, 1954).

TRADITIONALLY, DEFINING DEATH has not been thought to involve any real difficulty. Indeed, one finds, in the few state statutes that bother to treat the question, a presumption that anyone knows intuitively when death has occurred. In Pennsylvania, for example, a "dead body" is defined as "(i) a lifeless human body, or (ii) such parts of a human body as permits a reasonable inference that death has occurred."[3] Courts in the United States generally have opted to follow the definition in Black's Law Dictionary, which similarly takes a good deal for granted: "Death is the cessation of life; the ceasing to exist; defined by physicians as a total stoppage of the circulation of the blood, and a cessation of the animal and vital functions consequent thereon such as respiration, pulsation, etc."[4] The problem is thus thrown back into the physician's lap; and, for legal purposes, we have become accustomed to the common medical definition that relies essentially on the cessation of heartbeat and respiration.[5]

> Traditionally, the physician would feel for the pulse, listen for a heart beat, check for respiratory movement, stimulate the individual to attempt to elicit some response, and in the absence of these

3. PA. STAT. ANN., tit. 35, § 450.105 (1964).
4. BLACK'S LAW DICTIONARY 488 (deluxe 4th ed. 1951).
5. The standard medical dictionary definition is the "apparent extinction of life, as manifested by absence of heartbeat and respiration." DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 387 (24th ed. 1965).

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observable signs of life, he would pronounce the individual dead.[6]

Like many of us, the law has assumed that this is the best if not the only possible definition of death. As a matter of medical fact, however, it is certainly not the only possible meaning of the word and very likely not the best. Although the law requires that death be determined as having occurred at a precise moment in time, the medical reality is that death is a process. It is the fact that different parts of the body perish at different rates and times that makes organ transplants and resuscitation possible. Death is in reality a transition from the state of living to the state of being dead. "The moment of death is thus an arbitrary point in this process, determined by professional judgment, based on established, historic, and possibly obsolete principles."[7]

The historic definition met little challenge until recent times—in part because it was wholly satisfactory in almost every instance, given the state of medical science in the past. The shortcomings become clear, however, when the definition is applied to situations in modern medicine. Today the heart may be inactivated to permit the performance of delicate coronary surgery. Respiration and heartbeat may be restored and maintained almost indefinitely even though there is no hope of restoring spontaneous respiratory or circulatory functions or of returning the patient to consciousness. And the success of a transplant, employing the organs of persons whose life is irretrievable to give new life to others, depends on the ability to obtain organs before the damage of anoxia (lack of oxygen due to the cessation of circulation) occurs.

Particularly with the advent of this last development in medicine, human organ transplantation using cadaver donors, the need for a precise legal definition of death has become urgent. Effective transplantation depends in large measure on the removal of organs immediately after death; and one must, therefore, be able to define and determine the moment of death with some precision. It is true that skin and cornea, for example, are normally serviceable for transplant purposes up to several hours after death. Other organs, however, are much less resistant to the effects of anoxia. Kidneys must be obtained from the donor within an hour after anoxia begins. The liver, lungs, and heart are even more susceptible, suffering extensive and irreparable damage after only 10 or 15 minutes without oxygen.[8] If the moment of death cannot be accurately and positively pinpointed, damage resulting from anoxia, from continued use of life-sustaining drugs, or from agonal incidents (effects of prolonged last desperate effort of the body to save itself) will occur, rendering organs partially nonfunctional or even wholly unfit for transplantation.[9]

PERSONS INVOLVED IN TRANSPLANT PROCEDURES need a precise definition of death not only for these medical reasons but also to protect themselves from possible legal liabilities, such as homicide charges. The fear of such liability on the part of medical personnel is not unfounded. The cessation of treatment for transplant purposes as well as for other reasons has sometimes resulted in criminal prosecutions. For example, in 1968, the Swedish Central Medical Board found a physician guilty of violating established standards of conduct when he requested relatives' consent to end intravenous therapy for two elderly women in a state of irreversible coma. In a subsequent court action, it was ruled that the doctor had acted properly.[10] The most recent example in the United States, a heart transplant case decided just this year, will be discussed in some detail below.

In view of these deficiencies, a new definition has been proposed that both plots death at an earlier point in the transition from life to death and claims superiority in promoting the welfare of physicians, their patients, and the public generally. It is commonly referred to as the brain-death definition.

Simply stated, the brain-death concept means that death has occurred when the central nervous system function is gone. When the highly organized nerve cells of the cerebral cortex are so damaged, by whatever cause, that they are unable to resume normal functioning, the thinking or conscious element of the brain is dead. In that situation, the person is the victim of an irreversible coma and will not regain consciousness despite the continued functioning of other parts of his body. Thus the person is dead; the reasoning, thinking human being with personality and uniqueness is lost beyond hope of restoration. Interestingly enough, this concept has always been the unstated corollary to the traditional definition of death. Cessation of circulation and breathing have been called death because they were earlier not reversible conditions, and if not reversed, they soon resulted in the death of the brain through lack of

6. Kusanovich, *Medical Malpractice Liability and the Organ Transplant*, 5 U. OF SAN FRAN. L. REV. 223, 240 (1971), and medical authorities cited therein.

7. Halley & Harvey, *The Definitional Dilemma of Death*, 37 J. KAN B. A. 179, 180 (1968).

8. Wasmuth, *The Concept of Death*, 30 OHIO ST. L. REV. 32, 35–36 (1969).

9. *Comment*, 23 U. FLA. L. REV. 134, 154–55 (1970).

10. Ayd, *When Is a Person Dead*, 18 MEDICAL SCIENCE 34 (1967).

oxygen. In other words, heart and lung failure were considered death because of what that failure meant for the brain. Death must therefore be the impossibility of continued brain function, even under the old definition.

DESPITE THE LOGIC OF THE BRAIN-DEATH DEFINITION, however, two important problems stand in the way of its general acceptance. The first inheres in the fact that "the patient who has degenerated to a medical 'non-person' is still symbolically a person to somebody."[11] Although a patient's brain is dead, his heart and respiratory system may still function. Either mechanical sustenance or resuscitation following death of the cerebral cortex cells may prolong the life of the more resilient cells of the midbrain and brain stem, which control such things as respiration and temperature.[12] Having lived so long with the understanding that one is alive while his heart is beating, we find it difficult to pull the sheet over someone's head" even though the brain, the person, is long since dead. The difficulty may be only psychological, but it is real.

The second stumbling block concerns the accuracy with which brain death may be diagnosed. There is a natural reluctance to accept the declaration that death has taken place when the signs are not so easily observable as the absence of heartbeat—particularly when organ transplants are involved. One English physician has charged that "[a]s soon as one has a patient with useful organs one has a gang of vultures trying to snatch out these organs, ranging from the cornea to the heart."[13] The future patient may fear that the brain-death concept will be used to separate him from useful organs rather than treat him. Apart from the validity or invalidity of this uneasiness,[14] there remains the more objective problem of the medical ability to diagnose brain death with certainty. In an effort to provide guidelines in resolving this matter, a special committee was established at the Harvard Medical School some years ago. The final report of this committee, issued in August, 1968, emphasized that "irreversible coma has many causes, but we are concerned here only with those cómatose individuals who have no discernible central nervous system activity." The committee's report lists two prerequisites to accurate evaluation: the exclusion of (1) central nervous system depressants, and (2) hypothermia (temperature below 90° F). When these conditions are met, the following criteria are said to represent brain death:

1. There is a total unawareness of externally applied stimuli and inner need and complete unresponsiveness. . . . Even the most intensely painful stimuli evoke no vocal or other response not even a groan, withdrawal of a limb, or quickening of respiration.
2. No spontaneous muscular movement or response to stimuli. After the patient is on a mechanical respirator, the total absence of spontaneous breathing may be established by turning off the respirator for three minutes and observing whether there is any effort on the part of the subject to breathe spontaneously.
3. Irreversible coma with abolition of central nervous system activity is evidenced in part by the absence of elicitible reflexes. As a rule the stretch of tendon reflexes cannot be elicited; i.e., tapping the tendons of the biceps, triceps, and pronator muscles, quadraceps and gastrocnemius muscles with the reflex hammer elicits no contraction of the respective muscles. Plantar or noxious stimulus gives no response.
4. Of great confirmatory value is the flat or isoelectric electroencephalogram (EEG) [for the brain, the equivalent of the electrocardiogram]. . . .
5. All of the above when repeated 24 hours later indicate no change.[15]

OTHER PROCEDURES AND PROPOSALS are being implemented, most with apparent success, to encourage recognition of the validity of the brain-death concept and foster its widespread use. The legal analysts seem to agree that the majority of the medical profession have accepted the brain-death definition of death as one superior to traditional concepts. In his more recent transplants, Dr. Denton Cooley, for example, has not waited for cessation of heartbeat before declaring the donor dead and therefore eligible as a donor. In response to the direct question "Under what circumstances would a beating, viable heart be electively removed?" Doctor Cooley replied, "I think the procedure is permissible with the diagnosis of brain death, especially in the presence of rapidly failing circulation."[16] At the Texas Medical Center, where Dr. Michael DeBakey operates, the physicians have used brain-death criteria from the beginning of their transplant program. Its chief administrator feels that undue delay in death determination involves critical ethical problems because of the possibility of transplanting a bad organ into a recipient. In a sequel to the original Harvard report, one of its

11. *Symposium: Definition of Life: "When Do You Pull the Plug,"* 205 J.A.M.A. 29 (July 1, 1968).
12. Nagovsky & Soboleva, *Delaying the Process of Death,* DISCOVERY 1–2 (1964).
13. Dworkin, *The Law Relating to Organ Transplantation in England,* 33 MODERN L. REV. 354, 369 (1970).
14. The Uniform Anatomical Gift Act, presently enacted into law in 48 states and the District of Columbia, applies a relatively simple conflict of interest safeguard against the possibly overzealous transplant surgeon. The provision in the Model version reads:

> The time of death shall be determined by a physician who attends the donor at his death, or, if none, the physician who certifies the death. The physician shall not participate in the procedures for removing or transplanting a part. UNIFORM ANATOMICAL GIFT ACT § 7(b), reprinted at 2 LOYOLA U. L. J. 275, 290 (1971).

15. The full report is reprinted at 5 U. SAN FRAN. L. REV. 283 (1971).
16. *Supra* note 7, at 150.

authors states that when the brain is dead, transplant physicians should not wait until the heart has stopped because damage to the vital organ needed in transplant may result.[17] At least one state has legislatively adopted the brain-death concept as an alternative definition. The statute, enacted by Kansas, permits, without a stated preference for either, the use of either the new or the traditional definition for all purposes civil or criminal. The pertinent paragraph reads:

> [A] person will be considered medically and legally dead if, in the opinion of the physician, based on ordinary standards of medical practice, there is the absence of spontaneous brain function; and if based on ordinary standards of medical practice, during reasonable attempts to either maintain or restore spontaneous circulatory or respiratory function in the absence of aforesaid brain function, it appears that further attempts at resuscitation or supportive maintenance will not succeed, death will have occurred at the time when these conditions first coincide. Death is to be pronounced before artificial means of supporting respiratory and circulatory functions are terminated and before any vital organ is removed for purposes of transplantation.[18]

IN MAY, 1972, THE BRAIN-DEATH DEFINITION was definitely recognized for the first time in a court of law. The case, decided by a jury in Richmond, Virginia, was a wrongful-death action by the brother of a heart transplant donor against the transplant team. The case turned squarely on the issue of how death is to be defined. Under a strict traditional definition, the physicians would have been guilty of wrongful death and perhaps homicide for removing the heart while it was beating. Under the brain-death concept, they were free of any wrongdoing.[19]

In the late afternoon of May 24, 1968, Bruce O. Tucker, a 56-year-old black laborer, was sitting on a chair at a gas station chatting with a friend. Tucker started to rise, fell forward and hit his head on the station's concrete apron. The friend called an ambulance, but Tucker refused treatment and stumbled off. The ambulance picked him up later and took him to the Medical College of Virginia (MCV) Hospital's Emergency Room. He was alone. Tucker's injuries were noted to be severe head injuries, and he underwent surgery beginning at 11 p.m. the day of his injury. After the operation, Tucker's condition was brought to the attention of Dr. Richard R. Lower, who determined that Tucker might be a possible heart transplant donor. At the request of hospital authorities the Richmond police tried to locate his relatives to secure consent for any transplant, to no avail. At 9:30 a.m. the next morning, May 25, a transplant team headed by Drs. Lower and David M. Hume first discussed the possible use of Tucker's heart in a transplant. Dr. Abdullah Fatteh, an assistant state medical examiner, was consulted concerning use of Tucker's heart under the Virginia unclaimed-bodies statute; he suggested that the team once more attempt to locate Tucker's relatives and secure their consent for the transplant. At 11:30 a.m., Tucker was placed on a mechanical respirator. Dr. Hooshang Hooshman, a neurologist, examined Tucker between 1 and 2 p.m. He conducted an EEG test and declared Tucker to be neurologically dead. The decedent's heart was beating and his body temperature, pulse, and blood pressure were all normal for a patient in his condition, but he showed no evidence of being able to breathe spontaneously. Dr. Hooshman stated later at trial that it was "very likely" that Tucker's condition was "irreversible" at the time he was admitted to the hospital on May 24. When the Richmond police again failed to locate any relatives that afternoon, Tucker was taken into the operating room in preparation for the transplant of his heart and both kidneys.

At 3:30 p.m. the mechanical respirator was turned off by Dr. Bralley, the treating physician, "to see if Tucker was really dead." No spontaneous breathing occurred, and the machine was turned on again to keep the heart beating and thus prevent anoxia. The next sequence of events became critical at trial because of their order. At 3:33 p.m., Dr. Lower made an incision in the recipient, Joseph Klett. Tucker was pronounced dead by Dr. Bralley at 3:35 p.m., and soon thereafter Dr. Fatteh gave permission by telephone for the transplant. At 4:25 p.m., an incision was made by Drs. Sewell and Hume to remove Tucker's heart. The kidney transplants followed. Note that the incision on Klett was made at 3:33 p.m., before Tucker had been officially declared dead and also before Dr. Fatteh had consented to the use of Tucker's heart. On the witness stand Dr. Lower said, "[I]f Dr. Fatteh had not given permission, there would not have been an operation." Asked when he decided to transplant Tucker's heart, Dr. Lower said, "When I saw that the scarring of Klett's heart was sufficiently extensive that it could not be corrected, somewhere around 4:30. I determined that his heart was not repairable."

THE ORIGINAL JURY INSTRUCTION that Judge A. Christian Compton proposed to give the jury, adopting the absence-of-heartbeat definition of death as the only permissible standard, would undoubtedly have resulted in a verdict against the

(Continued on page 21)

17. *Id.*
18. KAN. STAT. ANN. § 77-202, *Definition of Death* (Cum. Supp. 1971).
19. The following account is derived from reports in *The Richmond Times-Dispatch*, May 19, 1972, at 1-3; May 21, 1972, at 1; May 26, 1972, at 1; Mosher, *When Does Life End?* THE NATIONAL OBSERVER, June 3, 1972, at 1, 18; and the Memorandum Opinion of Judge A. Compton Christian of the Law and Equity Court of Richmond handed down on May 23, 1972.

North Carolina's Opportunity in Higher Education

Eugene C. Lee

TO BE ASKED to talk about multicampus universities in the 1970s is risky business. One seasoned observer described our attempt to study the University of California as similar to changing tires of a moving car, and—to say the least—I suspect that this statement could also be applied to the University of North Carolina in 1971-72.

The fact of the matter is, of course, that service on a governing board or in a university administration has become more complicated than ever before. One of the main reasons—and the one most often commented upon—is the rise of the multiversity—the complex, multipurpose campus. This was a dominant feature of the 1960s, as simple college campuses bloomed into complicated university centers with an aggregation of teaching, research, and service functions.

But what has not been as well understood is that the 1960s were also the period of a second development: the multicampus university, the grouping of individual campuses under a common framework of governance. This may come as a surprise to North Carolinians, accustomed to the fact that the University of North Carolina was established as a consolidated university in 1931, but—in fact—systems of higher education are of fairly recent origin. So rapidly have they developed that, today, over 90 per cent of all public four-year college and university campuses are part of multicampus systems. And over 85 per cent of public college and university students—excluding the two-year institutions—are also enrolled in multicampus colleges and universities.

WHY THIS TREND? Why have individual campuses with their own autonomous boards and chief executives been consolidated into systems at such a rapid rate in recent years? James Perkins, formerly president of Cornell University and now chairman of the International Council for Educational Development, has suggested these as among the most important factors:

(1) The pressures of enrollment which have led to the growth of old campuses and the creation of new ones.

(2) The diversification of enrollment, as not only *more* but *different* kinds of students have insisted upon education beyond the high school, creating the need for new kinds of institutions and new programs within existing ones.

(3) On top of this, an explosion of knowledge, new specialities, new fields, leading to the requirement that institutions concentrate their emphasis upon particular fields.

(4) But as colleges have become more specialized, they have also become more interdependent. Growth leads to complexity, complexity to specialization, specialization to interdependence.

(5) All of this growth and specialization costs money, not only for expansion but also for new computers, new kinds of libraries, and equipment that ever increases in expense.

(6) By and large, this money has come from public sources, with great increases in state and federal expenditures for higher education, and with this have come inevitable and completely appropriate demands for accountability.

And so, Perkins concludes: "We see a critical concern for achieving balance between the need for funding, planning and coordination on the one side, and the needs for independence, freedom to innovate, and internal flexibility on the other."

For many states, this attempt at coordination has resulted in a coordinating agency between state

The author, director of the Institute for Governmental Studies at the University of California at Berkeley, has also served as a university administrator. This article is drawn in part from his "The Multicampus University: A Study of Academic Governance" (coauthor, Frank M. Bowen), published in 1971 by the McGraw-Hill Book Company for the Carnegie Commission on Higher Education. Dr. Lee spoke before a conference on higher education called by Governor Scott in September and held at the Institute of Government.

government and the separate publicly supported single-campus institutions; for other states, the attempted solution has been to establish competing multicampus institutions within the same state—perhaps with a coordinating agency given the charge of refereeing the inevitable conflicts that have arisen between the multicampus institutions. In North Carolina for many years, of course, you attempted both—a single multicampus university, separate institutions, and a coordinating agency.

But now we see a third movement—the development of multicampus systems comprising *all* senior colleges and universities in a state, as you now have in North Carolina. These single-board arrangements had a spurt of popularity some years ago, dropped out of fashion for a period, and now are making a comeback. In the last decade, five states adopted this pattern, in addition to the fourteen that already had it. And then, in 1971–72, both Wisconsin and North Carolina chose this course of action, albeit in very different ways, so that now 21 states have adopted the single-board approach.

YOU KNOW THE ARGUMENTS for this trend far better than I, for you have lived through them, heard them all, and made your decision: that only by creating an effective governing board for *all* of the public institutions in the state can the goals of effective coordination be achieved: the protection of *diversity,* the promotion of *specialization,* and the creation of *cooperative programs* to take full advantage of the first two.

But you have also been well aware of the warnings of an experienced university administrator, Bruce Dearing, when he states: "Despite the inevitability of coordination to achieve efficiency and effectiveness in higher educational systems, some penalties cannot be avoided . . . when decisions are made in the development or implementation of policy for an entire system of diverse campuses, individual differences may be forgotten or ignored . . . [there is] the suspicion that some campuses are receiving preferential treatment at the expense of less favored units." He goes on to point out the paradox that "campuses with different missions, different stages of development, different sizes and geographical locations, obviously have different needs and priorities. Individual campuses are accordingly quick to protest that any formula developed for a total institution would be inappropriately applied to them, if the consequence would be a *disadvantage.* At the same time, a campus that believes itself to have been treated *less* well than another in some particular (even if the campus cannot offer a plausible argument of comparability) is likely to protest being treated differentially!"

The "you can't win" nature of this contradictory set of positions will not be lost on you. But now, North Carolina—a pioneer four decades ago in the development of the consolidated university—has taken another step in an attempt to achieve the best of both worlds.

I refer, of course, to the existence of the separate institutional boards that have been retained or established within the expanded, consolidated University of North Carolina. This is one of the most important experiments in the governance of higher education to take place in recent years. It will also be one of the most difficult experiments to pull off effectively. It is an experiment filled with both promise and peril. But it is an experiment whose time has come.

LET ME STRESS one point at the outset: The organization of higher education will not determine either the place or the future of the university in society. Whether a state has a single-board system or single-campus institutions; whether it has a strong coordinating agency or a multicampus system; or whether it has some combination of these—none of these factors will, in and of itself, solve the problems of higher education in the 1970s. None of the alternative patterns of organization are better or worse in abstract. They take shape and can be evaluated only in terms of the environment within which they are set. Particular sets of political and social circumstances may dictate a pattern of organization that could not survive in a different context.

The organization of higher education, therefore, is critical in combination with its environment. Organizational form affects the access and power of the different participants in academic governance with respect to specific decisions. It influences the agenda of all institutions of higher education, the manner in which that agenda will be handled, and the very substance of educational plans and programs. Organizational form affects the goals and values that control the life of the universities and colleges—singly and collectively—and will determine to a significant degree the response of these institutions to the more fundamental forces shaping higher education in the 1970s.

WHAT ARE SOME of these fundamental forces? In what sort of social and political environment must you conduct this experiment in governance? What is likely to happen to higher education in the 1970s that will influence you as you attempt to promote the overall needs of the state without sacrificing the unique strengths of the separate campuses? With a grateful acknowledgment to Clark Kerr for some of these predictions, let me suggest but a few of the more dramatic issues and trends of the 1970s—the environment within which you will be forced to operate:

(1) While enrollment *growth* will be slowed in the 1970s, the *variety* of students will increase. As we move toward universal access to higher education, students will be more diverse, with widely differing interests and levels of academic competence. A slower rate of growth of more diverse students will pose much more strain on university systems than the more rapid growth of the 1960s of a relatively homogeneous student population.

(2) The 1970s may also be a period of major educational reform—*must be*, if we are to heed the warnings of President McGill of Columbia:

> The University must some day confront the fact that the requirements of an advanced technology are generating major educational problems. In order to achieve professional status and serious involvement with the affairs of society, education is now more and more difficult and takes longer. . . .
>
> It seems to me that we need to move away from our present circumstances in which we work from educational concepts that were last modified in the twenties: two years of broad gauge education followed by two more years of major study, then a master's degree of dubious validity in any current educational structure, followed by a Ph.D. program which is notably insufficient in science and social science, followed by an indeterminate amount of post-doctoral work.
>
> If we do not begin soon to replace this creaky structure with some kind of career curriculum concept in which it becomes possible for students to exit from the University and enter society at a useful educational level for occupations they choose, to re-enter the University and study again, then move out again, so that education is considered to be a lifelong enterprise—we are in, I think, for continuing and basic trouble.

Governor Robert Scott

And from a different emphasis, Professor T. R. McConnell, one of the most experienced and wisest of observers of the higher education scene, comments:

> Where once public as well as private institutions responded primarily to the articulate, the influential, and the powerful in society, they will now come under great pressure to respond to a wider range of economic interests, to a pluralistic political constituency, and to a more diverse pattern of ethnic and cultural backgrounds and aspirations.
>
> In the course of coming to terms with a changing world, colleges and universities will have to become sensitive to new, or at least different, values from those which have motivated personal behavior and social institutions in a technological, acquisitive, and materialistic society. This sensitivity will demand an inordinately difficult re-orientation on the part of faculties themselves.

(3) But with a slowdown of growth and in the face of the financial stringency facing us all, the changes demanded by different kinds of students will be much more difficult to implement. In the 1960s, one could add on a new field without much strain, but in the 1970s, the addition of a new activity may well mean the phasing-out of an old one. The potential for strain between campus and system trustees and administrators is obvious.

(4) As for the faculty, professors have less consensus about the purposes of academic life. To suggest only two differences in attitude, there is a growing split between those who wish to preserve uniform standards of evaluation and those who favor adjustment of standards to the individual student; between those faculty who regard it as their role only to describe and observe the institutions of society and those who regard it as their mission to change those institutions. But in the face of these differences, collective activity will, in fact, increase during the 1970s, whether in autonomous unions or in traditional senates. The reasons for this and the ways it will take shape will be various and will shift over time, but the issue may be put in the form of several propositions:

If governing boards prove to be a conduit for political pressures rather than a buffer, faculty will organize to oppose such pressures.

If collective bargaining in the public sector comes to be the dominant mode of determining employment conditions, faculty will organize to secure equal benefits for themselves.

If proposals for educational change affect traditional prerogatives, working conditions, prestige, status, and budgetary allocations —as they will—faculty will organize to shape such changes more to their liking.

If students—radical and otherwise—press demands that affect faculty in a manner the faculty deem adverse, they will organize to counter such demands.

(5) The public interest in higher education will become more in-

tense as a larger proportion of youth (and other age groups) from a variety of backgrounds seek admission, and as budgets increase correspondingly. And this interest will lead to a more aggressive exercise of public authority. Logan Wilson suggests that such outer direction "[will] . . . inevitably tend to diminish the inner direction; that is, the control of the college and universities by professors, deans, presidents, and trustees."

(6) And—as Kerr notes—these pressures do not move in the same direction and indeed are frequently contradictory. For example, public interest moves in the direction of *public* control, increased student and faculty activism in the direction of *local* control. But at the same time, there is a loss of consensus concerning goals and methods of education among both faculty and students that make local self-governance more difficult. A slowdown in growth calls for more flexibility in making readjustments in past patterns of operation, but collective faculty activity can mean more rigidity and attachment to the status quo.

THIS, THEN, IS A PICTURE—already familiar to many of you—of higher education in the 1970s, a picture that will shape your agenda as you attempt to make the new University of North Carolina organization work in the interests of all the citizens of this great state, which has been so generous in the past in the distribution of its limited wealth to its colleges and universities.

But what about the specifics of that agenda? What are some of the questions that you will have to confront? What kinds of decisions will have an impact on the respective role of the universitywide administration and governing board and that of the individual campuses? Let me suggest but a few of the more critical issues that are almost certain to dominate your attention in the 1970s: academic planning, admissions, budgeting, collective activity by the faculty, and the response of the governing boards to all of these. My remarks are aimed at multicampus universities across the nation. You will have to judge whether the shoe also fits North Carolina.

First, *academic planning.* To promote specialization, diversity, and cooperation—which we have suggested are the goals of a multicampus university system — long-range academic planning must be intensified in new and different ways. Much planning in the 1960s appears, in retrospect, to have been based on the reactions of universities to external pressures rather than on academic imagination and initiative. Handicapped by inadequate staff, but also by tradition, the resulting statements and proposals often simply consolidate campus plans, rather than afford a fresh and comprehensive look at the needs of the entire university system and state. Respect for campus aims is desirable, but uncritical acceptance of them has understated the potential contribution of the multicampus university. Governing boards and state legislatures have a right to expect more and will undoubtedly demand it.

In developing academic plans on a universitywide basis, no one should expect that there will no longer be interinstitutional competition. There will be competition, and much of it can be healthy and desirable. The important point about the North Carolina experiment is that you have changed the *arena* of that competition—from legislative halls and the Governor's office to the board of governors. By their far-sighted action, the Governor and the legislature have made the judgment that interinstitutional competition should no longer take place in the state capitol, but in the chambers of the board of governors. Their expectation—and it is one that must be fulfilled—is that the change in arena will also promote more effective educational policy and decision-making.

Two specific aspects of academic planning are suggestive of the direction in which multicampus systems must move, appropriate to their own environment. First, far more attention should be given to *systemwide programs* that capitalize upon the strengths and needs of several campuses. Intercampus utilization of faculty and facilities

Eugene Lee, author of this article, talks with John Sanders, director of the Institute of Government, at the Conference on Higher Education.

suggest one direction that should be much more vigorously pursued. Possibilities for faculty interchange between collegiate and university campuses might go far to lower artificial status barriers. For students, much can be said for the present unplanned and unstructured opportunities for intercampus transfer. But an equal case can be made, too, for the development of experimental multicampus programs running from the freshman year through a professional degree, which would draw upon the resources of the entire system and provide new and exciting educational options. Such options need not universally be built upon present patterns in which the collegiate and university campuses offer virtually identical undergraduate programs. Upper-division and graduate campuses, separate or in combination, are one approach that is currently being pursued in Texas and elsewhere. It should be carefully evaluated.

A systemwide approach to academic plans and programs can enrich offerings. But more is required if the multicampus universities are to address the challenge of President McGill that, instead of a curriculum based largely on the artificialities of a nineteenth-century calendar, higher education turn to a "career curriculum" based on the reality of life-long education.

The potential for the multicampus university to meet this challenge is immense. Drawing upon resources denied to a single campus, able to implement programs in a manner beyond the ability of a coordinating agency, the institutional vehicle seems almost ready-made. Internal acceptability, given the conservatism of the professor toward his own affairs, and external support, given the demands of competing public expenditures, will not come easily. Nevertheless, the effort must be made.

Second, *admissions and transfers.* In the 1970s, trends now evident will be increasingly felt. With a slowdown in the construction of new campuses, more attention will be paid to the assignment of students to existing ones. The increasing proliferation of disciplines and subdisciplines will put campuses under increasing pressure to specialize, and machinery will have to be established to distribute students in accordance with their interests and needs. The need to articulate the transfer of students from two-year campuses, whether part of the multicampus system or not, will greatly increase. Demands for new measures of scholastic ability and open-admissions policies will create new pressures relating to the assignment of students to a campus beyond the ability of a single campus to resolve. Finally, policies and practices now utilized to screen undergraduate applicants will have their graduate counterpart. Subject-matter and departmental quotas will become common at both undergraduate and graduate levels.

To meet this changing environment, admissions policies and practices will require substantial change. Increased counseling and guidance at the campuses will be balanced by increased university-wide concern over admissions policy. Information concerning the admissions process and the relationship between admissions standards and student performance will be centrally gathered, analyzed, and distributed. Central staff will provide increasing services to campuses and perhaps even have operating responsibility for structured and deliberate transfer of students between campuses.

This shift in relative responsibility between campus and system will lead to conflicts among administrators, faculty, and students. Balancing the values of student choice, faculty preference, and university-wide needs will impose requirements upon the system administration and governing board. Adequate staff and executive leadership will be in even greater demand. It is not clear to me that the *total* delegation of admissions policies by the board of governors to the campuses will be able to be long continued. You may be forced to recentralize to meet the needs of the young people of North Carolina.

The overriding concern in this shifting environment will be to recognize and support the need for different dimensions of quality—in admissions as in other areas of higher education. The increase in centralized activity must *not* mean either a leveling of traditional academic qualifications, where these are relevant, or the deadening uniformity of standards, where they are not. In 1962, T. R. McConnell considered it ". . . indefensible, even in a coordinated and differentiated system, to assign a student once and for all to a particular institution or a specific curriculum." He warned that higher education must be ". . . flexible enough to enable each student to reach the highest level for which his aptitude and performance qualify him." This essential flexibility for a student to choose and change his own "dimension of quality" will be realized only by giving greater attention to the interinstitutional multicampus context of admissions and transfers.

Third, *budgeting.* Wherever we look, the bases for university budgeting are under attack. In a complex and costly environment, traditional formulas based on extrapolations from past experience are under scrutiny. Budget requests based on input (numbers of students per teacher, support costs per professor, books per student) are no longer accepted by state budget officers and legislative committees. The demand is for information on results and their relationship to expenditures. And in a society increasingly dependent on higher education but increasingly uneasy concerning its activities, who can fault the demand?

The challenge to the multicampus university is to demonstrate its willingness and its capacity to develop new concepts of financial measurement, to take the lead in

sophisticated and sensitive evaluation of its major cost factors, and to develop a basis for budgeting that will command the confidence of both professors and politicians. Unless it can accomplish this, it will neither effectively utilize nor even obtain the funds necessary for its programs.

The challenge to the multicampus university is matched by an equal challenge to the state. What incentive will it provide the university to develop more effective budgeting? Will state fiscal authorities—governors and legislators as well as professional staff — accept that much of the educational process cannot be reduced to formulas, that a high element of subjectivity is required in many budget decisions, and that these decisions can more properly be made by responsible university administrators than state officials? Will they permit a continuation, indeed an increase, in the use of discretionary funds, a flexible approach that has led to developments of distinction in several universities?

There is a dangerous paradox in these twin challenges to the university and to the state. If the university experiments with new, more objective approaches to budgeting, will the state prematurely seize upon these to make its own decisions, denying essential flexibility to the multicampus system? If the university develops more effective measures of need for university-wide purposes, will the state insist that these be applied automatically to each campus and program? A deadening uniformity can too easily replace the essential diversity among campuses that is the hallmark of an effective university system. The development of new techniques of resource allocation at both state and university levels requires both time and highly skilled personnel. It also requires that state and university officials develop mutual confidence and some sense of a division of labor. Neither time, nor competence, nor confidence is in oversupply. Undoubtedly, increased tension between university and state may be the unfortunate but inevitable response to the increasing costs and complexity of higher education.

The real issue is whether this tension can be not only contained but also turned to creative ends. Pressure from state officials can be a positive force for more effective budgeting if accompanied by recognition of the university's fragile nature—that it cannot be measured absolutely and accurately by the tools of cost accounting. For its part, the university must be willing to take a hard look at itself and to re-evaluate the conventional wisdom on which so much of academic budgeting has been based. The multicampus university has a unique contribution to make in meeting this challenge. Whether it will have the opportunity to do so remains in doubt.

Fourth, *faculty*. Diversity, specialization, and cooperation in academic programs and multiple dimensions of quality in admissions will impose new pressures upon both faculty and administration. Different kinds of faculty will be required to meet the widely differing needs of higher education in the 1970s. The single standard of productive scholarship will be too inflexible as a criterion of recruitment and advancement, as indeed there is evidence that it already is. Collegiate, university, and post-degree or continuing-education programs will require quite different talents, different patterns of recruitment, and different systems of compensation.

The creative containment of these differences may prove to be one of the most perplexing aspects of multicampus administration and one of the most important. The multicampus universities cannot develop their full potential if tied to a single inflexible systemwide reward structure, yet separate patterns within a common institution will create serious difficulties.

The issue may be posed as a question: Can a system executive and governing board within the same system fairly effectively and constructively deal differentially with faculty from different kinds of campuses?

IF THE MULTICAMPUS universities are to meet the challenges of the 1970s, the changes we have described must be met by equally significant changes on the part of governing boards. John Corson has suggested that "trustees have allowed the board authority that they were endowed with by law and historical practice to atrophy by concentrating their attention on the financial, physical and public relations problems of the university . . . [they have ignored] the very guts of the university operations." This cannot continue, for as another commentator, Canadian J. A. Corry, has observed, "The universities have moved to the public domain. . . . Not only costs, but content, organization, enrollment, kind and quality of service are public issues. . . . In the language of the lawyers, the universities are now revealed as an 'industry affected by public interest.'"

This is indeed the case, but all too often governing boards have concentrated on managerial detail and failed—as Corson suggests—to deal with many issues of major educational policy. We are not unmindful of the contribution in time, energy, and leadership exhibited by trustees. Nevertheless, much of this effort is misplaced in the face of the demands of the 1970s with which you will have to deal: the relationship between teaching and research, the efficacy of admissions standards, continuing education, the consequences of student mobility, new modes of faculty and student participation in governance.

In the context of the multicampus universities, the most serious need is for the system board to become concerned with systemwide matters—with promoting and evaluating the diversity, specialization, and cooperation in educational

programs among campuses for which the multicampus university is uniquely qualified. Governing boards cannot do so if they continue, as most boards do at present, to devote their major time and attention to details of governance at each of the campuses. And local boards, too, must keep their hands off administrative details. Let your chancellor do his job and hold him accountable.

The demands of the 1970s require a reorientation of board activity. Internally, campus and system executives, who must provide leadership to the faculties and students, will confront serious obstacles in their efforts to bring the multicampus universities into tune with the challenge of the times. Externally, legislators and citizens will require education to understand and support the changes that are necessary. Both internal and external pressures suggest the necessity—contrary to the criticisms of many students and faculty—for a strong governing board: to prod and support the administration, to make difficult decisions of educational policy, to hear appeals from the faculty and students, to interpret the university to a questioning and demanding community, and the community to the university—in short, to represent the public interest in the governance of the multicampus university.

But, and here we come to the heart of the North Carolina experiment, proper exercise of the leadership responsibilities over universitywide matters will require that boards delegate a substantial degree of their present managerial responsibilities. Much of these can properly be assumed by system and campus executives. But other important areas of campus life would benefit by the kind of lay interest and evaluation in which systemwide governing boards now engage, often with little effectiveness. Campus executives need an outside forum against which to test new proposals; faculty and students need regular contact with the public constituencies the university serves. For its part, the governing board requires an evaluation of the progress and problems of the several campuses, which few boards can now successfully accomplish without sacrifice to their critical universitywide responsibilities. And they may properly wish to delegate certain jurisdiction to a campus subject to some independent lay approval.

The excitement of the North Carolina experiment is that you can do just that—*experiment*. The division of authority between the governing board and the campus boards is not frozen in constitution or statute; you have the chance to proceed pragmatically. And importantly, you have the chance to proceed selectively, to try a new administrative approach or board delegation at one or another campus before making a critical organizational decision involving the whole university system. And, as difficult as the task may be, the board of governors has the power —indeed the duty—to consider *recentralization*.

AS YOU MAKE THESE DECISIONS involving the division of labor, I urge you to be bold. There is no question that the board of governors has done so, and there should be no cause for complaint on this score. As a long-range goal, reserve for the universitywide board only those instruments of governance that are essential to insure specialization, diversity, cooperation — but give the local boards power to innovate, to experiment, to manage, and—yes—to make mistakes. But recognize, too, the paradox that strong central leadership is essential to the preservation of diversity. Left to their own devices, campuses too often tend to become more alike, rather than different. Perhaps as an operational rule—if the problem is not important enough to demand the attention of top-level administrators or the trustees themselves, then it should be decentralized. Avoid the complaint of a campus executive in another university system when he states that "the most galling consequence of centralized decision-making as it affects an individual campus is the suspicion that important decisions related to individual campuses are in practice often made, not by the senior officials of a central staff who are qualified and experienced, but by minor clerks and functionaries operating according to little understood formulae, personal bias, or careless haste."

Second, I would warn chancellors and campus trustees against the dangers of pressing for overly formal decentralization, the dangers of trying to routinize that which is essentially subjective in nature. Campuses must understand that demands for formal decentralization in many areas—and salaries may be one such area—can lead to detailed and often inflexible rules and regulations that in the end are far less sensitive to the particular needs of the campus than the admittedly objective approach of system executives. Both university and campus boards must insist upon strong and dedicated leadership from the chief executives of both system and campus, but both boards must understand the difficult situation under which both executives will often find themselves. Growing external pressures seem certain to increase demands upon the system executive to exercise "educational leadership." Yet any response he might make to these demainds will run head on into the often tenuous and fragile exercise of that leadership by the campus executives, who themselves need every bit of substantive and symbolic authority they can muster. A division of labor is essential, but it requires a high degree of sensitivity and flexibility on the part of both executives, a tolerance for ambiguity as to their respective authority, and a considerable measure of personal trust. This is a high order, as the experience of more than one multicampus system makes clear. That it is not impossible is also apparent. What

cannot be demonstrated is a formula for success, good for all systems and all times.

It is equally certain that the central and campus boards must themselves recognize the sensitive and ambiguous nature of their own relationships and the critical importance of personal trust. They must also be extremely sensitive to the relationship between the president and the chancellor. Local boards have it in their power to contribute to or virtually destroy an effective relationship between these two officers. This is not to suggest for a moment that there will not be tension and controversy. This is not only inevitable but desirable. The goal—to repeat a previously stated theme—must be to make this tension a source of creative and constructive activity.

And so to conclude, can the multicampus universities meet the challenge of change? Can they—can you—promote far-reaching innovation and preserve the best of the past; provide first-rate undergraduate collegiate programs and maintain graduate centers of excellence; expand to enroll students with highly diverse needs and avoid the perils of uncontrolled growth; meet the needs of an increasingly complex society and remain free from crippling political involvement and interference?

The answer *can* be yes, for the multicampus university has by its very nature a special potential in its unique ability to promote specialization, diversity, and cooperation. These characteristics can be a critical cutting edge of higher education in the 1970s.

But these advantages will not be realized automatically. One underlying condition must first be met: The multicampus university can meet the challenges of the 1970s only if, in fact as in theory, it can develop as a system. More than in the past, the multicampus university must be greater than the sum of its parts.

This is the charge which the people of North Carolina, through their legislators and governor, have placed upon you. A positive answer will demand dedication, energy, and trust. The world of higher education will be closely watching your response and is betting that once again, as in 1931, North Carolina will prove a pace-setter for the nation. The answer rests in your hands.

Defining Death *(Continued from page 13)*

participating doctors and the medical examiner, Dr. Fatteh. Rather dramatically at the last minute, however, Judge Compton revised the instruction in such a way that the jury was left to choose between the traditional definition and the brain-death concept of death. It read:

> In determining the time of death, as aforesaid, under the facts and circumstances of this case, you may consider the following elements, none of which should necessarily be considered controlling, although you may feel under the evidence, that one or more of these conditions are controlling; the time of the total stoppage of the circulation of the blood; the time of the total cessation of the other vital functions, consequent thereto, such as respiration and pulsation; the time of complete and irreversible loss of all function of the brain; and whether or not the aforesaid functions were spontaneous or were being maintained artifically or mechanically.

The jury deliberated for approximately 47 minutes and then brought in a verdict for the defendants, thereby accepting the concept of brain death as the definition of death.

At this crossing of medical and legal paths, a contrary decision would have been a major setback for the brain-death concept. As it stands, the decision promises to be a landmark. Although it was reported that experts in medical ethics were concerned with some particulars of the case, notably the lack of approval from next of kin, the basic principle of brain death was not challenged;[20] rather the trends already in progress were ratified. In defining death, the near future may well see a dramatic shift in emphasis from the heart to the brain.

20. "When Does Life Cease?" *N. Y. Times*, June 4, 1972, at 3.

North Carolina's Water Pollution Control Program

Milton S. Heath, Jr.

This is the second in a three-part series of articles concerning North Carolina's state water pollution control program. Part one appeared in the October issue of POPULAR GOVERNMENT.

Water Pollution Control in Context

One useful way of viewing water pollution control is in the broader context of closely related programs. It will serve to begin our review of the organizational history of the North Carolina water pollution control program.

Today North Carolina has a combined state water and air resources agency, governed by a single policy board with unified jurisdiction over water quantity and water quality, as well as over air quality. This arrangement has evolved slowly over the past quarter-century, starting from a situation in which water quality was the exclusive concern of the State Board of Health, air quality was not treated as a concern of state government, and water quantity programs were housed in the Department of Conservation and Development. (See "North Carolina Water Resource Organization" on page 24.) From this beginning, two parallel lines of evolution have occurred. Water pollution control was gradually moved from the Health Department to an independent status; surface and ground water studies and water-use policy were gradually removed from the Department of Conservation and Development; and, thereafter, both the water quantity and water quality functions were gradually merged, first in a single department with two policy boards and finally under one unified board. This last step, with the addition of air pollution control authority, was another achievement of the 1967 water legislation program. It brought about the creation of the Department of Water and Air Resources and the Board of Water and Air Resources.

The first landmark in this evolution was the creation within the State Board of Health of a semi-autonomous board, the State Stream Sanitation Committee, to manage the water pollution control program. The next important step in the chronology was the creation in 1955 of a water-policy study group, the State Board of Water Commissioners, with limited authority to control water use in local water supply emergencies. During the late 1950s the water commissioners led by General James Townsend, an early backer of water law reform, patiently studied water law and water resources organization. In 1959 the old board was transformed into a new one, the State Board of Water Resources. This board was originally conceived as a single, coordinating board for all state water programs and was to be staffed by

a single Water Resources Department.

Nominally, a single department was created by the 1959 Assembly; but instead of fashioning a unitary water board, the 1959 legislation created one department with two policy heads—the State Board of Water Resources, to carry forward the water-use policy and development functions of the old water board, and the Stream Sanitation Committee, to continue as master of the state's water pollution control program. General Townsend moved from the old board to head the new Board of Water Resources, while former Senator J. Vivian Whitfield, the father of the Stream Sanitation Law, remained head of the Stream Sanitation Committee. Through the early 1960s the fledgling department slowly gathered its forces, strengthening and expanding the stream sanitation program, building a ground-water staff, and initiating a planning program.

From this long and slow evolution finally emerged, in 1967, the first substantial water policy legislation after a decade of study and appraisal. It unified the direction of the Water Resources Department under a single board with responsibility for water and air resources. Separate acts granted additional powers to the Department, including the capacity-use-areas law, a well-construction law, and a dam safety law.

The 1967 legislation gave North Carolina a firm statutory basis both for a unified program of coordination and control of water quality and quantity and for coordination of water and air pollution control. Soon after enactment of these laws General Townsend retired from the old Board of Water Resources, and Senator Whitfield was appointed chairman of the new Board of Water and Air Resources.

The most recent organizational development, in 1971, was the transfer of the Department of Water and Air Resources to a new Department of Natural and Economic Resources. This move combined Water and Air Resources with the former Department of Conservation and Development, the Wildlife Resources Commission, the State Soil and Water Conservation Committee, and the Department of Local Affairs. This change was a product of the recent state constitutional amendment requiring that more than 100 state departments and agencies be reduced to not more than 25 basic departments by 1975.

For administrative purposes the water and air program has been designated as the Office of Water and Air Resources.

Water Pollution Control in Focus

Looking more closely at the water quality program, the following dates trace its modern history:

1951: Stream Sanitation Act.

1953: Original stream classification and standards adopted.

1957: Clarification of jurisdictional lines between Stream Sanitation Commission and State Board of Health.

1959: First major reorganization—transfer of stream sanitation program to new Department of Water Resources.

1963: Completion of original river basin classifications.

1967: Second major reorganization—creation of a single Board (and Department) of Water and Air Resources. Also, enactment of capacity use areas and well-construction laws.

1968: First general revision of standards and classifications.

1969: Enactment of research-scientific classification law and mandatory water-sewer plant operator certification.

1970: Second major review of standards and classifications.

1971: Third major reorganization—transfer of all water and air programs to the new Department of Natural and Economic Resources.

Several points emerge from this resumé. First, the water pollution control agency has been kept perennially busy absorbing the impact of a series of reorganizations—moving ever closer to an integrated water quality and quantity management unit and eventually absorbing air quality management as well. Second, of late, after a very slow start, the agency has been involved in almost continuous revision of its standards and classifications. Third, again after a slow start, the Department of Water and Air Resources has recently moved into an era of notably active and effective legislative development.

The North Carolina pollution control program has been dominated during its first twenty years by two forceful and able leaders, J. Vivian Whitfield and Earle Hubbard.

Whitfield became interested in water pollution control in the late 1940s, after a varied public service career including several terms as a state senator and representative and eight years in the U.S. Foreign Service. Whitfield was a principal legislative backer of the 1951 State Stream Sanitation Act and became chairman of the Stream Sanitation Committee in 1956. He served continuously as Stream Sanitation chairman or as chairman of the successor Board of Water and Air Resources until his death in 1968.

Whitfield was a vigorous leader whose policy views, as a practical matter, were the law of water quality control in North Carolina for over 15 years. His force of expression, combined with the tenacity and filibustering capacity of a typical southern politician of the old school, made him a formidable adversary. For example, in 1959 he overcame the preferences of the Governor and the State Commission on Reorganization and pre-

served his Stream Sanitation Commission from a proposed six-year statutory fade-out. Though the Commission was abolished and merged with the Water Board eight years after the 1959 reorganization, this came about on Whitfield's terms and in his own good time. More important, Whitfield served as an effective buffer for his pollution control staff in dealing with industrial and municipal polluters.

Earle Hubbard was named the first staff director for the new Stream Sanitation Commission in 1951 and has headed the pollution control staff work since. Hubbard attracted an able corps of division heads and held them by his leadership for the better part of twenty years. He developed a reputation for running one of the stronger programs in the service of state government in North Carolina.

A word, finally, about General James R. Townsend, who chaired the State Board of Water Commissioners from 1956 to 1959 and the State Board of Water Resources from 1959 to 1967. While Whitfield and Hubbard masterminded the stream sanitation program, it was Townsend—a retired brigadier general and premier city manager at Greensboro for a decade—who in the long run shaped the course of water resources policy for North Carolina. From the beginning Townsend saw clearly the need for a marriage of water quality and water quantity management, and he pursued this end diligently through thick and thin. (The mixture was sometimes quite thin. Whitfield, like many strong-willed individualists, could be a trial to nerve and sinew, working at close range, and Townsend worked closely with him for a decade.) Townsend also saw with equal clarity both the necessity for an evolving policy of water-use management and the difficulty of attaining it in an economically conservative and relatively poor state.

Clearly North Carolina has been blessed with extraordinary leadership in its program of water quality and quantity management. Townsend and Whitfield left their successor, S. Vernon Stevens, Jr., a solid program foundation.

Program Philosophy

During the long unbroken tenure of Whitfield from the mid-1950s until 1968, the philosophy of the North Carolina program was explicitly and consistently a voluntary approach. Some leaders in his position might have hesitated to proclaim a preference for staying out of court, in fear that this might be interpreted by the public or polluters as a policy of being soft on polluters. But not Whitfield. He preferred to make a virtue out of what he plainly regarded as a necessity. Whitfield made no bones about his preference—not merely to pursue a *general* policy of voluntarism but also to stay out of courts at all costs. The following remarks made at a 1962 classification hearing are typical of statements uttered hundreds of times by Whitfield at hearings and meetings.

> There is nothing spectacular about cleaning up streams, but it is urgent. We take pride in the fact that North Carolina now is up among the top. Up among the top in putting its streams in order. We feel proud of that record. We feel proud of the fact that the State Stream Sanitation Committee of North Carolina has never had to hail anybody into court. People can hardly believe that in other states. They say, how in

North Carolina Water Resource Organization

Pre-1950

(1) Department of Conservation and Development, surface and and ground water studies
(2) State Board of Health (SBH), protection of domestic supply
(3) State Ports Authority
(4) Fish and game agencies

1950–55

(1) State Stream Sanitation Commission (SSSC) created (1951) within SBH
(2) State Board of Water Commissioners, long-term study commission created in 1955

1956–60

(1) Clarification of water pollution control roles of SBH and SSSC (1957)
(2) General reorganization, creation of State Department of Water Resources with two policy boards—SSSC and Board of Water Resources (BWR)
(3) Small watershed enabling laws (1959)

1961–66

Creation of North Carolina Seashore Commission (1963)

1967

Creation of unified Department of Water and Air Resources governed by one Board of Water and Air Resources with addition of air pollution function and elimination of dual policy boards

1971

(1) Return of the water and air resources programs (along with related activities, such as fish and game programs) to an enlarged Conservation and Development Department—renamed the "Department of Environmental and Economic Resources."

Future Prospects

Creation of a unified environmental management program and agency?

the world can you do it? Well, we tell them that the longest way to clean up streams of any state is through a courthouse door. You can't get around the conference table with people and treat them fairly, give them time, and help them, without them going along with you. One of the great problems of all state agencies is trying to swing their weight around—trying to be big shots. The little shot in the world is a fellow who tries to make out like he is a big shot. You can't fool people. Oh, I know it is a great temptation when you have power to try to use it, but the very fact that you have power means that you should be doubly patient because you can always exert that power if necessary. You can lead people much more easily than you can drive them. Just remember that. So we come to you today not as a punitive committee, not as somebody trying to make you do this, or make you do that. Instead, we have come to advise you. We are doctors to sick streams, and we know, you who have these problems whether you represent a municipality or an industry, that you are going to cooperate with us. That is why we have made the record that we have because everybody has been willing to cooperate with us.[1]

Since Whitfield's death in 1968 there has been some modification of the Water Board's litigation policy. The agency has authorized its staff to take polluters into court more than once—for example, during the summer of 1970 in pollution cases that resulted from pesticide misuse. A more balanced approach toward judicial enforcement, as one of the available weapons to implement a pollution control policy, appears to be emerging.

This new policy direction has gained momentum since the reorganization of the board under the 1971 anti-conflict-of-interest legislation. Prodded by its new members, notably conservationist James Wallace, the board has adopted an avowedly "get tough" attitude on enforcement against lagging violators.

1. N.C. Stream Sanitation Committee, Public Hearing Regarding Proposed Classification of the Waters of the New River Basin 10 (1962).

BASIC HIGHWAY PATROL SCHOOL 52nd GRADUATING CLASS

In October, the Highway Patrol School graduated 32 new State Highway Patrol Troopers. The men qualified to become Troopers by successfully completing an intensive, 14-week training course at the Institute of Government.
And Governor Scott was among the speakers who congratulated the Troopers and their families.

On Maintaining the Integrity of the Court System

Jack A. Thompson

WE ARE ENTERING a new era in North Carolina, an era of new public interest and awareness in the court system of this state. As a result of this new awareness, people are beginning to demand and expect that officials run the court system fairly, impartially, and honestly.

This demand for impartial, honest, and fair administration of justice has been long overdue. It is one in which you as clerks of superior court should assume a leadership position so that the goals are accomplished.

I am here to talk about corruption in the court system and, more specifically, corruption that originates and is carried out in the offices of clerks of superior court.

When you mention corruption, most people immediately conceive of a bribery situation in which cash changes hands in return for favors. But this is only one kind of corruption; its forms and techniques are many.

Why should we be so concerned about corruption in our court system and in government generally? Corruption in the most minor matters and at the lowest levels of government has a contagious effect on our whole society. It tends to grow into other areas and infect almost everyone and everything in the system in which it exists.

It seemingly has a "settling influence." By this I mean that if it exists long enough and is practiced by enough people, it is eventually rationalized by members in the system as the best way.

The motives or over-all picture of the intent of corruption, especially in our court system, should be seriously considered. The motive that I have observed is the use of corruption to gain power over governmental functions and to enable a select few people to manipulate this power for their own personal gain. The method is to dispense favors to large numbers of individuals to create a following and then use this following to achieve block voting power. If you can affect the outcome of elections, you can control the government in a community. As a result, "people power"—or democracy—is no longer the system, but in effect a dictatorship or machine is created.

Individuals can be involved in effecting this result without realizing it. An improper act can be rationalized by saying that the offending official was merely trying to help people; but this is an excuse, an attempt to justify the unjustifiable.

The results can be disastrous. One result is the eventual control of the court system by a few influence-peddling individuals who can affect the disposition of criminal cases.

It can mean the eventual control of law enforcement to protect a few individuals in a community.

It can mean an accumulation of illicit wealth and power by a few individuals.

In short, and very bluntly phrased, it means prostituting the "justice" in our system of justice.

These results are often up to you. The reason is that you and your employees are in positions of trust in the court system. The court system and all laws relating to the court system are premised upon the idea that the clerk of superior court and employees of the clerk will fairly, honestly, and impartially perform the duties of their office. Corruption in the court system cannot exist without your knowledge and assistance to one extent or another.

Corruption can occur by seemingly minor acts; but if these acts are repeated and allowed to flour-

The author is solicitor of the Twelfth Solicitorial District, with headquarters in Fayetteville. This article is adapted from his address to the recent convention of North Carolina Clerks of Superior Court in Charlotte.

ish, they can corrupt a whole county and seriously affect the whole state.

MY COMMENTS will be concerned mainly with the criminal justice system, because this is my main area of experience and is obviously the primary area of potential abuse in our court system.

Forms of corruption and misconduct are as numerous and varied as the individuals who devise them. My comments to you about particular forms of abuse will not cover all forms, only the most recurring ones that I have observed in the courts of this state.

I would like you to remember throughout this discussion that our system of justice is designed around a "three-party transaction"; that is, in every criminal case the judge, the solicitor, and the defendant (or if represented, his attorney) must be a party to and know all aspects of every case. If you remove any one party when dealing with a criminal case, abuse is likely—abuse that may be detrimental to the defendant or, more likely, detrimental to the State of North Carolina.

In Cumberland County one of my first investigations involved a magistrate. Magistrates are nominated by the clerk of superior court and appointed by the senior resident superior court judge—so in effect the magistrate is hired by the clerk.

The corruption practiced in that case worked this way. When arrested for a minor offense, the defendant, or any of his friends who had some connection with the personnel in the clerk's office, would make contact. Then the shuck would disappear from the pending files for a period of time, usually about two months. If there were no inquiries about what happened to the case, the case would be taken to the magistrate by the contacted official. No probable cause would be entered, and the file would be placed in the closed files. All this was occurring without the knowledge of the district court judges, the solicitor, or the prosecuting witnesses.

I have touched on "concealed continuances," which are a form of corruption in and of themselves. District court calendars are the solicitor's responsibility; but, as a matter of administration, they are set automatically by the officer or the magistrate whenever the warrant or citation is issued. The printed docket is typed several days before the trial date by listing the shucks placed in a cubicle marked for that particular date. Concealed continuances operate as follows: The offending official or officials in the clerk's office have the shuck removed from the pending files and concealed in someone's desk. Since the case is not listed for trial, the solicitor will not know that the case is missing. If the officer does not keep an account of his many cases, he will not remember or notice that a case does not come up on a particular day for trial. If no one later inquires about the case, the case can possibly go uncalendared indefinitely. If someone begins looking for the case file, the case can suddenly be discovered misfiled and returned to the pending court files. If the official wants the case set for trial after it has been concealed, he fills in the continuances section and then sets it for trial on a particular future date.

Another form of corruption and misconduct occurs when judgments in criminal cases are entered without the knowledge of the solicitor, an essential party to every criminal case. A judge is approached by a defendant or a friend of the defendant. A certain disposition is requested, most commonly a prayer for judgment continued. The judge calls the clerk or an assistant clerk and authorizes a certain judgment to be entered. This practice could be eliminated if the clerk's office would, as a matter of course, notify the solicitor or insure that he knows of every judgment that is entered in a criminal case.

Often once a clerk or an assistant clerk as authorized to sign a judge's name, he develops his own "court system" and signs judgments without the judge's consent or knowledge. Especially in a heavy-volume area, hundreds of cases may be processed this way without detection. If a clerk does this, he commits forgery of court records, a felony punishable by ten years in prison.

"Illegal practice of law" is another widespread corruption, and I will cite several examples of this:

A nephew, cousin, or friend contacts you and says that he has a speeding ticket and needs prayer for judgment continued. You pull the shuck and go to the district court judge who will hear the case, and you tell him what a nice person this defendant is and that he needs a favor. The defendant comes on his court date, pleads guilty, and the court enters a prayer for judgment continued. You have violated the law by acting as legal counsel or representing another individual in the court system. More important, you have, intentionally or not, left with the defendant an impression—right or wrong—that you accomplished a "fix" for him.

The same result can be achieved by bringing your friends to the solicitor's office and representing to the solicitor all the great attributes of this defendant. You are illegally practicing law; and, if the solicitor acquiesces in this, he is aiding and abetting the illegal practice of law.

Many of you may think that, because of your employment, special privileges should be accorded you or your friends. But like Caesar's wife, you must be above reproach. You must, because of your position, maintain a more

restricted position than the public in general and should not, for any reason, give in to extending favors. You must convince the public and your friends that no special favors exist for anyone.

Related to this illegal practice of law is the practice, easily adopted, of contacting clerks in other jurisdictions on behalf of a defendant in your jurisdiction and requesting either a continuance or some other special favor. This is, of course, wrong and again is the illegal practice of law. It also leaves the defendant with the notion that your assistance constitutes some special favor.

Another corrupt tactic is used when you leave the impression that you have fixed a case or gained the individual a special favor when in fact nothing wrong was done. I have seen this particularly in waivable offenses. For example, a person comes to you at home one night and tells you a sad tale that he was charged with speeding 45 mph in a 35 mph zone. You tell him, with a wink and all-knowing smile, "Give me $25 and the pink copy of the citation and I will take care of the case for you." You take the $25 and the pink copy of the citation to the office the next day, complete the waiver form on the back and pay the ticket. Though what you did was technically legal, you left the defendant with the impression that you had done him a favor. To me this is as bad as an intentional fix because damage is done to the reputation of the criminal justice system.

A drastic measure that has been practiced is the destruction of warrants not yet indexed. Then the entry on the warrant issue register is removed to eliminate any proof of the warrant's existence. This is a specific crime subject to punishment. Some of you may think publicly or privately, "If the judge or my employer requests me to carry out one of the mentioned acts, I am helpless and have no choice but to follow orders." I say this to you now: If you do so, you become an accomplice or an aider and abettor to this act; and, if criminal charges are brought or a removal proceeding is instituted, you cannot hide behind this excuse or rationalization.

HOW IS CORRUPTION allowed to develop and grow in a community? Apathy is the number-one culprit — apathy by the public to the improprieties that happen in their court system and apathy by court officials about what is transpiring. What can you do when you know that this is going on? You can give this information to the proper officials, and usually this can be done confidentially. If requested to participate in improper practices, you must refuse; if you do not, you are as guilty as the person requesting you.

What can you do to improve our system? Make the public aware by all means possible how the system of justice operates and that it must be a fair and impartial system.

Have conferences with your solicitor and district and superior court judges and establish written rules of practice so that you do not fall into either the improper conduct practices I have mentioned or similar practices. To prevent any misconceptions, make the public aware of these written procedures.

And, foremost, insure that you never leave the impression that you have conducted yourself in any way other than properly.

To close, let me give you a rule to live by—your oath of office—which you should read often:

> I do swear that by myself or any other person, I neither have given nor will I give to any person whatsoever, any gratuity, fee, gift or reward in consideration of my election or appointment to the office of the Clerk of Superior Court, nor have I sold, or offered to sell, nor will I sell or offer to sell my interest in the said office;
>
> I also solemnly swear that I do not, directly or indirectly, hold any other lucrative office in the State;
>
> And I do swear that I will execute the office of the Clerk of Superior Court without prejudice, favor, affection or partiality to the best of my skill and ability so help me, God."

a thumbnail look at no-fault insurance

Excerpts from an address by Elmer R. Oettinger before the North Carolina's Boys' State, June, 1972.

No-fault automobile insurance is an insurance that insures the owner of an automobile himself rather than the other people or vehicles he injures, as under the present liability insurance system. Under no-fault insurance, claims are paid without regard to fault. This means that, in some types of no-fault programs, the driver loses his right to sue for personal injury or for property damage either completely or up to a certain amount, called a threshold.

This definition suggests some of the claimed benefits of no-fault over the present system. These benefits do not derive from the alleged newness of no-fault insurance, except as applied to automobile insurance. Actually, most insurance is already first person—that is, it insures the person who takes it out. Life, health, fire, even the collision part of automobile insurance are first-person insurances. And the right to sue in court is not an inalienable, unbreached right, as some no-fault opponents claim. Workmen's Compensation, which has been operating successfully in the country for more than three decades as a means of settling industrial accidents, is roughly equivalent to "no-fault." Systems of voluntary or compulsory arbitration exist in various states and replace the right to take certain matters to court.

THE REAL BENEFITS of no-fault will occur if one or more of the following four things result:

1) *A redistribution of benefits making settlement of claims and allocation of insurance money fairer.* At present under the fault system, the slightest negligence on the part of any party in an automobile accident may result in no recovery. Small claims are sometimes overcompensated while large claims are terribly undercompensated. A report of the Department of Transportation indicates that on the average only 42 per cent of actual loss is compensated under auto insurance policies. Many motorists who have accidents get nothing. Attorney's fees, long legal delays in settlement, and court costs take huge chunks from insurance money. So do the high administrative costs of a system in which adjustors, underwriters, and agents all have involved, integral roles in the insurance process.

2) *A reduction of rates, evidenced by lower premiums to the insured.* In Massachusetts, the first state to pass a no-fault system and one of three states to have a system that modifies the right to sue, rates have dropped substantially since no-fault began in January 1971. However, there is no guarantee that North Carolina's experience would be the same as Massachusetts'. Rates already are much lower in North Carolina, the state is not so litigous, recoveries are not so large, and the basic highway system and lower traffic density cause fewer problems.

3) *A reduction in court cases alleviating court congestion in the docket of civil cases.* Once again, however, congestion in civil cases in North Carolina appears to be much less than in Massachusetts and most urban states. Although there may well be room for substantial improvement in relieving civil dockets, this remains a moot question.

4) *A system of faster, surer payments to accident victims.* "No-fault" plans provide for payment of reparation benefits promptly by lump sum or installments.

WHY NOT STICK WITH THE PRESENT SYSTEM? The American Trial Lawyers Association, which opposes no-fault, insists that reductions of coverages and benefits under no-fault would more than negate any supposed benefits. Yet most no-fault plans now take into account the various types of coverages and try to provide them —either through or in addition to the first-person coverages. Trial lawyers have a clear interest in the present system. After all, under no-fault, the demand for their services in insurance cases involving auto insurance presumably could be reduced. This has happened in Massachusetts. On the other hand, many fields other than automobile liability suits are available to capable attorneys. For example, the consumer movement has opened legal opportunities in products liability. New questions are emerging in tax and labor areas. Cable television has legal problems that need answers. Due to recent Supreme Court decisions, more defendents are entitled to representation by attorneys than ever before.

INSURANCE COMPANIES, at first opposed to no-fault, now in general support some version—the one most attuned to their particular kind of company and potential benefits. Some adjustors are not happy with the thought of change; presumably the need for adjustors would be diminished under a no-fault system because usually the determination of fault would not matter.

The Nixon administration has come out strongly for state passage of some form of statutory no-fault —almost any form. Senators Philip Hart of Michigan and Warren Magnuson of Washington introduced legislation that would give the federal government more power in setting up a system of no-fault with federal standards (S945). Although the Senate Commerce Committee approved such legislation, the Senate recently sent it back to Committee by a 49–46 vote. At present four to ten states have in effect some version of no-fault, depending on definition. They are Massachusetts, Florida, Connecticut, New Jersey, Delaware, Oregon, Minnesota, Maryland, North Dakota and South Dakota. Puerto Rico and Saskatchewan have working plans. Many, including Department of Transportation officials, do not count the Oregon and South Dakota type of laws, which add first-person insurance to the present system without limitation of tort liability.

Inevitably, other major questions must be decided in any approach to no-fault legislation: whether first-person automobile insurance should be the primary insurance or secondary to health insurance; whether there should be subrogation among insurers; whether the limits of tort liability should be modified, abolished, or kept; whether no-fault should apply to property damage as well as bodily injury. These questions are resolved differently in various no-fault plans. But they are important to the main question of "no fault" itself, especially modification of the "fault" system as an answer to the admittedly defective present liability system of automobile insurance. Congress will act, report federal officials, if too few states enact no-fault legislation.

A majority of states will see no-fault legislation debated this fall and winter. Certainly North Carolina will. The central issue for states may become not whether to adopt no-fault but what kind of no-fault to adopt. The direction is clear. No-fault, says the President, is an idea whose time has come.

HARM CAUSED BY VARIOUS CRIMES

Often, in order to determine the relative importance of crime problems, some measure of the seriousness of crimes is necessary. One method of ascertaining the seriousness of a crime is to measure the harm, both physical injury and property loss, that result from the crime.

This report represents an example of the use of this method and uses information on crimes committed in Charlotte and Mecklenburg County, North Carolina, during 1971.

For this report, the injury, property loss, and intimidation caused by crimes as well as the number of crimes were used to indicate the total seriousness of several types of crimes.

Tables I and II and the accompanying Figures 1 and 2 represent the heart of the report. They present index scores that reflect total physical injury and total seriousness for each of the crimes. The indexes are derived by scoring each criminal incident being considered according to the following scheme:[1]

Element of physical injury, property loss, and intimidation	Score Value
Victim killed	26
Victim hospitalized	7
Victim treated and discharged	4
Victim suffered minor injury	1
Victim subjected to sexual intercourse	10
Victim subjected to intimidation by weapon in course of rape	2
Victim intimidated in course of offense other than rape, assault, or homicide	
By physical force or verbal threat only	2
By weapon	4
Victim suffers property loss of:	
Under $10	1
$10 to $250	2
$251 to $2,000	3
$2,001 to $9,000	4
$9,001 to $30,000	5
$30,001 to $80,000	6
Over $80,000	7
Victim suffers temporary loss of motor vehicle (recovered undamaged)	2
Premises entered forcibly	1

In crimes against persons (homicide, rape, assault, and robbery) a distinction is made between offenses in which some other relationship has existed between the victim and assailant (labeled as "nonstranger" on the tables) and offenses in which the assailant and the victim are strangers (labeled as "stranger" on the tables).

Table I includes the numbers of reported offenses of various kinds, the injury index score for each of those crimes, and the total seriousness index score for each of the crimes.

Figure 1 presents the total seriousness index scores for each crime.

Table II tabulates the levels of injury produced by each of the crimes against persons.

Figure 2 presents the total seriousness index scores for crimes against persons, distinguishing particularly between crimes in which the victim and assailant are known to each other and those in which the victim and assailant are strangers.

Noteworthy Features

On the seriousness scale, property crimes are reflected as far more serious than crimes against persons. Breakings and entering and theft (or larceny) each rank over twice as serious as assault, the most serious of the crimes against persons. (Table I; Figure 1.)

Among the crimes against persons, assaults are the most serious,

1. From WOLFGANG & SELLIN, THE MEASUREMENT OF DELINQUENCY (1964).

considerably ahead of robbery, the next most serious major category of crimes against persons. Robbery, in turn, ranks far more serious than either homicide or rape. (Table I: Figure 1.)

Assaults against people who are not strangers to their assailants accounted for almost half of the seriousness of crimes against the person. (Figure 1.)

In all categories of crimes against persons except robberies, nonstranger crimes accounted for a majority of the offenses. Even in robbery, many of the offenses were committed by an assailant who was no stranger to his victim. (Figure 1.)

Assaults against people who were not strangers to their assailants accounted for an overwhelming majority of injuries at every level of seriousness. (Table II.)

Among crimes against the persons who were strangers to their assailants, robberies accounted for over half the total seriousness—more serious than homicide, rape, and assault. (Figure 2.)

Although breaking and entering produced a greater total property loss than theft, fewer separate incidents of breaking and entering occurred. (Table I.)

Table I

Harm From and Seriousness of Reported Crimes against Persons and Property, Charlotte and Mecklenburg County—1971

Name of Offense	*Number Reported*	*Physical Injury Index*	*Intimidation by Weapon*	*Value of Property Loss*			*Total Seriousness Index*
				Value Taken	*Value Recovered*	*Total Loss*	
Stranger-to-stranger homicide	19	494					494
Non-stranger homicide	45	1,170					1,170
Total Homicide	64	1,664					1,664
Stranger-to-stranger rape	51	38	9				578
Nonstranger rape	65	53	6				715
Total Rape	116	91	15				1,293
Stranger-to-stranger assault	3,619	951					1,293
Nonstranger assault	447	7,294					7,294
Total Assault	4,066	8,245					8,245
Stranger-to-stranger robbery	283	239	127	$ 41,695	$ 13,117	$ 28,578	1,620
Robbery of business or institution	233	64	226	114,851	5,835	109,016	679
Nonstranger robbery	130	107	31	19,154	6,025	13,129	1,472
Total Robbery	646	410	394	175,700	24,977	150,723	3,771
Residential break and enter	3,407			806,342	50,723	755,619	10,800
Business break and enter	2,796			791,928	126,059	665,869	8,753
Total Break and Enter	6,233			1,598,270	176,782	1,421,488	19,553
Shoplift	1,221			38,126	?	?	1,771
Auto theft/joyride	1,250			1,706,053	1,654,871	51,182	2,600
Other theft	7,457			1,166,180	?	?	16,406
Total Larceny	9,928			$2,910,359	$1,860,092	$1,050,267	20,777

Table II

Levels of Injury Resulting from Crimes against Persons, Charlotte and Mecklenburg County—1971

Name of Offense	*Deaths*	*Injuries Resulting in Hospitalization*	*Injuries Resulting in Treatment and Release*	*Minor Injuries*	*Restraint or Intimidation*
Stranger-to-stranger homicide	19				
Nonstranger homicide	45				
Total Homicide	64				
Stranger-to-stranger rape				38	13
Non-stranger rape			4	37	24
Total Rape			4	75	37
Stranger-to-stranger assault		66	85	149	147
Nonstranger assault		442	566	1936	675
Total Assault		508	651	2085	822
Stranger-to-stranger robbery		11	18	90	164
Robbery of business or institution		4	5	16	208
Nonstranger robbery		2	6	69	53
Total Robbery	—	17	29	175	425
TOTALS	64	525	684	2325	1248

Preparation of the Report

The Wolfgang-Sellin index of delinquency was used in this report. Based upon the obvious fact that some criminal incidents are more serious than others, this index provides a method for assessing the seriousness of crime. A scoring chart for the index was derived by experimenting with a number of different groups of people in the Philadelphia area and subsequently confirmed in similar experiments in other places. This scoring chart, laid out in the first section of this report, is the means for providing an answer to the question "How much more serious is one crime than another?"

Information on the relationship between assailant and victim, on the use of weapons in offenses, and on the level of physical injury resulting from crimes against persons was obtained by examining every report of a crime against a person filed with the 1971 offense

Figure 1
SERIOUSNESS OF CRIMES AGAINST
PERSON AND PROPERTY
CHARLOTTE AND MECKLENBURG COUNTY—1971

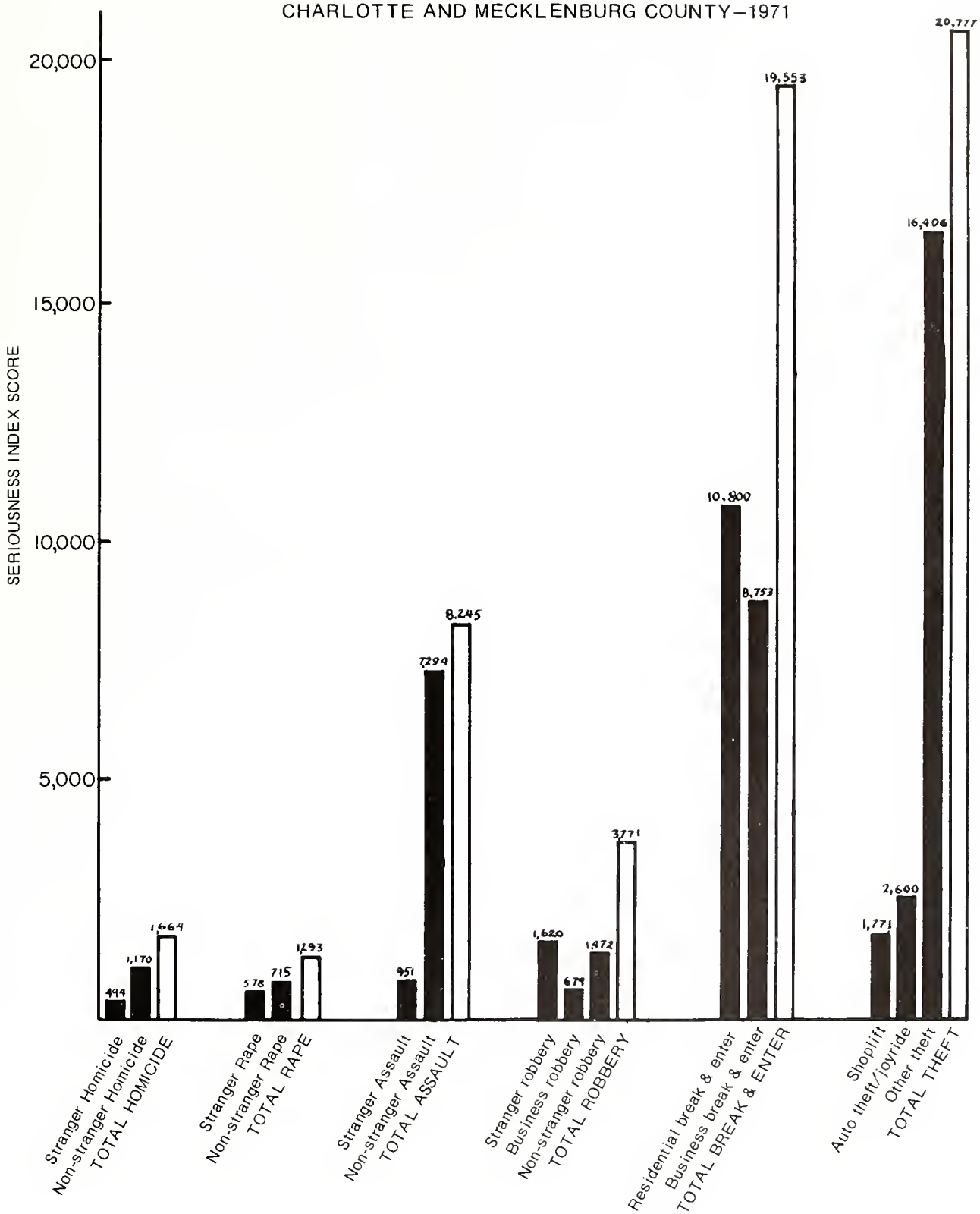
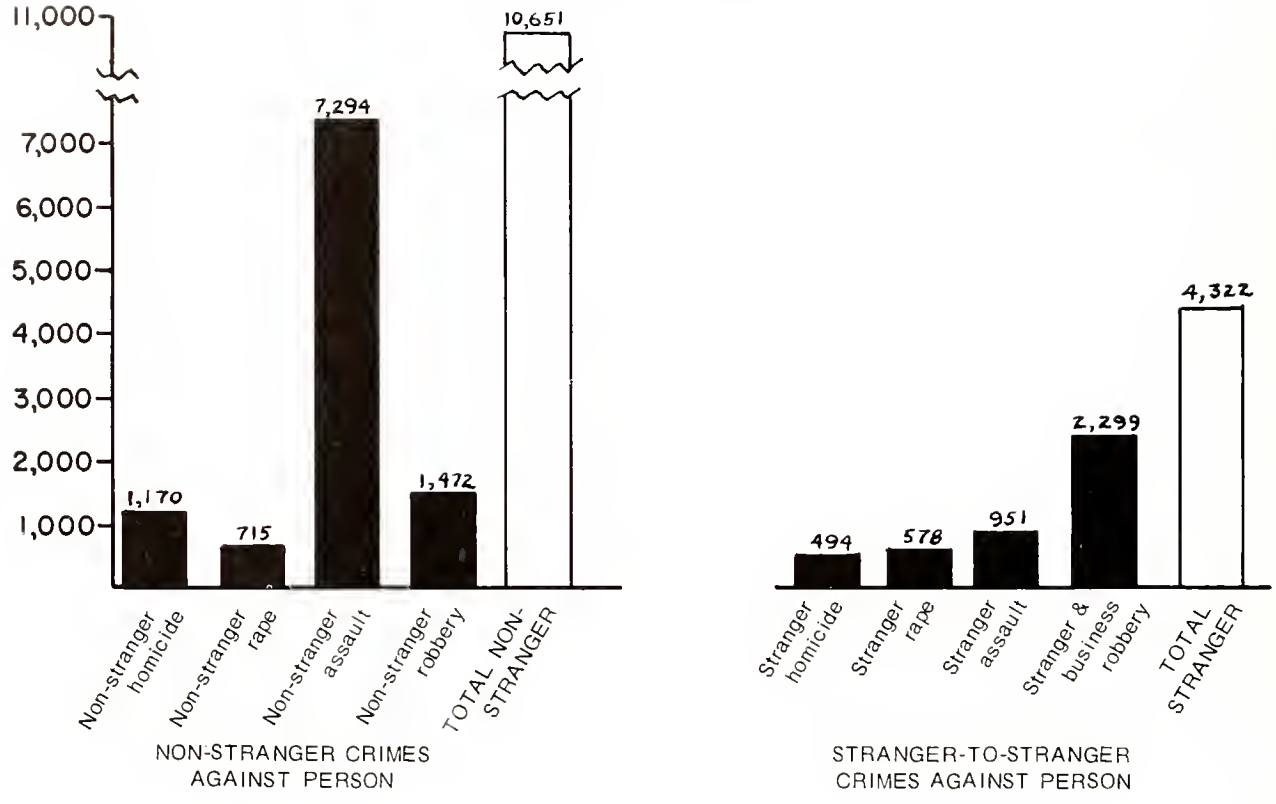


Figure 2
RELATIVE SERIOUSNESS OF CRIMES
AGAINST PERSONS



reports of the Charlotte and Mecklenburg Police Department. Known relationships between victims and assailants were extrapolated to those incidents in which the relationship was unknown or unclear.

The information on the total value of property taken in various categories of offenses was obtained from a computer print-out specially prepared by the police department's data processing division. These results were then extrapolated to offenses reported in the county.

Information on the amount of property loss resulting from individual incidents was obtained from a sample of a month's offense reports from the Charlotte Police Department in each of the categories. The results of this sample were then extrapolated to all of the offenses against property in each of the categories.

Limitations of This Report

This report represents only *one* possible way of approaching the relative seriousness of various crimes. Although the weighing procedure used is not arbitrary, it is not a substitute for human judgment. It attempts to probe the principal elements of the "crime problem."

In some cases, elements of some offenses may have been omitted because of the methods used to tally these incidents. (For example, a theft that occurs in conjunction with a rape would not have been scored.) Experience elsewhere[2] suggests that such oversights have little effect on the total seriousness score of a category of ocenses.

This assessment of relative seriousness is based on *reported* crimes only. Since the actual seriousness of crimes is of course tied to the actual occurrence of crimes, seriousness should be underestimated somewhat since some crimes go unreported.

This method for rating the seriousness of criminal incidents may fail to account adequately for some of the intangible harm done by crime, such as the fear it creates for citizens.

This report does not attempt to rate the seriousness of some types of crimes—for example, fraud, vandalism, sale and use of drugs, gambling, and morals offenses.

2 See St Louis Police Department, *The Use of an Incident Seriousness Index in the Deployment of Police Patrol Manpower* (January 1972).

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