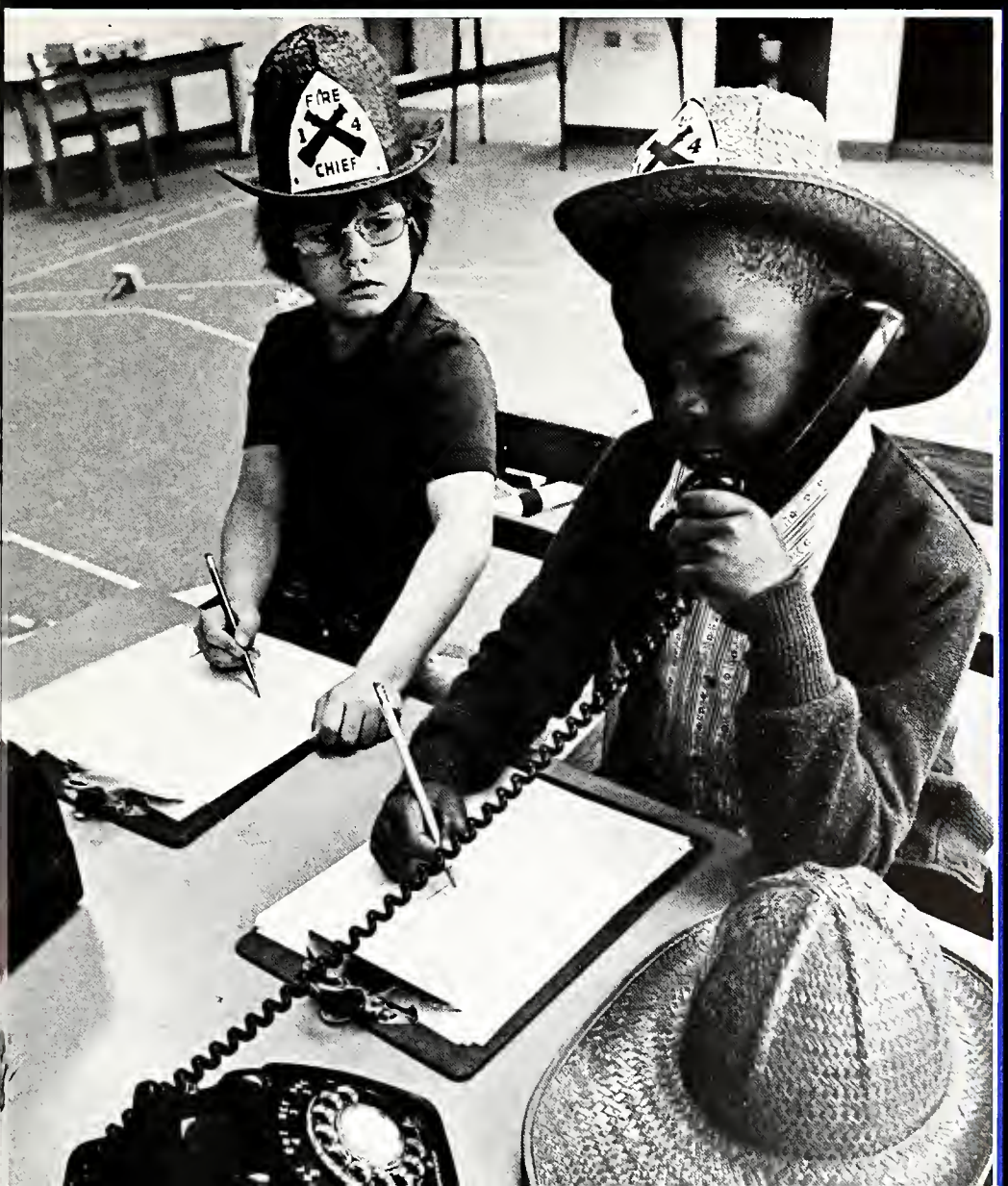
POPULAR GOVERNMENT

April / 1973

PUBLISHED BY THE INSTITUTE OF GOVERNMENT
UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL



This month

POPULAR GOVERNMENT / Published by the Institute of Government

Contents

This month's cover shows a moment in an unusual second-grade classroom, where kids learn that if you live in society, you've got to have government. See the story on page 4. (Photos by Maury Faggart.)

VOLUME 39 APRIL, 1973 NUMBER 7

Published monthly except January, July, and August by the Institute of Government, the University of North Carolina at Chapel Hill. Change of Address, editorial business, and advertising address: Box 990, Chapel Hill, N. C. 27514. Subscription: per year, $3.00, single copy, 35 cents. Advertising rates furnished on request. Second-class postage paid at Chapel Hill, N. C.

VS. The Dismissal of a School Superintendent: A Case Study

In January 1972, the Wayne County Board of Education voted to dismiss its superintendent, Gerald D. James, during his contract term. The dismissal, which led to a year of litigation, raised the question of how a superintendent dismissed during his contract term may obtain judicial review of a school board's decision. The North Carolina Court of Appeals ultimately decided that the dismissal was subject to review in Wake County under the state's Administrative Review Statute. At this point, the state Supreme Court granted certiorari to review this decision. Before the case was heard in the Supreme Court, however, the parties agreed to a settlement under which the board paid James $18,800 and adopted a resolution stating that the only matters at issue between the parties consisted of good-faith differences of opinion. The settlement, which denied the Supreme Court an opportunity to render a decision, left unclear the proper method for judicial review of a superintendent's dismissal.

The two articles that follow represent the two points of view in the controversy between Gerald James and the Wayne County Board of Education, which involved political maneuvering, administrative hearings, and litigation in court. They also discuss substantive areas of disagreement between James and the board, including complicated questions about the use of school funds and the proper division of authority between the school board and the superintendent. One point on which the authors agree is that new legislation is needed to clarify the procedures for judicial review of a superintendent's dismissal.

The first author, Robert W. Spearman, was attorney for Dr. James. Now associated with the firm of Sanford, Cannon, Adams & McCullough in Raleigh, he was a Rhodes Scholar and took his law degree at Yale. The second author, George K. Freeman, represented the Wayne County Board of Education. He practices law in Goldsboro with the firm of Freeman and Edwards. His law degree is cum laude from the Harvard Law School.

James vs. Board

FOR JAMES:

Robert W. Spearman

PART I The Charges

On December 6, 1971, the Wayne County Board of Education voted 4 to 3 to demand that its superintendent, Dr. Gerald D. James, resign within forty-eight hours. The vote ignited a controversy that lasted over a year, spawned six lawsuits (including one in which three members of the board sued the other four); established a legal precedent for judicial review of superintendent dismissals; deprived Gerald D. James of his job as superintendent; and cost Wayne County taxpayers an estimated $40,000 to $50,000 in legal fees, court and hearing costs, and payments to compensate James for lost salary and personal injuries.

On the day of the vote—December 6—no reasons were given Dr. James or the public for the four members' decision to force his resignation. The board resolution stated simply that it would be in the "best interest of the Wayne County School system" for James to resign, and that the board would meet in two days "to receive his resignation."

On December 8, James appeared at the board meeting with counsel and was granted a week's delay to consider his response. The four anti-James members still declined to set forth reasons justifying the demand for resignation and refused to reveal any charges to the three members who supported James.

On December 14, the board again met to receive James's resignation; however, as soon as the meeting began, it was enjoined by a temporary restraining order obtained by the three members against the anti-James faction. The minority had convinced a superior court judge that no action should be taken until the majority revealed its reasons for seeking James's dismissal. Under compulsion of the court order, the majority faction informed the other members of certain grievances against James, but no charges were turned over to James himself.

On December 21, the board met once again in special session to consider the request for resignation. James announced that he had still been given no reason why he should resign. He refused to step down, demanding that the meeting be opened to the public and that any charges be brought out in the open. The meeting was marked by the 4–3 bloc voting between the pro- and anti-James factions that was to characterize the year-long controversy. A pro-James member demanded that the meeting be opened to the public, but his motion failed when it received only the support of the other two James supporters. An anti-James member then introduced a resolution detailing nineteen charges against James and setting a hearing date. It carried 4–3. James's attorney moved that the four members voting to prefer charges disqualify themselves from participating in the hearing; he argued that no board member should be accuser, judge, and jury in the same case. The motion failed when it obtained only three votes. James's attorney then requested that the hearings be governed by the rules of evidence applicable in Superior Court, but that motion failed as well. The hearing was scheduled for January 6, and both James and the board chairman were authorized to utilize the power of subpoena to obtain documents for the hearing.

The resolution charged that James, in violation

(Continued on page 39)

# of Education

FOR BOARD OF EDUCATION:

George K. Freeman

James v. Board of Education is the first and only case to explore the procedure under the North Carolina General Statutes for dismissing a school superintendent before his term of office expires. This article will discuss the problems presented to the board of education, the superintendent, and the attorneys involved. If it serves no other purpose, I trust it will indicate the need for legislative action. In my opinion, the present state of the procedural and substantive law is grossly unfair to both the boards of education and the superintendents.

I

The Superintendent: Public Official or Contract Employee?

G.S. 115–39, which deals with the election of a superintendent, seems to make him a public or at least quasi-public official. This statute speaks in terms of "election," "term of office," and "taking office." Further, G.S. 115–42 provides that if he is dismissed, the superintendent ". . . shall have the right to try his title to office in the courts of the State."

Yet the superintendents in the state seem to have the impression that they have an employment contract. Walter R. Dudley, thirty years a superintendent and now secretary-treasurer of the Division of Superintendents of the North Carolina Association of Educators, expressed this view in a letter to the membership, dated January 11, 1972, when he said "Gerald James has a contract that expires on June 30, 1973. It is a good contract because each of you has one that is exactly like Gerald's." Under G.S. 115–39, the Superintendent of Public Instruction must certify the superintendent to the board and the board must report his election, yet nowhere do the General Statutes mention a contract for a superintendent.* Only on March 1, 1973, did the State Board of Education adopt a resolution requiring a copy of the written contract between the local board of education and the superintendent be filed at the same time the certificate of election is forwarded to the State Board of Education.[1]

Apart from whether he is a public official or a contract employee, is a superintendent a professional educator or a business administrator, or both? In my opinion, no one can perform in these dual roles under the laws of this state after the school system he administers has grown beyond a certain point.

The superintendent must be a professional educator. A specialist in business administration should be hired to administer the business facets of the school system. Those sections of the General Statutes that cover budgeting, accounting, and withdrawal of funds are page after page of rugged verbal mountaineering. It takes an accounting major, preferably a C.P.A. and probably a financial genius, to decipher them. The forms necessary to comply with the statutes should

*After this article was written, the North Carolina General Assembly amended G.S. 115–39 to require a written contract between the board and the superintendent.

1. *NCSBA Bulletin* (March 1973), 3. The resolution was later amended by substituting the word "request" for "required." *NCSBA Bulletin* (April 1973), 4.

(Continued on page 31)

THE SECOND GRADE LEARNS BY DOING

A town is a pretty complicated place, and everyone has a job to do.

Joseph Sanders
Frank Porter Graham Child Development Center

WHAT MAKES A TOWN LIVE? The answer to that question is so complex that most municipal officials are content simply to assume that their town is indeed alive—and often livelier than they would prefer.

Even a little town has a complex anatomy made up of institutions, community organizations, and occupations that interact to bring life to the body corporate. Because of that complexity, many of a town's vital functions are not studied in the primary grades of North Carolina's public schools.

Researchers at the University of North Carolina at Chapel Hill, by applying a teaching technique new to the state, have demonstrated that second-grade students can understand these interactions in a community. The children learned how a town operates by building their own town and acting out the occupations that were needed to keep their town running.

The technique, termed "dramatic play," was applied to the second-grade social studies curriculum by Dr. Loretta Golden of the Frank Porter Graham Center, a division of the University's Child Development Institute. In dramatic play, children act out the roles of adult occupations. "As a child dramatizes a job, he feels the need for more information on that occupation," Dr. Golden said recently. "He also becomes aware of how that job fits into other occupations in the community."

In traditional social studies programs for the primary grades, pupils study only one or two occupations at a time. The Frank Porter Graham project involved the development of an entire community with the dramatizations of many jobs in a single lesson.

Dr. Golden introduced the dramatic play technique to North Carolina in 1969, when she applied it to the Education Improvement Program in Durham city and county schools. Since 1970, she has conducted dramatic play projects in cooperation with the Chapel Hill-Carrboro school system.

The most recent project was initiated shortly after the start of the 1972–73 school year, financed by a grant from the State Department of Public Instruction. Two second-grade classes at the Frank Porter Graham Elementary School, participating in dramatic play, operated a child-size town constructed out of modular blocks in an open classroom at the FPG Center. A smaller community was constructed out of wooden boxes, desks, chairs, and tables in a traditional self-contained classroom at another elementary school in Chapel Hill.

At the beginning of the school year at FPG, the community included only two houses, a store, and a post office, each furnished with realistic props. As the pupils played, they discovered they needed more buildings and workers. In order to send letters, the pupils needed an airport staffed with air traffic control officers and pilots. An airplane crash created the need for a hospital, with doctors and nurses. Policemen were added to help in accidents and regulate traffic. One pupil opened a gas station to repair and service cars.

By the end of the school term, the town supported such institutions as a bank, a fire station, a school, a restaurant, and a traffic court. The town had become a complex community. After the mayor was elected, he met with the city council and hashed over the parking problem.

ONCE EACH WEEK, the entire class participated in the 20-minute dramatic play periods. Before the play, each child chose his occupational role for that period. There were no scripts or lines to memorize, but each child attempted to make his play authentic. Each dramatic play period was followed by a group discussion, lasting up to 15 minutes, in which pupils told what they did in their occupation that day and what problems they had encountered. The classroom teacher, who had observed and taken notes during the play, used the discussions to guide the children to see their need for more information about their jobs and their community.

In order to lead the play activities to higher educational levels, the teacher planned research lessons for the remaining social studies periods in the week. Traditional social studies tools were used, such as movies, field trips, filmstrips, pictures, and books. But the children viewed these lessons in a new light. These lessons were research sessions that the children needed to make their play authentic.

Dramatic play also increased the pupils' interest in math and writing assignments. For example, the students wrote letters and computed the postage needed to mail them.

The dramatic play experience resulted in significant gains in the second graders' understanding of their community. Dr. Donald McKinney of the FPG Center tested the children's learning in a 1971–72 pilot study and followed with a full-scale evaluation of the 1972–73 project. Test results were compared with those of a similar class that received traditional social studies instruction.

Both methods of teaching social studies produced gains in pupils' factual knowledge. The dramatic play technique, however, produced a gain in social studies factual knowledge seven times greater than that of the traditional method.

In addition, the dramatic play technique produced two times as much gain in the pupils' ability to think imaginatively as the traditional method. And some evidence suggests that the program encourages more cooperative and productive behavior in the classroom. Pupils who took part in dramatic play in self-contained classrooms did as well in their tests as those in open classrooms.

ALTHOUGH DRAMATIC PLAY appears to be an effective technique for teaching social studies to primary grade children, introducing the method into North Carolina's schools presents a challenge. Teachers will need training, props, and administrative support to carry it off.

The police station provides an example of the variety of props needed for authentic dramatic play: small police cars, hats, traffic tickets, badges and toy walkie-talkies. The pupils can make some props, such as tickets, and local high school industrial arts classes can construct others.

Dr. Golden is preparing a dramatic play curriculum guide for teachers and administrators to be distributed in the late fall by the State Department of Public Instruction. If a funding source can be found, a series of workshops for interested teachers will be held. The need for training arises mainly from the demanding requirement that the entire class participate in dramatic play at one time.

Most primary teachers already include some role-playing lessons of single occupations in their social studies curricula. Dramatic play in this program involves all students simultaneously, expands as children gain more information, and continues throughout the entire social studies curriculum.

This complex interaction among jobs constitutes both the greatest demand of the dramatic play project and also its chief virtue. "One of the essential advantages of the use of this kind of dramatic play," Dr. Golden said, "is that children learn that people in a community depend on each other. They learn that any occupation in a town depends on other occupations to function."

A SHIELD LAW FOR THE PRESS

What Is the Free-Press Guarantee of the First Amendment?

Elmer Oettinger

The "Free Press" Promise: Background

The principle that the press is to be free has in less than 200 years become ingrained in the minds and hearts of the American people. That fact in itself silhouettes and underlines the power and the responsibility that must challenge the daily awareness of every news editor, reporter, and analyst. When, on December 15, 1791, the first ten amendments of the Constitution of the United States of America became effective, including that promise in Amendment I that "Congress shall make no law . . . abridging the freedom of speech or of the press; . . .,"[1] new vistas and visions were opened for mankind. State constitutions were drawn to reflect the federal dream. The Constitution of the State of North Carolina in Article I, section 14, specifically states: "Freedom of speech and of the press are two of the great bulwarks of liberty and therefore shall never be restrained, but every person shall be responsible for their abuse."

Yet long before the surge of federal and state constitutional guarantees of press freedom, it had become clear that ultimate interpretation of such rights would lie in the province of the courts. As early as 1734, a young attorney named Andrew Hamilton defended printer Peter Zenger, who had been critical of the royal Governor (Cosby) of New York and had been charged with seditious libel for "intending to raise Factions and Tumults;" Hamilton argued with eloquence that the only question at issue was "the Liberty—both of exposing and opposing arbitrary power (in these Parts of the World, at least) by speaking and writing Truth."[2]

The nineteenth and twentieth centuries brought lines of court decisions that have established the First Amendment right as a cherished principle. Those cases, however, also have sought to balance press freedom with governmental and personal rights and privileges. It has become clear that the court views press privilege in some instances as qualified, not absolute. It has become equally clear that the protections build by judicial decision around the heritage of press freedom have been expanded with the years.

Under the laws of defamation (and later, privacy), a qualified privilege was established and enlarged, beginning with *New York Times v. Sullivan* in 1964[3] to provide broad protection, in absence of proof of

1. U.S. Const. amend. I.

2. 17 Howell's State Trials 675 (1735).

3. 376 U.S. 254 (1964).

actual malice, against suits by public officials and those cloaked with a public interest.

Although a qualified privilege to report court proceedings was early established, an apparent conflict between the provisions of the First Amendment and the Sixth, which promises an accused "the right to a speedy and public trial, by an impartial jury . . . ," has required careful examination by courts and ad hoc professional and state organizations, resulting in a new law and guidelines. In 1966, in *Sheppard v. Maxwell*,[4] the United States Supreme Court handed down stern warnings and guidelines relating to press and court alike in the area of "free press—fair trial." A year earlier Lewis F. Powell, Jr., then president of the American Bar Association, had written that "responsible leaders . . . agree that fair trial and free press must be preserved and ever strengthened, for each is essential to the survival of the other.[5] "The crucial task," he said, "is to see that both of these rights can still be accommodated to the limited area (where there is conflict)."[6] And a year earlier, in 1964, the Warren Commission had recommended that "representatives, law enforcement associations, and the news media work together to establish ethical standards concerning the collection and presentation of information to the public so there will be no interference with pending criminal investigation, court proceedings or the right of individuals to a fair trial."[7]

So, it had become apparent that the press could not resolve the applications of its constitutional freedom alone, and the Warren Commission Report precipitated both liaison and dialogue between press, bar, and bench at the state and national levels. One result has been the guidelines on pretrial reporting of criminal and juvenile proceedings, in North Carolina, as elsewhere.[8]

Federal and state court rules prohibiting photography in the courtroom and adjacent corridors were furthered by the United States Supreme Court decision in the *Billy Sol Estes* case.[9]

The question of access to governmental information also has received court attention often deriving from federal or state statutes and culminating in the Pentagon Papers case.[10] In this area, as in others, the question of prior restraint upon publication has been a vital issue. Almost always in the past the press has prevailed. The courts in general have held that the press is free to report what it will, but must face whatever legal consequences it may invite later. State statutes on access to meetings and records, like North Carolina's, are usually of the limited, qualified variety, although there have been attempts in a few states to establish an absolute mandate for "open meetings."

Protection of Press Information and Sources: Recent Cases

The most recent testing of the First Amendment has come with limitations on the right of the press to protect sources. The *Caldwell* case (40 L.W. 5025)[11] has become the most celebrated, but certain other cases deserve mention.

As early as 1959 Marie Torre of the *New York Herald Tribune* went to jail for 10 days for contempt of court after she had refused to disclose her sources of information.[12] In 1960 Vy Murphy, a Colorado Springs reporter, was sentenced to thirty days in jail upon conviction of criminal contempt by the Colorado Supreme Court, also for refusing to disclose her news sources.[13] In both cases the United States Supreme Court declined to review. Annette Buchanan, a student editor of the *Oregon Daily Emerald*, also was convicted of contempt and was fined $300 upon refusing to tell a grand jury her sources for an article on marijuana.[14] In 1972, for refusing to testify as to the sources of information, Peter Bridge was jailed in New Jersey,[15] and William Farr went behind bars in California.[16]

Again, in 1972 cases involving reporters' refusal to divulge confidential sources, the United States Supreme Court held that Earl Caldwell of the *New York Times*, Paul Branzburg of the *Louisville Courier-Journal*, and Paul Pappas of WTEV in New Bedford, Massachusetts, were not justified under the law in refusing to provide grand juries with source

4. 384 U.S. 333 (1966).
5. 51 ABA J. 535 (1965).
6. *Id.*
7. Report of the President's Commission on the Assassination of President John F. Kennedy. 1964. Chapter 1, p. 15.
8. News Media-Administration of Justice Council of North Carolina, North Carolina Guidelines for Reporting Criminal Court and Juvenile Proceedings (1971).
9. Estes v. Texas, 381 U.S. 532 (1965).
10. New York Times Co. v. U.S. 91 S.Ct. 2140 (1972).
11. *E.g.*, Florida has a "Government in the Sunshine" act.
12. 259 F.2d 545 (1958), *cert. denied*, 358 U.S. 910 (1958).
13. 365 U.S. 843 (1961), *cert. denied*, —— Colo. ——.
14. 392 U.S. 905 (1968), *cert. denied*, —— Ore. ——, 436 P.2d 729 (1967).
15. —— N.J. —— (1972); docketed 41 U.S.L.W. 3377 (January 9, 1973).
16. 22 Cal. App. 3rd 60 (1972), *cert. denied*, 41 U.S.L.W. 3271 (November 14, 1972).

data derived confidentially.[17] In a 5–4 decision, the Court decided that the power of a grand jury had priority over any First Amendment protection for testimony of a reporter. The majority opinion read: "The great weight of authority is that newsmen are not exempt from the normal duty of appearing before a grand jury and answering questions relevant to their criminal investigations."[18] In the Branzburg appeal, the Court noted that "citizens generally are not constitutionally immune from grand jury subpoenas; and neither the First Amendment nor other constitutional provisions protect the average citizen from disclosing to a grand jury information that he has received in confidence."[19] The court found no special exemption for reporters that are not available to any citizen. It said: "It is clear that the First Amendment does not invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general applicability."[20]

Shield Law Legislation: State and Federal

Long before the Supreme Court had jolted press concepts of the right to shield news sources, newsmen had turned for help to the legislative process, especially at state level.

Eighteen of the fifty states have enacted shield laws. Most of these state laws give a qualified privilege; a few, an absolute privilege. They protect in varying ways and degrees the reporter's sources of information or the right to refuse to testify. The United States Supreme Court, in the Caldwell, Branzburg, and Pappas holding, observed:

> A number of states have provided newsmen a statutory privilege of varying breadth, but the majority have not done so, and none has been provided by federal statute. Until now the only testimonial privilege for unofficial witnesses that is rooted in the federal Constitution is the Fifth Amendment privilege against compelled self-incrimination. We are asked to create another by interpreting the First Amendment to grant newsmen a testimonial privilege that other citizens do not enjoy. This we decline to do. Fair and effective law enforcement aimed at providing security for the person and property of the individual is a fundamental function of the government and the grand jury plays an important constitutionally mandated role in this process. On the records now before us, we perceive no basis for holding that the public interest in law enforcement and ensuing effective grand jury proceedings is sufficient to override the consequential but uncertain burden on news gathering which is said to result from insisting that reporters, like other citizens, respond to relevant questions put to them in the course of a valid grand jury investigation or criminal trial.[21]

A number of bills are now pending in the Congress. They range from a bill that would provide absolute protection of confidential sources and information, introduced by Senator Cranston of California, to bills providing qualified privilege introduced by Senators Mondale of Minnesota and Mansfield of Montana, Ervin of North Carolina, and others.[22]

The Supreme Court has confirmed, in the Caldwell-Branzburg-Pappas holding, that state and congressional action is permissible. It said:

> At the federal level, Congress has freedom to determine whether a statutory newsman's privilege is necessary and desirable and fashion standards and rules as narrow or broad as deemed necessary to address the evil discerned, and, equally important, to refashion those rules as experience from time to time may dictate. There is also merit in leaving state legislatures free, within First Amendment limits, to fashion their own standards in light of the conditions and problems with respect to the relations between law enforcement officials and the press in their own areas.[23]

The journalism fraternity Sigma Delta Chi, the Joint Media Committee, and others have come up with model confidential communication statutes. The Conference of Commissioners on Uniform State Law last summer set up a committee to try to formulate a uniform shield law. That committee has come up with a rather restrictive qualified privilege bill. Four shield-law bills have been introduced in the North Carolina General Assembly. Two are versions of the same bill, so in reality there have been only three

17. 40 U.S.L.W. 5025 (June 27, 1972).

18. *Id.*

19. *Id.*

20. *Id. But see* Baker v. F & F Investment, 470 F.2d 778 (1972).

21. *Id.*

22. The latest bill introduced by Senator Cranston is S 158, a much more detailed but more qualified privilege than that granted by his brief initial measure. The bill introduced by Senators Mondale, Mansfield, and others is S 657. Senator Ervin's bill is S 917. He currently is amending that in an attempt to meet press objections to some provisions. H.H.R. 16527, introduced by Congressman Whalen, appeals to the American Society of Newspaper Editors and its Freedom of Information Committee.

23. 40 U.S.L.W. 5025 (June 27, 1972).

proposals. Senate Bill 124, introduced by Senator Coleman of Orange, would provide a privilege against testifying in court to a newsman who agrees to keep a source confidential before receiving information but who must testify to that fact before claiming the privilege. This privilege also would extend to any individual who causes information to be disseminated through the news media if that individual agreed to keep the source confidential before receiving the information, but he too would have to testify to the fact before claiming the privilege.

Senate Bill 160, introduced by Senator McNeill Smith of Guilford and others, provided that no newsman shall be competent to testify in any legal proceeding as to the identification of persons supplying him with information if the information was entrusted to the reporter in his professional capacity. Reporters would still be required to testify as to matters witnessed, and they are not relieved from liability for defamation. Unlike the Coleman bill, the Smith bill would apply the privilege to information disclosed before the effective date of the act (ratification) as well as afterward. This measure failed second reading in the Senate on March 20 and apparently is dead.

House Bill 413, introduced by Representative Campbell of Wilson, provides that newsmen not be required to disclose any information or source of any information observed as part of their job in any judicial, legislative, or administrative proceeding except when the person seeking disclosure files application with the superior court having jurisdiction, alleging the name of the reporter, the specific information sought, and its relevance to the proceeding, and either (1) that there is reason to believe that the disclosure of the source is essential in establishing guilt or innocence in an investigation or a trial for murder, kidnapping, or battery resulting in serious bodily injury, and the information cannot be obtained from another source; or (2) that the person from whom the source of information is sought is a defendent in a civil action for defamation and has asserted as a defense to that action that the alleged defamatory information came from an undisclosed source. After a hearing, the court may order full or partial disclosure. The court order would be subject to appeal and, while the appeal is pending, the privilege would remain in effect.

The North Carolina Association of Broadcasters helped draft and supports the Campbell bill. Its general counsel, Wade Hargrove, points out that this legislation would leave reporters free to investigate those areas that have traditionally been the focus of investigative reporting "corruption in government and industry, the sale of unlawful drugs, fraud, theft, illegal gambling, and dissident political activity,"[24] while qualifying the privilege for only such crimes as murder, rape, kidnapping, and serious assault, which, he says, are rarely the subject of investigative reporting.

On the other hand the North Carolina Press Association, through its general counsel, William C. Lassiter, would prefer a bill similar to that prepared for the State of Florida.[25] The Florida bill defines "reporter" specifically and provides that

> no reporter shall be compelled to disclose in any administrative, judicial or legislative proceeding or in collateral proceedings thereto, or anywhere else, or before any court, board, agency, committee, legislative body, state's attorney, grand or petit jury, or anyone else, any information or the source of any information procured or received by him while acting in the course of his employment or news gathering, irrespective of whether such information is actually published or broadcast. Such privilege shall be available to persons who were reporters at the time such information is procured or received though not at the time the privilege is claimed.

That bill would see that reporters are not compelled to testify about either confidential sources or information, in court or elsewhere.

The problem, then, is complicated by the fact that neither the press nor legislators agree on what kind of shield law is needed, or on whether one is needed at all. It is further complicated by the fact that some press-supported qualified-privilege bills passed by states have been narrowly interpreted by the courts, resulting in unexpected restriction,[26] and still further complicated by the fact that many of the bills under consideration in the Congress and in state legislatures take qualified approaches more restrictive than press leaders view as desirable or useful.

A major complication is a conviction held by many judges and some newsmen that the First Amendment guarantee belongs to everyone and cannot be given special application to the press alone. If that concept prevails, no newsman (or any individual or group) is entitled to a special privilege to protect sources or information that *all* American citi-

24. Statement of Wade H. Hargrove, attorney for the North Carolina Association of Broadcasters, before the Judiciary II Committee of the North Carolina Senate, March 1, 1973.

25. The Florida bill would "create" Section 90.243, "providing a privilege of non-disclosure of information or sources of information for reporters. . . ."

26. New Jersey and California are examples.

zens do not share. The question may be asked: How can a "free press" that purports to believe in the public's "right to know" claim the public has no right to know what the press chooses to conceal?[27]

Where lies the burden? On the government to prove "by clear and convincing evidence" that a newsman should be compelled to testify or on the newsman to prove that he should not be compelled to testify? The press recognizes that "the authorities have been winning the argument if not the secrets," but it points to a congressional "counterattack" in which 91 House members and 17 Senators had "at last count" introduced or co-sponsored various shield bills.[28]

Meanwhile the number of newsmen ordered to disclose sources or information and sent to jail for failure to obey court orders is increasing. It should be recognized that the fact and circumstances in these cases vary greatly. For example, reporter Caldwell refused to identify informants whose possible crime involvement (in connection with Black Panther activities) the government wanted to check. Reporter Branzburg refused to tell the government what it wanted to know with relationship to a crime he had actually witnessed. Reporter Bridge refused to be asked about matters related to corruption that he had decided not to write about.[29] The recent United States Supreme Court decision denying Bridge's appeal indicates that the line is being drawn firm and hard against press refusal to testify unless such refusal has the sanction of applicable state or federal legislation.[30] The cleavage in press and governmental interpretation of the need for protection of press sources and information continues, however. So does the battle in the halls of Congress and in state legislative bodies. Ultimately, some clearer and more satisfactory resolutions are imperative, for the tests involve the very fabric of freedom, the limits of press and governmental responsibility and stakes that have application to all.

Conclusion: The Dilemma

Should press sources or information be protected? Is legislation the only way to assure protection? The available alternatives are to enact federal or state legislation, or both, or neither. The press and officials are split as to which, if any, of these alternatives should be pursued. They recognize the alternatives of (1) a shield law providing *absolute* protection of sources and/or information, (2) a shield law providing *qualified* protection of some sources and information under stated circumstances and conditions, or (3) no shield law at all. Some professional groups and legislators agree upon the desirability of some sort of shield law, but disagree on the most desirable type. The American Society of Newspaper Editors tends more and more to favor an absolute privilege law; yet such distinguished journalists as Vermont Royster and Tom Wicker prefer no shield law at all. Royster does not believe that an absolute privilege is proper or desirable and sees danger that any qualified privilege bill will restrict newsman more than no law.[31] Wicker would like to see an *absolute* federal source privilege but thinks it is impossible to pass, and he fears a *qualified* privilege.[32]

Much as these divisions may illuminate the issue, they hamper any resolution. So long as the press, media, legislature, Congress, and courts remain split and fragmented, action may be expected to be halting, piecemeal, and frustrating. Yet, so long as newsmen go to jail rather than see their sources dry up and the free flow of information impeded, so long will there be a crisis crying for resolution. Although time may be of the essence, so is clear thinking. The call is not merely for action, but for careful assessment and reassessment of the role and responsibilities and needs of news media, government, and citizens alike.[33] The problem is larger than press access *to* people. It encompasses access *to* the press and indeed the general opinion of and attitudes toward the press. One danger is that emotion will play a greater role than logic in resolving the current debate over shield laws. If, indeed, reason is to prevail, the civil liberties that underlie and underscore the protection of our cherished freedoms must be explained and applied in terms so clear, fair, and eloquent that all can understand. And the needs of freedom and order must be re-examined with infinite care to the end that any redefinition of boundaries will not upset the delicate balance that undergirds our heritage.

---

27. Vermont Royster raises these points in a column published in March, 1973.

28. See George Lardner, Jr., column *The Washington Post*, February 5, 1973.

29. Discussed in Charles Rembar "The First Amendment on Trial: The Government, The Press, and The Public," *The Atlantic Monthly* (April, 1973), 51.

30. 41 U.S. L.W. 3503 (date?).

31. Vermont Royster, "Dubious Shield, Better Not Donned," The Wall Street Journal, March ??, 1973. ". . . our free press has survived these 200 years without any law to make newsmen a class apart, and I suspect it will survive without our claiming privileges denied to other men."

32. Tom Wicker, "Leaning on a Weak Reed," *The New York Times*, February 22, 1973. "The hard truth is that while an absolute, preemptive bill is a political impossibility, any less sweeping bill will amount to an effective Congressional definition of *the limits of press freedom*, and those limits are likely to be narrowed rather than broadened by the later interpretations of judges."

33. A House subcommittee is studying shield law alternatives for North Carolina during the legislative interim.

A Technical Assistance Program for Small Cities Receiving Community Development Revenue-Sharing Funds

George D. Morris, Jr.
Division of Community Services, Department of Administration

State governments in general have a long record of unresponsiveness to their cities' urban problems and needs. North Carolina, recognizing its responsibility to local government, has accepted the challenge of a federal-state-local government partnership through Community Developing Revenue-Sharing and has embarked on a new working relationship with its cities.

President Nixon, in his message to Congress on March 5, 1971, proposed a system of special revenue-sharing for urban community development, stressing better government through better management and planning and the return of decision-making to local governments.

The anticipated community development legislation ushers in the era of "new federalism"—the Administration's response to the disenchantment with categorical programs, the excess of federal control, review, and red tape. Community Development Revenue-Sharing (CDRS) is designed to provide a block-grant, no-strings-attached approach to the social, economic, and physical rehabilitation of our cities and to give both a freer hand and greater responsibilities to local elected governments. If the legislation is enacted, much responsibility will be transferred from the federal level to mayors, city councils, and city managers, requiring, in turn, greater responsibility for establishing objectives and priorities and determining the feasibility of local efforts designed to achieve these objectives.

"Better Communities Act"

CDRS legislation now before the Congress, designated as the Better Communities Act, would provide $2.3 billion in fiscal year 1975 to communities to spend as they wish to meet community development needs. This proposed legislation replaces inflexible and fragmented categorical federal aid programs. Included are programs in urban renewal, model cities, rehabilitation loans, open space, neighborhood facilities, basic water and sewer grants, and public facility loans. The new program is to become effective July 1, 1974, and features a "hold harmless" provision assuring that no city receives less money for community development than it received under the categorical grants program.

The legislation would eliminate "grantsmanship," or the competition for federal funds existing in the categorical programs, and proposes in its place the concept of an entitlement or block grant for a city. All cities with 50,000 population or more would automatically receive an entitlement. Under a "hold harmless" provision, cities of less than 50,000 population that meet the prerequisite of recent urban renewal or model cities experience would receive an entitlement equal to the average level of funding during recent years for these categorical programs folded into CDRS. After a relatively short and simple application stressing management capabilities is submitted and approved, these block grants will be directed to the city.

CDRS stresses "comprehensive" planning and management and will require cities to do a better job in policy-planning, budgeting, project planning and implementation, and monitoring and evaluation. This may present a problem for smaller communities eligible for "hold harmless" funds, since they frequently lack funds to hire the planning and management expertise required. Most of the "hold harmless" entitlement cities in North Carolina contract for planning help on a part-time basis with the state's Division of Community Services or with private consultants.

The Department of Natural and Economic Resources, recipient of a HUD 701 planning grant, has assigned its Division of Community Services (DCS) the responsibility of assisting twenty-seven "hold harmless" cities with populations under 50,000 in preparing to accept the responsibility for CDRS. The Division, operating statewide through its five regional offices, has provided planning and management aid to local governments through the 701 Planning Program for some fifteen years.

To assist North Carolina's twenty-seven "hold harmless" cities with the transition to CDRS and in planning for the use of block-grant funds, the Division, with the help of McManis Associates and

A. L. Nellum and Associates, has developed and integrated into its regular assistance program an intensive 24-month community development (CD) program of training and technical aid that it feels is unique. The primary objectives of the program are to introduce basic principles of community development planning and management processes; the upgrading of local planning and management capabilities; and a strategy to involve regional councils of governments as sources of planning and management expertise not economically available to small cities.

On a contractual basis, the Division will help each city involved to assemble background studies and other data necessary for the comprehensive CD planning process and then provide further aid in setting up mechanisms for a planning process, developing the CD plan, preparing the application to HUD for funds, and establishing the management structure and procedure to execute its CD plan. The Division has identified key areas in which most cities will need help and has brought together a competent staff with management skills and knowledge of local government operations. In addition to a section chief for program development and coordination, the CD staff consists of five specialists in the areas of citizen participation, management and evaluation, social planning, fiscal planning and management, and housing and urban programs—all available to provide technical aid to local officials.

Three-Phase Program

The Division's extensive twenty-four-month community development technical assistance program for transition to CDRS has three phases (see Figure 1):

Phase I: January-February, 1973. The Division's CD staff conducted five regional orientation workshops throughout the state to introduce the basic concepts of HUD's proposed CDRS program. Attending the workshops and receiving copies of the Division's *Community Development Handbook* were local officials, regional officials, and the Division's staff planners. The need for mayors, local elected officials and city managers to attend was emphasized, and mayors were encouraged to include any other key local officials they felt would benefit from attending the workshop (e.g., local redevelopment, finance, housing, planning, and public works officials). The Division's CD technical assistance program was introduced, and all twenty-seven "hold harmless" cities were encouraged to apply for pilot-city consideration.

Phase II: March-September, 1973. A pilot program of on-site technical assistance to five of the twenty-seven "hold harmless" cities. The following criteria were used in selecting these five pilot cities: (1) Availability of background planning information and willingness to obtain this data; (2) local management capability; (3) existent planning capability; (4) cooperation with county and regional jurisdiction; (5) human relations activities; (6) previous contracts with the Division; and (7) a willingness to use local funds to correct background planning deficiencies. In addition to this rating system, a resolution and letter of commitment were obtained from the local governing body and the city manager, with a statement of compliance with citizen-participation requirements of the program.

The Division's CD staff will help the pilot cities during the comprehensive policy planning period. The major steps are: (1) collecting factual information on community needs; (2) interviewing citizens and professional staff on what the needs are and what the priorities should be; (3) consolidating information into a concise summary of the community's problems, their causes and their relative importance to residents; and (4) the mayor and council's review of the staff summary of problems and needs, with their own assessment, and the establishment of broad objectives and priorities for the coming year.

During Phase II, each of the twenty-seven cities will review its existing community development programs and budget CD needs for fiscal 1974. Special attention will be given to on-going conventional renewal projects and to the need for amendments. The effect of the freeze on housing funds on proposed land re-use in renewal projects may require an alternate re-use. Other essential projects caught in the federal pipeline and not under contract when the freeze came may require early action and a resorting to general revenue-sharing as a source of funds.

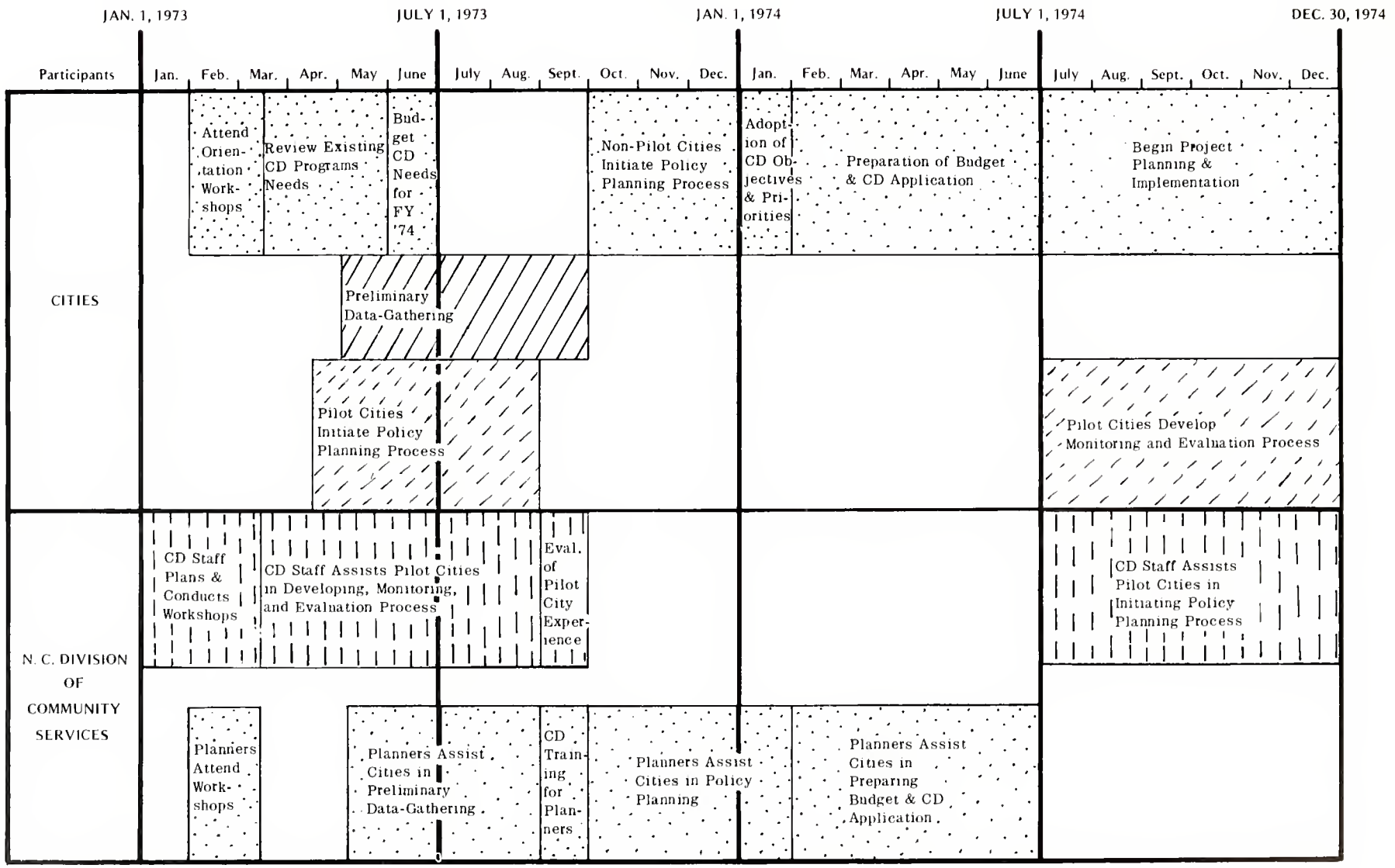
Also during this phase, DCS planners will, through contractual agreement, help all twenty-seven cities in preliminary data-gathering necessary for the comprehensive policy planning process.

To complete Phase II, an evaluation of the technical assistance program will be undertaken to determine the impact of the Division's activities in achieving program objectives. Also, during this period DCS planners will undergo training to sharpen their abilities in the areas of comprehensive policy planning, budgeting, and the CD application.

Phase III: October 1973-December 1974. The Division, using the experience and lessons learned during the pilot city phase (Phase II) of the technical assistance program, will help the twenty-two cities that are not part of the pilot program during the policy planning process, preparation of the budget, and CDRS application.

The final six months of Phase III will be spent helping cities develop monitoring and evaluation processes—monitoring (of performance) to determine that CD activities are within their time and expenditures forecast and evaluation to measure the impact of CD activities in achieving the city council's objectives.

NORTH CAROLINA'S COMMUNITY DEVELOPMENT ASSISTANCE PROGRAM



The Bail System in Charlotte / Mecklenburg, 1971–72: An Evaluation

Stevens H. Clarke

The author is an Institute faculty member and part of the Institute's consulting staff to the Charlotte/Mecklenburg Criminal Justice Pilot Project. The project is funded by the Law Enforcement Assistance Act.

Introductory Note

The bail[a] study with which this report deals concerns Charlotte and Mecklenburg County, North Carolina, and presents no specific information on the bail systems in operation in the rest of the state. However, the report suggests measures of bail system performance that may be generally applicable: amount of bail opportunity (fraction of arrested defendants who obtain bail), nonappearance rate (fraction of bailed defendants who fail at least once to appear in court as scheduled), and rearrest rate (fraction of bailed defendants who are arrested at least once on a new, nontrivial charge before their original case is disposed of). Also, because Mecklenburg County has been the first in the state to try out a formal program of pretrial release without secured bond, the study's findings may be relevant in considering whether to start such pretrial release programs in other areas.

Since there is apparently some interest in trying out new systems of pretrial release elsewhere in the state, one may ask how the judicial districts with greatest need for bail improvement can be selected. This can be done fairly easily by sampling the court records in each judicial district. The sample should be taken randomly from among cases filed in the most recent full year—1972. It is important that the sample be from *all cases filed* rather than from just the cases that happen to be open when the sample is conducted. Cases that begin by citation rather than by arrest should be excluded from sampling; public drunkenness cases should also be excluded, lest they distort the sample because of their high frequency. From among the remaining cases filed in 1972 in the district (exclusive of citation cases and public drunkenness), two separate random samples[b] should be taken—one of misdemeanors and one of felonies. If possible, each sample should be large enough to include at least 100 cases in which the defendant obtained bail (pretrial release) in some way.[c] For each case selected in a sample, the following information should be recorded: whether the case is a felony or misdemeanor, what form[d] of pretrial release (if any) the defendant obtained, whether the defendant obtained his pretrial release (if any) within one day of arrest, and whether a capias has ever been issued for the defendant because of his failure to appear as scheduled before disposition of his case.[e]

The resulting information will indicate, for each judicial district where the samples are taken, fairly reliable estimates of the following: the fraction of misdemeanor arrestees (excluding public drunkenness defendants) who fail to obtain bail, the fraction of felony arrestees who fail to obtain bail, the relative frequency of misdemeanor and felony arrests, the relative frequency of the various forms

a. "Bail" and "pretrial release" are used interchangeably.

b. Procedures for true random sampling are not difficult to use. To guarantee reliability, the sampling could be supervised by the Administrative Office of the Courts.

c. If there are not enough cases filed in 1972 to produce large enough samples, cases filed in 1971 should be used. If there still are not enough, the "samples" will simply consist of all misdemeanors filed in 1971 and 1972 (exclusive of citation cases and public drunkenness), and all felonies filed in 1971 and 1972.

d. A code could be used to identify the form of bail. Those now in use in North Carolina include: bondsman release (release on bond secured by professional bail bondsman), cash bond (release secured by cash deposit), property bond (release secured by pledge of property), release on unsecured bond by magistrate or judge, release on recognizance (without any bond, i.e., promise to pay by defendant if he fails to appear) by judge, and release where special program like the Mecklenburg Pretrial Release Program is involved.

e. Some types of capiases should be ignored: those that may be issued after disposition—i.e., after discharge or sentence—for failure to pay fines, make court-ordered support payments and the like.

of bail, the fraction of bailed defendants who failed to appear at least once, and the fraction of bailed defendants who obtained their release within one day of arrest.

This information will help in several ways in deciding whether bail improvement is necessary and in planning improvement should it be found necessary. Perhaps the most important items of information are the fraction of unreleased defendants—those who stay in jail until their case is disposed of—and the fraction of releasees who fail to appear in court. The size of these fractions will indicate whether bail innovations should be undertaken in a particular district.

For example, suppose the fraction of defendants not released is thought to be too large in a particular judicial district. To reduce this fraction—which might well be due to the unprofitability of professional bail-bonding in the district—several things could be done. The Charlotte bail study indicates that permitting magistrates to release defendants on unsecured bond (if properly administered) is a good way of releasing certain defendants with a low probability of nonappearance. Therefore, if such unsecured bond-releasing is not used or used very little in our hypothetical judicial district, it may be advisable to increase its use, under appropriate procedures issued by the chief district judge. If it is believed that many unreleased defendants will be in a "high risk" category, and will therefore not qualify for this type of magistrate release, a program like the Mecklenburg Pretrial Release (PTR) Program should be considered.[f] Such a program would employ both a more extensive prerelease investigation (including not only employment, residence, and family, but also criminal history) and post-release supervision of the released defendant and might therefore tend to reduce the risk of nonappearance. Magistrate release and a PTR type of release could be used together to increase bail opportunity, the former for the lower-risk defendants and the latter for the higher-risk defendants.

What about a judicial district in which bail opportunity is considered sufficient but the nonappearance rate is too high? Again, the Charlotte bail study indicates some counter-measures. Stricter court regulation of bondsmen can (as in Charlotte) cause a significant decrease in the nonappearance rate of bondsmen-released defendants. Also, it may be worthwhile to try to encourage other forms of bail. The Charlotte bail study offers some evidence that release based on investigation of social attachments (family, employment, and residence) may produce less nonappearance than release based on ability to pay the bondsman's fees.

Summary of Charlotte Bail Study

The bail system in Charlotte was evaluated for the period 1971–72 with respect to bail opportunity, defendants' nonappearance rates, and rates of rearrest for a new charge while on bail. A random sample (stratified on race and type of charge) of about one-third of all criminal defendants arrested in the first quarter of 1971 was compared with a similar sample of those arrested in the first quarter of 1972. These data support the following conclusions:

1. The over-all bail system improved from 1971 to 1972 in that nonappearance rates dropped significantly from 11.7 per cent to 5.2 per cent. The rate of rearrest for a new offense while on bail also registered a drop from 7.4 per cent to 5.8 per cent, which, however, did not prove to be statistically significant (in the sense that the difference between the two rates had a chance greater than 5 per cent of having occurred merely as an accidental product of sampling).

2. Defendants in the 1972 sample released by professional bail bondsmen had a much lower nonappearance rate (6.8%) than those in the 1971 sample (15.5%), which can be attributed to enforcement of forfeitures and stricter regulation by the court.

3. The fraction of defendants who failed to obtain bail was reduced significantly, from 12 per cent in 1971 to 9 per cent in 1972, and a slight but significant disadvantage of low-income defendants and black defendants in obtaining bail apparently disappeared in 1972; both of these changes can be attributed to the new Mecklenburg Pretrial Release Program, which began in July 1972.

4. Defendants released by the new PTR Program have a nonappearance rate of about 2.5 per cent, which is half that of defendants released by bondsmen in 1972 (5.2%). PTR defendants' nonappearance rate did not differ significantly from that of defendants released by magistrates without the involvement of PTR. PTR defendants' rearrest rate (about 7.8%) also was not significantly different from that of bondsmen-released defendants, magistrate-released defendants, or the two groups combined.

5. The data suggest that the low nonappearance rate of defendants released by PTR is due to the way they are *selected* for release (based on investigation of employment, residence, family, and criminal history), and not their post-release supervision. However, post-release supervision might play a greater role if a higher-risk group of defendants were released by PTR.

6. Although the PTR Program has released some defendants (especially low-income and black defendants) who would probably not have been released in the past, most of the PTR releasees probably would have been released by magistrates if the PTR Program had not existed. PTR is apparently not taking many clients away from bondsmen.

f. Such a program *can* have the effect of eliminating apparent bail discrimination against the poor and the black defendant. The Mecklenburg PTR Program seems to have had this effect.

I. Introduction

A. FORMS OF BAIL

In this report, the terms "bail" and "pre-trial release" will be used interchangeably to refer to any legal means of freeing the criminal defendant before disposition of his case. The purpose of bail is to permit the defendant to avoid being jailed until his case is decided and to assure that he will appear in court when necessary. In Charlotte during 1971 and 1972, there were six methods of releasing a defendant before trial, listed here in order of relative frequency in 1972 (see Table 1). The most frequent type of release, called "Bondsman" in this report, is obtained by posting an appearance bond secured by a professional bondsman acting as surety in return for a fee. The amount of the bond depends on the specific charge against the defendant and is set according to a schedule of minimum amounts prescribed by the chief district judge.

The second most common type of release, called "PTR" in this report, involves the Mecklenburg Pretrial Release Program. This program did not begin operating until July 1971, and therefore no figures for it appear in Column 1 of Table 1, which deals only with defendants arrested in January, February, and March 1971. Under the terms of the PTR Program, any defendant who is a resident of Mecklenburg County and is not charged with public drunkenness or a serious offense of certain types[1] is eligible for consideration by the program investigator. The investigator obtains from the defendant information about his attachments to society (chiefly his employment, home, and family) and from official records about his criminal history (if any). The defendant is assigned a score reflecting both the nature of his attachment to society (which is thought to be related to the probability that he will appear in court as directed) and the extent of his criminal history. The PTR investigator may make a recommendation either for or against releasing a particular defendant, based on the defendant's score. For defendants charged with misdemeanors, the decision to release is made by the magistrate (the judicial officer who issues most arrest warrants and handles the booking of arrestees). For felony defendants, the release decision is made by a judge.

The third most common type of release (called "Magistrate" in this report) is release by a magistrate on unsecured bond. This release is similar to PTR release in that the defendant executes an unsecured appearance bond—i.e., makes a promise unsecured by any pledge of money, property, or surety that he will pay a certain sum of money if he fails to appear in court. The difference between PTR release and what is here called "Magistrate release" is as follows. In Magistrate release, the PTR Program is not involved. The booking magistrate makes his own decision according to guidelines prescribed by the chief district judge. After "Magistrate" release, the magistrate ceases to have any contact with the released defendant. After PTR release, the defendant is required by the terms of a written agreement which he signs to maintain weekly telephone or personal contact with the PTR office and to appear there on each scheduled court day before going into the courtroom. If this contact is broken, a PTR counselor investigates at once and may take a variety of actions such as reminding the defendant of his obligation to report to the PTR office or of the penalty for failing to appear in court (a misdemeanor) or referring the case to the police if the defendant appears to be "on the run."

The three remaining types of release are relatively infrequent. "Cash Bond" is release of the defendant upon the deposit of the full minimum amount prescribed by the chief district judge for the particular offense with which he is charged. "Recognizance" is the release of the defendant by a district or superior court judge on the defendant's unsecured promise to appear in court. "Property Bond" is the release of the defendant upon the pledge of property of sufficient value to cover the minimum bond amount.

B. RECENT DEVELOPMENTS IN BAIL

Two recent developments in the Charlotte bail system should be mentioned. The first concerns bail bondsmen. In the latter part of 1971, the bondsman who until that time had secured the release of more defendants than any other single bonding company became financially embarrassed. A court order forced him to cease operations in January 1972. Soon thereafter, the clerk of superior court adopted new procedures keeping a stricter watch over the total amount of bonds undertaken by bondsmen to insure that they were adequately covered by capital. The court order, the stricter surveillance by the clerk, and perhaps also the publicity surrounding the financial troubles of the leading bondsman may have been responsible for the improvement in failure-to-appear rates among Bondsman releasees which will be discussed below.

The second major development has already been mentioned: the initiation of the Mecklenburg Pretrial Release Program in July 1972. This program, modeled on the Manhattan Bail Project operated by the Vera Institute of Justice in New York City in the early 1960s and on the present pretrial release program in the City of Baltimore, did not operate at full capacity until late in 1971. In the first quarter of 1972, the PTR Program released an average of 78 defendants per week; the average climbed to 96 per

1. These are: first-degree murder, rape, first-degree burglary, safe cracking, habitual felon, assault upon a public officer, assault with a firearm upon a law enforcement officer, kidnaping, malicious use of explosives or incendiary devices, arson, felonious narcotics, and felonious possession of barbiturates or stimulant drugs. All are very small categories except for drug felonies, which constitute about one-fourth of all felony arrests. As it turned out, this exclusion did not pose a significant problem in this study.

week by the last quarter of the year.[2] It has already been explained above that the PTR Program recommends released on unsecured appearance bond of defendants by a magistrate or district judge after an investigation of employment, family, home, and criminal history, and maintains contact with the released defendant until his case is disposed of. In the first six months of 1972, concurrently with PTR Program operation, the magistrates continued to release defendants on unsecured bond without the involvement of PTR, although much less frequently than they did before the PTR Program began. At the end of July 1972, the magistrates were ordered to cease releasing defendants without involving PTR, and the practice has probably greatly decreased since that time. The fact that the magistrates continued to release defendants during the first three months of 1972, while the PTR Program was also in operation, affords the opportunity to compare these two modes of pre-trial release.

II. Method of Study

The study method was to analyze data on two samples of arrestees. One sample was drawn from the period January through March 1972 (when the PTR Program was in operation), and one was drawn from the same months of 1971, before the PTR Program had begun. No data were collected for defendants who were arrested for traffic or vehicular offenses, except that defendants arrested for drunken driving *were* included in the study. Defendants charged with public drunkenness and "wildlife" offenses (such as out-of-season hunting) were also excluded. Each arrest was traced through the criminal courts to find out what sort of court disposition occurred, and whether the defendant ever failed to appear in court or was ever rearrested on a new charge before court disposition of his case.

A. DEFENDANTS' BAIL-RELATED CHARACTERISTICS

The attributes of defendants believed to be most relevant to bail opportunity, nonappearance, and rearrest were these: income, race, type of offense charged, criminal history, employment status, and living arrangement at home. Criminal history and living arrangement were not included in the study because of the prohibitively high cost of obtaining the information. The study did include data on the other four variables—income, race,[3] offense, and employment status at the time of arrest. In the sample, all of these variables proved to be related to bail opportunity, especially employment and offense seriousness (see Table 1). Among defendants in the sample who were bailed, none of the variables by itself was related significantly to failure to appear in court while on bail. Rearrest for a new charge while on bail was significantly higher for felony-charged releasees than for misdemeanor-charged releasees, and also higher for high-income releasees than for low-income releasees. The other two variables (race and employment) did not prove to be related to rearrest. Section III(C) of this report discusses these relationships in more detail.

It was not possible to determine the individual income of each defendant in the sample. Instead, each defendant was assigned to one of five income categories, depending on the 1969 median income of families and unrelated individuals in his census tract of residence. If his records showed no address in the city of Charlotte, he could not be assigned to a census tract, and his income was called "Unclassified." About 10 per cent of all defendants fell into this category. To simplify the analysis, the six income categories were collapsed into three: "low" (median $0–$6999), "high" (median $7,000 and over), and "unclassified."

Offense category is treated in two ways. "Offense seriousness" refers to whether the offense with which the defendant is charged on the arrest warrant is a felony or misdemeanor. These two categories can be further broken down into eight specific offense categories, as follows:

1. Felony involving harm or danger to persons: assault, robbery, rape, homicide, kidnaping, and the like.
2. Felony involving property loss or damage only: burglary, other breaking and entering, larceny, fraud, forgery, embezzlement, and the like.
3. Felony involving vice ("victimless" felonies): drug felonies, gambling, and sex offenses.
4. Misdemeanor involving harm or danger to persons: drunken driving, assault, weapons offenses, and the like.
5. Misdemeanor involving property loss or damage only: misdemeanor breaking and entering, larceny, fraud, worthless check, damaging property, and the like.
6. Misdemeanor vice: drug misdemeanors, gambling, prostitution, sex offenses, and violation of liquor laws.
7. Misdemeanor—family: domestic nonsupport ("desertion").
8. Misdemeanor—other: disorderly conduct, escape, vagrancy, and the like.

Here, the offense category depends only on the original charge on the warrant. Since the arrest usually precedes the warrant, the charge reported on the

2. The increase was most likely due to the fact that the magistrates were ordered on July 26, 1972, to cease releasing defendants on their own without the involvement of PTR, which meant that PTR would release more of the defendants who would otherwise have been released by the magistrates unassisted by PTR. See Section III(c)(2) of this report.

3. Race in this study is either Negro or non-Negro.

police arrest report may differ from the charge on the warrant. No attempt was made in the study to allow for the reduction of a charge during court processing.

B. MEASUREMENTS OF PERFORMANCE OF BAIL SYSTEM

Opportunity for bail, failure to appear in court as directed while on bail,[4] and rearrest for an alleged new offense while on bail[5] are the subjects of measurement in this report. To measure opportunity for bail, it is assumed that opportunity to obtain bail is equivalent to actually obtaining bail—that is, that all defendants will in fact obtain bail if given the opportunity. If a secured bond is involved, opportunity will of course depend on the defendant's financial position.

This study compares various forms of bail, but is in no sense a controlled experiment. The best way to test the relative effectiveness of various forms of bail would have been to select defendants chosen at random from predetermined groups for "treatment" (i.e., release) on each type of bail, and then to compare the resulting failure to appear and rearrest rates. This was obviously not practical. Instead the defendants who were actually selected—for whatever reasons—were compared for various types of bail. The resulting data allow us to make general statements only about the class of defendants who obtain release on each type of bail, and not about a more generalized class of defendants. If, for example, it had been possible to assign low-income felony defendants at random to Bondsman and PTR release, it might have been validly concluded that PTR release exhibited a higher (or lower) rearrest rate than Bondsman release, *for the class of low-income felony defendants in general*. As the study was in fact conducted, the only conclusions that can be made are of this type: "Those low-income felony defendants who obtain release by employing a bondsman exhibit a higher (or lower) rearrest rate than those who obtain release through the PTR Program." Note that this statement cannot be limited to the possible effects of the two forms of bail; *it also necessarily includes the characteristics of the released defendants themselves*. The fact that defendants released on a certain form of bail have a certain failure-to-appear rate reflects not only the characteristics of that form of bail, but also factors extrinsic to the bail system—chiefly the characteristics of the defendants who choose, or are chosen for, that type of bail.

In the present study, then, there is no way to distinguish the influence of the defendant's characteristics from the influence of the operation of a particular form of bail. However, one can at least compare defendants on different types of bail who fall into the same income, race, employment, and offense categories. The effect of partitioning the comparisons in this way is that income, race, employment, and type of offense can be excluded as explanatory factors. In other words, if, say, low-income defendants on Bondsman release were compared with those on PTR release and differences in failure to appear and rearrest rates were observed, it would be clear that the difference is not due *solely* to the income and offense of the defendants; the difference must be ascribed to other factors, possibly acting in combination with income and offense. Partitioning the comparisons brings us closer, in a sense, to statements about the intrinsic advantages and disadvantages of various forms of bail than we would be without partitioning. However, it is important to keep in mind when reading the results presented here that, although those defendants who are released on some particular form of bail may have certain rates of rearrest or failure to appear, it cannot be concluded that *all* defendants would exhibit such rates if they were released on this form of bail.

C. TESTS OF STATISTICAL SIGNIFICANCE

In this report, when observed differences in percentages or rates—for example, the percentage of defendants who fail to appear—are compared, these are said to be "significant" or "not significant." Differences are considered significant when the probability is no greater than 0.05 (19-to-1 odds) that the observed difference could have happened by accident in sampling, that is, without a corresponding true difference in the entire population of defendants. Otherwise, observed differences are considered not significant.

III. Results of Study

Parts A and B of this section will state the conclusions of the study, and Part C will be concerned with detailed discussion of some of the supporting findings.

A. GENERAL CONCLUSIONS ABOUT THE PRETRIAL RELEASE PROGRAM AND THE MECKLENBURG COUNTY[6] BAIL SYSTEM

The bail system has improved from 1971 to 1972. The failure to appear rate for all released defendants has dropped significantly from 11.7 per cent to 5.2 per cent, estimated from the sample. This reduction

4. "Failure to appear" is defined as "the issue of at least one capias by the court for failure to appear."

5. "Rearrest for new charge while on bail" means that at least one new record of an arrest *on a new charge* is found in the police records during the period of bail.

6. Although the sample discussed here is limited to defendants arrested within the Charlotte city limits, it is treated as being representative of the county as a whole. Only a small portion of the total arrests occur outside the city limits (11 per cent in 1970).

of over-all nonappearance has been due mainly to reduced nonappearance among those released by professional bondsmen. The rate of rearrest for a new offense while on bail was 7.4 per cent for the 1971 sample and 5.8 per cent for the 1972 sample; however, since this difference did not meet the significance criterion, the conclusion is that the rearrest rate is unchanged. Inequality of bail opportunity for the low-income and black defendant apparently disappeared between 1971 and 1972.

The most frequently used forms of bail have been Bondsman (56 per cent of defendants in the 1971 sample and 49 per cent in the 1972 sample), PTR (25 per cent in 1972), and, until it was officially stopped in July 1972, Magistrate (i.e., release on unsecured bond by a magistrate without involvement of PTR), which was the form of release of 28 per cent of the defendants in the 1971 sample and 10 per cent of the defendants in the 1972 sample. There is reason to believe (see Table 1) that most of the defendants released by PTR would in the past have been released by magistrates on unsecured bond, although PTR has probably taken some customers away from the professional bondsmen. Also, PTR released some low-income and black defendants who would probably not have been released at all in the past.

The PTR Program has been generally successful. The defendants released by PTR in this report's sample of 177, which are probably representative of PTR releasees during 1972, have done as well as or better than those in the sample who were released in other ways with respect to appearing in court as scheduled and avoiding rearrest while their cases are pending. The PTR Program is responsible for the disappearance of a small but significant disadvantage in bail opportunity for the low-income and black defendant. Another obvious achievement of PTR has been to save some of its releasees the necessity of paying bondsmen's fees to enjoy the right to bail (although most PTR releasees would probably in the past have been released on unsecured bond by magistrates, and thus would not have had to engage bondsmen).

The data presented in this report do not warrant the conclusion that PTR can claim exclusive credit for all of the improvements of the bail system, or that PTR should replace other forms of bail. As will be shown below, the bail bondsman system has apparently reformed itself (with a little help from the court) between 1971 and 1972, with the result that the nonappearance rate of Bondsman releasees has dropped. With regard to whether PTR should become the sole form of bail, the data of this study do not indicate what would happen if a large proportion of defendants now released by bondsmen were to be released instead by PTR. Even controlling for income, race, employment, and type of offense, the PTR and Bondsman releasee groups may possibly differ with respect to other (unknown) characteristics or combinations of characteristics that are related to the likelihood of nonappearance or rearrest while on bail.

If the county administration and the court of the Twenty-sixth Judicial District decide to expand the PTR program and to begin releasing defendants who would otherwise have been released by bondsmen or not at all, it will be necessary to continue to follow a course of gradual, rather than sudden, growth and to continue monitoring nonappearance rates, rearrest rates, and other indexes to be sure that the defendants released by PTR are behaving as well as those it has released in the past.

B. SUMMARY OF SPECIFIC FINDINGS

● *1. Opportunity for release.* The opportunity for release before trial is here measured by the proportion of defendants who actually were released. The proportion of defendants released went from 87.8 per cent in 1971 to 91.4 per cent in 1972, using the sample proportions as estimates; this is a slight but significant increase. When income and seriousness of offense (felony or misdemeanor) are controlled for, however, virtually no significant increases in opportunity are discerned.[7] This means that there is no justification for ruling out the possibility that the increase in opportunity was due to some change in defendants' characteristics (or combinations thereof) that the study did not control for, rather than due primarily to changes in the bail system. In other words, it is possible that defendants in 1972 were inherently more "bailable" than those in 1971.

● *2. Ending of inequality of bail opportunity.* For defendants in the 1971 sample, there was a slight but significant difference in bail opportunity that favored higher-income property-crime defendants over lower-income property-crime defendants and favored white over black.[8] This difference was not present in the 1972 sample. The disappearance of the opportunity

7. The one exception is the category High Income-Misdemeanor Vice, in which the proportion of defendants released is 64.3 per cent in the 1971 sample and 95.7 per cent in the 1972 sample, a significant difference. This may be due to the fact that most high-income drug offenders were classified as felons in 1971, and therefore suffered the felon's disability in obtaining bail (see Table 3, Rows 5 and 6) despite their presumable ability to pay bondsmen's fees, whereas many offenders of the same type became misdemeanants in 1972 because of the new drug statute, and therefore tended to lose the felon's stigma.

8. For defendants charged with misdemeanors against property, the proportion not released was: 14.1 per cent low income, 1.8 per cent high income, 1971; 6.2 per cent low income, 5.2 per cent high income, 1972. For those charged with property felonies, the proportion not released was: 41.2 per cent low income, 19.6 per cent high income, 1971; 29.1 per cent low income, 10.8 per cent high income, 1972. In both cases, the difference in proportions is significant for 1971 but not for 1972. For low and high income *without* controlling for offense, no significant differences were found in 1971 or 1972.

9. In the 1971 sample, 14.7 per cent of Negro defendants were not released at all as compared with 9.7 per cent for non-Negro defendants. In the 1972 sample, the corresponding proportions were 10.0 per cent for Negro and 7.2 per cent for non-Negro. The difference was significant in 1971 but not in 1972.

differential is clearly due to the PTR Program (see Table 3, Rows 1–4).

● *3. Failure to appear in court: improvement of Bondsman releasees.* Considering all types of defendants in the sample, those released by means of professional bondsmen in the 1972 group exhibited a much lower failure-to-appear rate (6.8 per cent) than those in the 1971 group (15.5 per cent), and the difference is statistically significant. However, when income and offense seriousness are controlled for, the sample data show a significant improvement from 1971 to 1972 only for low-income and high-income misdemeanants. The data do not show any significant differences from 1971 to 1972 for the other income/offense groups (unclassified income misdemeanants and low, high, and unclassified income felons). Therefore, the conclusion supported by the data is that Bondsman-released misdemeanants in 1972 had a lower nonappearance rate than those in 1971. The data do not support such a statement about felons. (In a sense, the exclusion of felons is not a very important limitation, since 85 per cent to 90 per cent of the Bondsman releasees have been misdemeanants.) What can the improvement in Bondsman-released misdemeanants' appearance rate be attributed to? Probably either to an improvement in bondsmen's procedures—perhaps a greater reluctance to release everyone who happens to be able to pay the bondsmen's fee, or perhaps an increased effort to impress upon the defendant his obligation to appear in court—or to a difference in the inherent characteristics of misdemeanor defendants who are released by bondsmen, or both.

● *4. Rate of rearrest while on bail: no improvement of Bondsman releasees.* The sample percentages for rearrest on a new charge while on bail were 7.4 per cent for the 1971 sample of Bondsman releasees and 5.7 per cent for the 1972 sample; this difference did not prove to be significant.

● *5. Failure to appear: PTR compared with other forms of release.* Compared with defendants released in 1972 either by bondsmen or by magistrates on unsecured bond, PTR releasees in the sample exhibited a lower rate of failure to appear (2.5 per cent as compared with 6.2 per cent). This difference does not quite meet the 0.05 level test of significance,[10] but is close to it.[11] Comparing just the 1972 Bondsman releasees with the PTR releasees, the rate is 2.5 per cent for PTR and 6.8 per cent for Bondsman. This is a large and significant difference. When income and offense seriousness are controlled for, however, the difference disappears, except for high-income misdemeanants. Therefore, the large difference in nonappearance rates of Bondsman and PTR releasees may be attributable to differences in defendants' characteristics, possibly acting in combination with differences between the PTR and Bondsman release systems.

Comparing PTR releasees with Magistrate releasees leads to a surprising and contra-intuitive finding. No significant differences in nonappearance rate were found between PTR and 1971 Magistrate releasees in the sample, nor between PTR and 1972 Magistrate releasees. (The rate is about 3 per cent for the 1972 groups.) The same was true comparing PTR with 1972 Magistrate releasees and controlling for income and offense seriousness. In other words, PTR and Magistrate releasees do not differ in nonappearance rate. Also, combining the 1972 PTR and Magistrate groups, we find that their combined nonappearance rate (2.7 per cent) is significantly lower than that for 1972 Bondsman releasees (6.8 per cent). What do these two forms of release (PTR and Magistrate) have in common that Bondsman release does not have? It is the practice of releasing defendants based in part on information about the strength of social attachments—residence, family situation, and employment. The questionnaires employed in the two release procedures are similar, although not identical, with respect to social attachments; however, they differ in that PTR also includes criminal history as a factor in its rating system, while Magistrate release does not. Bondsman release presumably depends mainly on ability to pay the bondsman's fee. All of this suggests that the supervision of releasees by the PTR Program after release is not what keeps the nonappearance rate low—as many, including the

TABLE 1

Numbers[1] of Defendants Arrested[2] in January February, and March, 1971 and 1972, by Type of Release Before Trial

	(1) 1971		(2) 1972		(3) % Gain or Loss
1. No release	314	(12.2%)	238	(8.6%)	− 3.6%
2. Bondsman	1434	(55.6%)	1348	(48.6%)	− 7.0%
3. PTR Program	0	(0.0%)	689	(24.9%)	+24.9%
4. Release by Magistrate on Unsecured Bond	712	(27.6%)	279	(10.1%)	−17.5%
5. Recognized by Judge	24	(0.9%)	40	(1.4%)	+ 0.5%
6. Cash bond	84	(3.3%)	158	(5.7%)	+ 2.4%
7. Property bond	9	(0.3%)	19	(0.7%)	+ 0.4%
8. TOTAL	2577	(100.0%)	2771	(100.0%)	——

1. Projected from stratified sample (over-all sampling fraction is one-third).
2. Excluding those arrested for motor vehicle offenses (but including drunken driving) and excluding those arrested for wildlife violations and public drunkenness.

10. See Section II(C) above.
11. Chi square is 3.54 with one degree of freedom.

TABLE 2

Failure to Appear and Rearrest on New Charge Before Trial for All Defendants Released,[1] 1971 and 1972, by Type of Release

Type of Bail	Failure to Appear								Rearrest on New Charge Before Trial							
	1971				1972				1971				1972			
	Failed		Total Released		Failed		Total Released		Rearrest		Total Released		Rearrest		Total Released	
1. Bondsman	222	(15.5%)	1434	(100.0%)	91	(6.8%)	1348	(100.0%)	106	(7.4%)	1434	(100.0%)	77	(5.7%)	1348	(100.0%)
2. PTR Program	0	—	0	—	17	(2.5%)	689	(100.0%)	0	—	0	—	54	(7.8%)	689	(100.0%)
3. Release by Magistrate on Unsecured Bond	41	(5.8%)	712	(100.0%)	9	(3.2%)	279	(100.0%)	53	(7.4%)	712	(100.0%)	7	(2.5%)	279	(100.0%)
4. Recognized by Judge	2	(8.3%)	24	(100.0%)	2	(5.0%)	40	(100.0%)	6	(25.0%)	24	(100.0%)	5	(12.5%)	40	(100.0%)
5. Cash Bond[2]	0	(0.0%)	84	(100.0%)	12	(7.6%)	158	(100.0%)	3	(3.6%)	84	(100.0%)	0	(0.0%)	158	(100.0%)
6. Property Bond	0	(0.0%)	9	(100.0%)	0	(0.0%)	19	(100.0%)	0	(0.0%)	9	(100.0%)	4	(21.1%)	19	(100.0%)
7. Total Released	265	(11.7%)	2263	(100.0%)	131	(5.2%)	2533	(100.0%)	168	(7.4%)	2263	(100.0%)	147	(5.8%)	2533	(100.0%)

1. Projected from stratified sample (over-all sampling fraction is one-third).
2. For defendants released on cash bond, "failure to appear" does not include those who failed to appear and were allowed to forfeit their bond, with no capias being issued.

author, have believed—but rather, the selection of releasees in the first place is all that matters.[12]

However, one should not conclude that the supervision system of the PTR Program has no utility. Both the magistrates and PTR can select releasees who have a very low probability of failing to appear in court—probably as low as any system of release could ever hope for. With this sort of selection, the PTR post-release supervision system may be superfluous. However, if PTR were to begin handling the release of large numbers of higher-risk defendants—for example, defendants normally handled by bondsmen, who have a nonappearance rate of 7 per cent—then the supervision system might be able to bring that rate down. This raises the question whether large numbers of defendants normally released by bondsmen would be able to qualify for release under the PTR standards. It is the author's impression (there are no hard data on the subject) that most of the Bondsman releasees, when booked, do not wait to be interviewed by PTR but instead find (or are found by) a bondsman and obtain release immediately.[13] Thus it appears possible that many Bondsman releasees could qualify for PTR release, and that the PTR post-release supervision system might be able to bring their nonappearance rate down.[14]

● *6. Rate of rearrest while on bail: PTR compared with other forms of release.* For defendants in the 1972 sample, a comparison of PTR and Bondsman releasees shows no significant difference found in proportion rearrested on a new charge while on bail. This is also true when income and offense seriousness are controlled for.[15] Comparing PTR releasees with 1971 Magistrate releasees, no significant differences in rearrest rate are found. The same is true when PTR releasees are compared with 1972 Magistrate releasees, even though the Magistrate releasees were far fewer (and therefore probably more carefully selected in 1972) and exhibited a much lower rearrest rate than those of 1971 (2.5 per cent compared with 7.4 per cent).[16]

● *7. Rate of rearrest: Acceptable? Reducible?* The proportion rearrested on a new charge while on bail in the 1972 sample is 5.7 per cent for Bondsman releasees, 7.8 per cent for PTR, 2.5 per cent for Magistrate, and 5.8 per cent for all six types of releasees, including Recognized, Cash Bond, and Property Bond (see Table 2). Is this an acceptable rate? Put in perspective, this rate can be compared with the estimated chance of arrest of a citizen in Charlotte. For defendants in the 1972 sample, the median time between arrest and court disposition, which is approximately equal to the time on bail, is about 27 days; 94 per cent of the defendants' cases were disposed of within 120 days. During the year 1970, the police reported 10,611 arrests of persons over age 15 in Charlotte on charges that exclude suspicion, drunkenness, traffic, and wildlife but include drunk driving. Most of those arrested (10,231) were in the 16-to-54 age group.

12. Due to the surprising nature of this finding, further comparisons between 1971 Magistrate and 1972 PTR releasee groups were performed, controlling for (1) race and felony/misdemeanor; (2) income and felony/misdemeanor; (3) race and specific offense category (there are eight of these); (4) employment status and specific offense category. Of course, when data are chopped more finely in this manner, significant differences are "harder to get" because sample sizes become smaller. Therefore, although no significant differences between PTR and Magistrate 1971 with respect to nonappearance rate were found with these stricter controls, it is still possible that differences might have shown up if five or ten times as much data had been collected. Needless to say, the cost of obtaining this much additional information was prohibitive.

13. Most released defendants are released within five days of arrest. However, for defendants who have the wherewithal to pay the bondsman's fee, Bondsman release means freedom within half an hour of arrest rather than the one hour to several days required for PTR release.

14. Does PTR interview, and then refuse to recommend release for, many defendants who later obtain Bondsman release? Not many. The number interviewed and found not eligible is only about one-fourth of the number released.

15. The sole exception is the unclassified income misdemeanant group, which constitutes only 8 per cent of the total sample of 1972 PTR and Bondsman releasees.

16. In the sample, although the rearrest rates were 7.8 per cent for PTR and 2.5 per cent for 1972 Magistrate releasees, the observed difference has a probability of between 10 per cent and 15 per cent of having occurred by chance (chi square is 2.459, with one degree of freedom) and thus does not meet the study's significance criterion.

Dividing this 10,231 by the city's 1970 population of persons age 16 to 54 (129,796) gives 0.079, which is an estimate of the chance a city resident now has of being arrested during an entire year. This chance would be 0.006 for a 27-day period (the median bail period) and 0.026 for a 120-day period. Therefore, the chance of rearrest during the bail period for a bailed Charlotte defendant (0.058) was from two to ten times larger than the chance during a comparable period of time for a randomly selected Charlotte citizen.

The author cannot say whether this 5.8 per cent rearrest rate is acceptable to the community but assumes that any rearrest rate other than zero is undesirable. How could the rate be reduced? Using denial of bail as a way to reduce the rearrest rate may violate constitutional rights, and therefore is not advisable. Rehabilitative services provided to the bailed defendant between arrest and trial do not offer much hope, either; for one thing, the time period (median 27 days) seems too short for such service to be effective. Probably the most effective way of reducing the rearrest rate while on bail is to concentrate on reducing the delay between arrest and disposition for those charged with felonies. As Table 4 indicates, felon releasees in the 1972 sample had a rearrest rate of 11.7 per cent, which was more than twice that of misdemeanant releasees (5.4 per cent); the difference was statistically significant. Not only do felons in the sample have a much higher chance of being rearrested on a new charge while on bail, but also their being rearrested is naturally a cause for more concern than the rearrest of those charged with misdemeanors. Felony cases take longer to dispose of (median 57 days in the 1972 sample) than misdemeanor cases (median 25 days), and are probably more sensitive to delay-reducing court reforms than misdemeanors. However, despite all the good reasons for concentrating on the reduction of felony processing delays, the author has no information on how much "slack," if any, now exists in the processing time for felonies, and therefore cannot estimate the potential for delay and rearrest rate reduction. The only thing that can be said is that the reduction in rearrest rate should be proportional to the reduction in processing delay.

C. DETAILED DISCUSSION OF CHARACTERISTICS OF RELEASES

The purpose of this subsection is to provide some of the details supporting the general conclusions that were omitted or only briefly referred to earlier in the report.

● *1. What can be said about recognizance, cash bond, and property bond?* Defendants on these three forms of bail were only 4 per cent of the 1971 sample and 8 per cent of the 1972 sample (see Table 3). With numbers this small, nothing significant can be said about the releasees involved and their rates of non-

(Continued on page 24)

Proportion of Defendants[1] Released, by Incor

	(1) Not Released		(2) Bondsman		(3) P.T.R.		
1971							
1.1 Low Income	202	(14%)	856	(58%)	0	—	
	(64%)		(60%)		—		
1.2 High Income	53	(6%)	419	(50%)	0	—	
	(17%)		(29%)		—		
1.3 Uncl. Income	59	(22%)	159	(60%)	0	—	
	(19%)		(11%)		—		
1.4 Total	314	(12%)	1,434	(56%)	0	—	
	(100%)		(100%)				
1972							
2.1 Low Income	136	(9%)	789	(55%)	393	(27%)	
	(57%)		(59%)		(57%)		
2.2 High Income	62	(6%)	379	(40%)	255	(26%)	
	(26%)		(28%)		(37%)		
2.3 Uncl. Income	40	(12%)	180	(53%)	41	(12%)	
	(17%)		(13%)		(6%)		
2.4 Total	238	(9%)	1,348	(48%)	689	(25%)	
	(100%)		(100%)		(100%)		
1971							
3.1 Negro	187	(15%)	748	(60%)	0	—	
	(60%)		(52%)		—		
3.2 Non-Negro	127	(10%)	686	(53%)	0	—	
	(40%)		(48%)		—		
3.3 Total	314	(12%)	1,434	(56%)	0	—	
	(100%)		(100%)		—		
1972							
4.1 Negro	139	(10%)	692	(51%)	419	(30%)	
	(58%)		(51%)		(61%)		
4.2 Non-Negro	99	(7%)	656	(48%)	270	(19%)	
	(42%)		(49%)		(39%)		
4.3 Total	238	(9%)	1,348	(48%)	689	(25%)	
	(100%)		(100%)		(100%)		
1971							
5.1 Felony	134	(34%)	199	(51%)	0	—	
	(43%)		(14%)		—		
5.2 Misdemeanor	180	(8%)	1,235	(58%)	0	—	
	(57%)		(86%)		—		
5.3 Total	314	(12%)	1,434	(56%)	0	—	
	(100%)		(100%)		—		
1972							
6.1 Felony	101	(28%)	144	(41%)	33	(9%)	
	(42%)		(11%)		(5%)		
6.2 Misdemeanor	137	(6%)	1,204	(50%)	656	(27%)	
	(58%)		(89%)		(95%)		
6.3 Total	238	(9%)	1,348	(48%)	689	(25%)	
	(100%)		(100%)		(100%)		
1971							
7.1 Employed	151	(9%)	896	(54%)	0	—	
	(48%)		(63%)		—		
7.2 Unemployed	81	(21%)	233	(60%)	0	—	
	(26%)		(16%)		—		
7.3 Student or unknown	82	(16%)	305	(57%)	0	—	
	(26%)		(21%)		—		
7.4 Total	314	(12%)	1,434	(56%)	0	—	
	(100%)		(100%)		—		
1972							
8.1 Employed	95	(5%)	872	(50%)	438	(25%)	
	(39%)		(65%)		(63%)		
8.2 Unemployed	68	(15%)	192	(44%)	102	(23%)	
	(29%)		(14%)		(15%)		
8.3 Student or unknown	75	(13%)	284	(48%)	149	(25%)	
	(32%)		(21%)		(22%)		
8.4 Total	238	(9%)	1,348	(48%)	689	(25%)	
	(100%)		(100%)		(100%)		

1. Projected from stratified sample (over-all sampling fraction is one-third).

TABLE 3

Race, Offense Seriousness and Type of Release, 1971 and 1972

) trate	(5) Recognized		(6) Cash Bond		(7) Property Bond		(8) Total Released		(9) Total	
(24%)	18	(1%)	40	(3%)	5	(0%)	1,272	(86%)	1,474	(100%)
	(75%)		(48%)		(56%)		(56%)		(58%)	
(39%)	5	(1%)	30	(4%)	4	(0%)	781	(94%)	834	(100%)
	(21%)		(35%)		(44%)		(35%)		(32%)	
(13%)	1	(0%)	14	(5%)	0	(0%)	210	(78%)	269	(100%)
	(4%)		(17%)		(0%)		(9%)		(10%)	
(28%)	24	(1%)	84	(3%)	9	(0%)	2,263	(88%)	2,577	(100%)
	(100%)		(100%)		(100%)		(100%)		(100%)	
(5%)	30	(2%)	28	(2%)	6	(0%)	1,321	(91%)	1,457	(100%)
	(74%)		(18%)		(32%)		(52%)		(53%)	
(19%)	5	(1%)	72	(7%)	12	(1%)	909	(94%)	971	(100%)
	(13%)		(45%)		(63%)		(36%)		(35%)	
(5%)	5	(1%)	58	(17%)	1	(0%)	303	(88%)	343	(100%)
	(13%)		(37%)		(5%)		(12%)		(12%)	
(10%)	40	(1%)	158	(6%)	19	(1%)	2,533	(91%)	2,771	(100%)
	(100%)		(100%)		(100%)		(100%)		(100%)	
(23%)	18	(1%)	14	(1%)	4	(0%)	1,081	(85%)	1,268	(100%)
	(75%)		(17%)		(44%)		(48%)		(49%)	
(32%)	6	(0%)	70	(5%)	5	(0%)	1,182	(90%)	1,309	(100%)
	(25%)		(83%)		(56%)		(52%)		(51%)	
(28%)	24	(1%)	84	(3%)	9	(0%)	2,263	(88%)	2,577	(100%)
	(100%)		(100%)		(100%)		(100%)		(100%)	
(5%)	26	(2%)	31	(2%)	5	(0%)	1,247	(90%)	1,386	(100%)
	(65%)		(20%)		(26%)		(49%)		(50%)	
(15%)	14	(1%)	127	(9%)	14	(1%)	1,286	(93%)	1,385	(100%)
	(35%)		(80%)		(74%)		(51%)		(50%)	
(10%)	40	(1%)	158	(6%)	19	(1%)	2,533	(91%)	2,771	(100%)
	(100%)		(100%)		(100%)		(100%)		(100%)	
(7%)	17	(4%)	8	(2%)	9	(2%)	262	(66%)	396	(100%)
	(71%)		(10%)		(100%)		(12%)		(15%)	
(31%)	7	(0%)	76	(3%)	0	(0%)	2,001	(92%)	2,181	(100%)
	(29%)		(90%)		(0%)		(88%)		(85%)	
(28%)	24	(1%)	84	(3%)	9	(0%)	2,263	(88%)	2,577	(100%)
	(100%)		(100%)		(100%)		(100%)		(100%)	
(9%)	24	(7%)	5	(1%)	19	(5%)	258	(72%)	359	(100%)
	(60%)		(3%)		(100%)		(10%)		(13%)	
(10%)	16	(1%)	153	(6%)	0	(0%)	2,275	(94%)	2,412	(100%)
	(40%)		(97%)		(0%)		(90%)		(87%)	
(10%)	40	(1%)	158	(6%)	19	(1%)	2,533	(91%)	2,771	(100%)
	(100%)		(100%)		(100%)		(100%)		(100%)	
(32%)	12	(1%)	67	(4%)	4	(0%)	1,514	(91%)	1,665	(100%)
	(50%)		(80%)		(45%)		(67%)		(65%)	
(16%)	8	(2%)	3	(1%)	1	(0%)	308	(79%)	389	(100%)
	(33%)		(4%)		(11%)		(14%)		(15%)	
(22%)	4	(1%)	14	(3%)	4	(1%)	441	(84%)	523	(100%)
	(17%)		(16%)		(44%)		(19%)		(20%)	
(28%)	24	(1%)	84	(3%)	9	(0%)	2,263	(88%)	2,577	(100%)
	(100%)		(100%)		(100%)		(100%)		(100%)	
(11%)	20	(1%)	118	(7%)	11	(1%)	1,646	(95%	1,741	(100%)
	(49%)		(75%)		(57%)		(65%)		(63%)	
(11%)	15	(3%)	16	(4%)	2	(0%)	374	(85%)	442	(100%)
	(38%)		(10%)		(11%)		(15%)		(16%)	
(8%)	5	(1%)	24	(4%)	6	(1%)	513	(87%)	588	(100%)
	(13%)		(15%)		(32%)		(20%)		(21%)	
10%)	40	(1%)	158	(6%)	19	(1%)	2,533	(91%)	2,771	(100%)
	(100%)		(100%)		(100%)		(100%)		(100%)	

Institute Faculty Member Retires from Army Reserve

Col. Philip P. Green, Jr., Professor of Public Law and Government at the Institute of Government, has been awarded the U.S. Army's Legion of Merit for "exceptionally meritorious conduct in the performance of outstanding services" in the Army Reserve.

Major General Thomas J. Thorne, commander of the 120th U.S. Army Reserve Command, made the presentation at ceremonies marking Col. Green's impending retirement after more than 30 years of service. The Legion of Merit is the Army's second highest award for meritorious service, ranking behind only the Distinguished Service Medal.

Col. Green has been commandant of the 3284th USAR School in Durham for the past four years. During his tenure the school increased in enrollment almost tenfold and was designated a Superior Unit. Previously he served in Europe with an armored field artillery battalion during World War II and held a succession of USAR positions, including command of an artillery battalion and duty as a division staff officer.

He was also medalist of his class at the Army's Command and General Staff College and an honor graduate of both the Industrial College of the Armed Forces and the Army War College.

At the Institute of Government since 1949, he has specialized in the field of state, regional, and local planning law and administration.

appearance and rearrest. In any event, cash bond and property bond are really not comparable to the other forms of bail. As a practical matter, failure to appear while on cash or property bond is often thought of as an implicit plea of guilty, in which the forfeited cash or property is similar to a fine.

● *2. If there had been no PTR, would PTR releasees have been released in some other way?* The data suggest that most of the PTR releasees in the 1972 sample would have been released by magistrates on unsecured bond if there had been no PTR Program in existence at the time they were arrested.

Table 3 shows that the PTR releasees in the 1972 sample, although more likely (61 per cent) to be Negro than the 1971 Magistrate releasees (42 per cent), had a 57 per cent chance of being in the low-income bracket ($0–$6999 median income), which is about the same chance as 1971 Magistrate releasees had (50 per cent). The proportion of felony-charged releasees is the same (5 per cent for PTR; 4 per cent for 1971 Magistrate), and much lower than the proportion for Bondsman releasees (14 per cent in 1971 and 11 per cent in 1972). The PTR proportion of employed (63 per cent) is somewhat lower than that of 1971 Magistrate (75 per cent). None of these comparisons is particularly telling, in view of the fact that none of the four variables (race, income, offense seriousness, employment status) is significantly related (in the 1972 sample) to the principal measure of bail performance used here—the failure-to-appear rate.

The principal evidence for the contention that most PTR releasees would have been released by magistrates on unsecured bond if there had been no PTR program is the fact that, from 1971 to 1972, as the practice of Magistrate release declined, PTR release increased (see Table 1) by an amount roughly equal to the decline, while the number of Bondsman releasees dropped only slightly. Another supporting fact is that PTR release, after the investigation of the defendant's social attachments and criminal history is completed, takes the form of recommending release to the magistrate,[17] who then (if he accepts the recommendation) releases the defendant on unsecured bond. In view of the close working relationship that this practice entails, it is likely that the standards for release employed by magistrates unassisted by PTR, on the one hand, and the PTR Program working with the magistrates, on the other hand, have tended to merge. The operators of the PTR Program, wishing (as one might expect) to be cautious, have probably released more or less the same defendants as the unassisted magistrates would have released, and, as Table 2 shows, with the same low rearrest and nonappearance rates. Also, they have apparently not competed very actively with bail bondsmen.

The 1972 sample is limited to defendants arrested in Charlotte during the period January, February, and March 1972. Is there any reason to believe that PTR has broken new ground since that time and begun to release more defendants, perhaps defendants who would otherwise have been released by employing bondsmen? The answer appears to be no. The average number of releases per week by PTR for the four quarters of 1972 were 77.7, 77.1, 95.2, and 95.9. The difference between the first two and the last two averages could not have occurred by chance if the PTR "releasing system" had remained the same; i.e., there was a statistically significant difference in the operation of PTR by the second half of 1972.[18] This is almost certainly due to the fact that, after a year of uncertainty about the relationship between the magistrates and PTR, the magistrates were formally directed on July 26, 1972, to entirely stop releasing defendants without the involvement of PTR. The weekly totals of releases by PTR for the eight weeks preceding this order were 71, 90, 104, 88, 60, 65, 60, and 94; the next week (following the order), the figure jumped up to 129, and thereafter was 103, 100, 102, 115, 99, 90, 105, etc. Comparing the average number of releases per week by PTR for the first and last quarters (77.7 and 95.9), we see a 23 per cent increase by the last quarter. Table 1, Column 2, Rows 3 and 4, show that the fraction released by the magistrates acting independently of PTR was more than enough to allow this sort of increase by PTR. The projected number of defendants arrested in the first quarter of 1972 and released by the magistrates independently is 279, which is 40 per cent of the corresponding number for PTR (689).

Therefore, although PTR's releasing has sharply increased in 1972, there is no reason to believe that it has become more "competitive" with bondsmen than the data used in this report would indicate. The data strongly suggest that the increase in PTR releases during the second half of 1972 is mainly attributable to releasing more defendants who otherwise would have been released by the magistrates independently.

Although the PTR Program has released for the most part those who would have been released by the magistrates anyway, it has certainly released some defendants who would not otherwise have been released. Section III(B)(2) of this report notes that the slight but significant disadvantage in bail opportunity for the black defendant and the low-income property crime defendant observed in the 1971 sample was not present in the 1972 sample. A careful look at Table 3 will indicate why the ending of the disadvantage is most likely due to PTR. The proportion of black defendants released via bondsmen did not go up from 1971 to 1972; it went down slightly from 52 per cent

17. This is not true for the few felony defendants whose release is recommended by PTR. They must be released by a district judge.

18. The difference between the means for the first and last quarters is significant at the 0.001 level, using the observed variances as estimates of the "underlying process" (population) variances.

to 51 per cent. The same was true for the proportion of low-income defendants (down from 60 per cent to 59 per cent). (See Column 2, Rows 1, 2, 3, and 4.) The magistrates, while reducing greatly their practice of release on unsecured bond in 1972, also greatly reduced the proportion of black and low income releasees (Column 4, Rows 1, 2, 3, and 4). PTR, on the other hand, had a higher proportion of low-income defendants among its releasees than the magistrates did among theirs in 1971 (57 per cent compared with 50 per cent), and also a higher proportion of blacks (61 per cent compared with 42 per cent for magistrates in 1971). Finally, the over-all proportion of defendants released increased slightly in 1972. Thus, it is fair to give PTR credit for ending (at least during the period of the study) the bail disadvantage of low-income and black defendants.

● *3. Bail opportunity and defendant's characteristics.* As Section II(A) of this report points out, variables associated with bail opportunity are not necessarily associated with nonappearance or rearrest rates. Income and race were related to bail opportunity in the 1971 sample but not in the 1972 sample, as explained in the preceding subsection. Offense seriousness and employment status, as Table 4 shows, are strongly related in the 1972 data to bail opportunity; 28.1 per cent of felony arrestees were not released at all, compared with 5.7 per cent of misdemeanor arrestees, and 15.3 per cent of unemployed arrestees compared with 5.4 per cent for employed releasees. None of the four variables in the 1972 data is related to failure to appear in court. However, one should not jump to the conclusion that offense seriousness and employment status are not, in general, related to the chance that a randomly selected defendant will fail to appear if released. It may be that the bail system succeeds in selecting *just* those unemployed defendants or *just* those felony defendants who will have low nonappearance rates, and that if more of the unemployed or felony defendants were released, they would have a significantly higher nonappearance rate than employed or misdemeanor defendants.

Column 3 of Table 4 shows that the proportion of releasees rearrested on a new charge while on bail is significantly higher for felons than for misdemeanants (11.7 per cent versus 5.4 per cent), and—remarkably—significantly lower for low-income releasees than for high-income releasees (6.4 per cent versus 15.1 per cent). The chance of rearrest is not significantly related to the other variables, race and employment status. This suggests that the practice of discriminating against felons in granting bail may have a rational basis, but, without further information, it is equally possible that the bail system has been unsuccessful in selecting felons for release—i.e., that if they had been selected in some other way, the felon releasees would not have exhibited such a high rate of rearrest. It is also possible that the bail system has, in fact, selected the felons with the lowest rearrest probability, and that if other felons were to be released, they would show an even higher rearrest rate.

The conclusion must be that these data do not tell us whether the bail disadvantage of the unemployed defendant and the felony defendant is justified. □

TABLE 4

Defendants in 1972 Sample: Bail Opportunity, Failure to Appear, and Rearrest While on Bail, by Race, Income, Offense Seriousness, and Employment Status ("Signif." Indicates Difference in Proportions Significant at 0.05 Level)

		(1) Bail Opportunity (1972)		(2) Court Appearance (1972)		(3) Rearrest on New Charge While on Bail (1972)	
		Released	Not Released	Failure	No Failure	Rearrest	No Rearrest
1.1	Negro	90.0%	10.0%	5.0%	95.0%	5.7%	94.3%
1.2	Non-Negro	92.8%	7.2%	4.7%	95.3%	6.5%	93.5%
1.3	Sample Size	N = 825		N = 825		N = 707	
2.1	Low Income (All Offenses)	90.7%	9.3%	5.6%	94.4%	6.4%	93.6% [Signif.]
2.2	High Income (All Offenses)	89.5%	10.5%	3.5%	96.5%	15.1%	84.9%
2.3	Sample Size	N = 755		N = 645		N = 637	
3.1	Felony	71.9%	28.1% [Signif.]	4.6%	95.4%	11.7%	88.3% [Signif.]
3.2	Misdemeanor	94.3%	5.7%	5.4%	94.6%	5.4%	94.6%
3.3	Sample Size	N = 825		N = 724		N = 707	
4.1	Employed[1]	94.6%	5.4% [Signif.]	5.8%	94.2%	5.9%	94.1%
4.2	Unemployed	84.7%	15.3%	4.5%	95.5%	7.0%	93.0%
4.3	Sample Size	N = 638		N = 638		N = 552	

1. Defendants who are students or whose employment status is unknown are excluded.

New Hanover County Voters Reject City-County Consolidation

In a referendum on February 27, 1973, the voters of New Hanover County, North Carolina, rejected a proposed charter that would have consolidated the governments of City of Wilmington and New Hanover County by a 3–1 margin with a light to moderate turnout (about one-third of the registered voters), the vote was 4,040 (26%) for consolidation and 11,722 (74%) against.

While the vote was a single county-wide one, the results indicate that voters outside the City of Wilmington as a group were much more strongly against consolidation than those inside. Inside the city, 44 per cent of the voters (2,793) favored consolidation and 56% (3,576) opposed. Outside Wilmington, only 13% (1,247) voted for consolidation while 87 per cent (8,146) voted against.

Of the county's 25 precincts, only three returned margins for consolidation—all within the City of Wilmington. One of these precincts favored consolidation by a 4–1 margin. The other 11 of Wilmington's 14 precincts voted against consolidation with margins as great as 4–1.

All outside precincts reported returns against consolidation with margins varying from 2–1 to 24–1 against.

Not only did more citizens outside the city oppose consolidation, but proportionally more of them voted. Approximately 44 per cent of the county's 82,996 citizens live outside the city. In the referendum, 60 per cent of the votes cast were from this portion of the county's population.

The Issues

The chief issues and arguments in the consolidation effort were similar to those that have arisen in consolidation attempts elsewhere in the United States. Those favoring consolidation stressed the unity of the total community, the better planning that consolidation would bring, greater efficiency in governmental operations, and better representation for all segments of the community on the proposed governing board. Those opposed stressed the likelihood of higher taxes, the loss of power and responsibility by the volunteer fire companies and the sheriff, the troubles of the city that would be spread county-wide, and the shift to two-year terms for members of the proposed governing board. (Currently, city and county board members are elected to four-year, staggered terms.)

Proponents and Opponents

A spirited campaign both for and against consolidation was waged in the weeks immediately before the referendum. Each side advertised widely in the newspapers, and the opponents especially used billboards and handbills extensively. Informational meetings were sponsored by the League of Women Voters and other civic groups.

The pro forces were generally led by the Citizens for Consolidation, headed by W. G. Broadfoot, a business and civic leader. Opposition leadership was generally focused in the Truth About Consolidation Committee, in which several county officials and community leaders played prominent roles. Outside the committee structures, several members of the Charter Commission worked for consolidation, and members of the volunteer fire departments and the sheriff's office were strong in opposition.

Members of the city council, the chamber of commerce, and the largest local newspaper favored consolidation. Members of the board of county commissioners, the rural volunteer fire departments, the sheriff, the local black newspaper, and conservative political groups opposed consolidation.

There appeared to be no significant division along party lines. Leaders in both major parties were among the leaders of both pro and anti forces. Nor were racial alignments important. The three predominantly black precincts in the city voted against consolidation by over a 2–1 margin—

almost as strongly against as the county-wide total.

Local news stories after the referendum quoted the chairman of the Republican Party as saying that the sheriff's department and the volunteer fire departments were the most influential political bodies in the county and were major contributors to the defeat of the consolidation effort.

The Consolidation Effort

The February defeat climaxed four years of work. In early 1969 a committee of the Greater Wilmington Chamber of Commerce studied local government in New Hanover and recommended functional consolidation for a number of city and county activities and suggested that a special commission be created to give further study to total governmental consolidation. Ten months later, in July of 1970, the city and county governing boards responded by creating the Wilmington-New Hanover Charter Commission. Between July of 1970 and June of 1972 the Charter Commission undertook extensive studies of the governments. Some 45 reports on various aspects of the governments were produced, as well as the proposed charter and the report of the Commission that commended its work to the citizens of the county.*

The chairman of the Charter Commission, Fred B. Graham, a retired banker and civic leader, was appointed jointly by the Wilmington and New Hanover County governing boards. These boards also appointed four persons jointly, and each appointed five others. The governing boards of the three beach municipalities—Carolina Beach, Kure Beach, and Wrightsville Beach—also appointed two members each. In addition, a Citizens Review Committee of 42 persons, also named by the various governing boards, was created to aid in the studies, to comment on proposals of the Commission, and to provide a broader representation of the entire community in the study process. Timothy Wood, previously director of the joint city-county planning department, served as executive director for Commission's work. The Institute of Government of the University of North Carolina at Chapel Hill served as consultant for the Commission and prepared drafts of the charter under the Commission's direction.

The Plan in Brief

By early 1971, the Commission concluded that the chances of approval of its efforts would be enhanced if the plan for consolidation simply merged the two major governments in the county—Wilmington and New Hanover County—with as few changes in existing practices and policies as possible with consolidation. Thus the basic form of the proposed government was the council-manager arrangement—now used by both Wilmington and New Hanover County. Present board members are elected at large, and the proposed plan called for at-large elections of consolidated board members. As noted above, the Commission did make a change in the terms of office—from two boards with five members each elected for four-year staggered terms to a nine-member board elected for terms of two years. The proposed mayor was to be elected at large, in contrast to the current practice in which the mayor of Wilmington and the chairman of the New Hanover Board of Commissioners are elected from among the members of the respective boards.

The sheriff, the register of deeds, and the members of the board of education are now elected at large and would have continued to be so elected under the proposed plan.

The manager was to be appointed by the governing board and would have exercised all the typical powers and responsibilities of a manager. Following current practices in the county and city governments, the tax supervisor, tax collector, attorney, clerk, and police and fire chiefs would have been appointed by the board. All other administrative personnel of the general government would have been appointed by the manager directly or, for fire and police personnel, subject to civil service regulations.

In general, the various boards and commissions (planning, airport, redevelopment, etc.) were continued with only minor conforming changes in their structures.

The use of an urban service district (Wilmington, at first) in which extra services or higher levels of services would be provided and extra taxes levied was proposed. The governing board was to be given broad discretion in deciding upon services and in allotting nontax revenues of the government. As a result, no definite shift in tax impact was projected. The Commission stressed that the plan would enable the governing board to provide for a fair and equitable system of financing services and did not mandate any specific shift in financial responsibility.

Under the proposed plan the three beach municipalities were to continue unaffected and were not to be consolidated. They were, however, to be able to merge into the consolidated government (and become urban service districts) at a later time if their citizens voted to do so.

The Future

Active interest in city-county consolidation has been present in New Hanover County for over 40 years. Leaders of the recent effort do not expect the interest to wane and several have suggested that renewed efforts toward consolidation are likely in the years ahead.

—Jake Wicker

*The Commission's report is entitled *Preparing for Tomorrow*. The final draft of *A Proposed Charter for the Consolidated Government of Wilmington and New Hanover County* is dated March 31, 1972 (as amended on June 20, 1972). A few copies of each are available through the City of Wilmington and the Institute of Government.

CATV and the Public Schools

An address by **Elmer Oettinger** before a conference of school board members.

IN 1970, THE REPRESENTATIVE ASSEMBLY of the NEA passed a resolution that said: "The National Education Association believes that the use of Community Antenna Television (CATV) channels for education is essential to preserve the public interest, to afford an opportunity for educational innovation, and to encompass the learning needs of a diverse society. . . . The Association directs its officers and staff to seek the reservation of at least 20% of all CATV channels for educational purposes." (Current Res., 70–25)

The 7,500-member NEA Assembly, representing some 1,220,000 people, augmented the resolution by submitting to the Federal Communications Commission, then in the process of making the rules on CATV, the following comments and recommendations:

(1) That "20% of any CATV system's capacity should be reserved for educational, instructional, civic and cultural applications" and that "this principle be applied to old as well as new CATV systems in order that uniformity of such services be made possible."

(2) That the FCC "require CATV systems in the top 100 markets to have a minimum capacity of 20 to 24 channels and that the Commission compel all systems to stay abreast of the state of the art in regards to both channels and systems capacity."

(3) That "the Commission require two-way capability (audio and video in both directions) in all CATV systems."

(4) That "the principle of the proposed public dividend plan—wherein CATV systems in the top 100 markets importing any distant stations would pay 5% of their subscription revenues quarterly in the public interest—be adopted and that the public dividend be reinvested in public cable facilities and programming rather than be allocated to public broadcasting."

(5) That "[i]n an effort to guarantee the public a fair share in public cable communications, the Commission should encourage experimentation in selected local communities with the development of public cable corporations dedicated to fostering a richly beneficial system serving the public interest."

What is this CATV, or Community Antenna Television, or cable television, that prompted the NEA to take such vigorous action? Cable television has been defined as a "transmission system that carries television signals over wires, underground or on utility poles from specially built high antennas and head-end control centers to those homes, offices, schools, or other receiving locations that are linked to the cable system. Thus, cable television provides high-quality signals to television sets in a city, a town, a county, or even a larger unit. Basically, CATV is a "wired system" provided by a company that obtains a franchise from a town or city—or, with new legislation, from a county in North Carolina. A citizen who desires cable television in his home pays a monthly fee to the franchised company for connecting his TV set to the cable network. Once the home or school is wired into a cable system, a potential is created to deliver a great variety of electronic communication and programs into the home or school.

Perhaps most important to education, cable television provides (1) multi-channel capability, permitting diversity of programming, (2) a remarkable opportunity for two-way communication, (3) a clear, ghost-free picture with little interference, and (4) a potential for educational programming that so far has only been scratched.

Cable TV is a complex subject. At the national level, the Federal Communications Commission has set forth extensive rules and guidelines. At the local level, the city or town government has the franchising power and enters into contract with private cable companies for local service. Thus, the kind of ordinance adopted by the community is important. Counties soon will be able to franchise, also. Some seven states have decided that cable television is a public utility and have placed it under their state public utilities law and controls. North Carolina has not done so. In fact, state government has had little to do with cable TV other than to give statutory sanction to local government franchising and to clarify tax statutes and

definitions. That may change. But for the moment, federal and local government are the dominating forces in cable television.

There are other aspects of complexity. Commercial telecasters see cable television as a competitor. Copyright law revision in Congress has brought spirited protests from broadcasters about the transmission of cable television operators of extensive programs without payment of fees or royalties. They point out that cable TV operators collect a connection fee from subscribers. The FCC has responded by restricting the importation of distant signals in the top 100 TV markets. Naturally, cable TV operators want as little copyright restriction as possible. The FCC has increased the commercial value of CATV by requiring the operators to originate programs in areas with 3,500 or more subscribers and permitting advertising to be sold on CATV.

The *1972–73 Cable Source Book* lists some 76 North Carolina towns and cities that are being served directly or have granted franchises for cable television systems. By fall a booklet on *Cable Television in North Carolina* (that I have been preparing for more than a year) should be ready for publication. Recently I have been asked to serve on two committees—one a committee of the University of North Carolina exploring the use of cable television in higher education and the public school system, the other a cable television task force advising cities and towns on franchising and ordinances. I have also been consulted by the State Department of Public Instruction on cable television matters as they relate to public schools.

THE IMPORTANT THING for school board members to know is that CATV has a tremendous potential for and impact upon the public schools. Unfortunately, many of the cable television franchises in our state have been agreed upon by city fathers and cablevision companies without sufficient awareness, knowledge, or input by local school officials. Although the school superintendents are holding their annual meetings this summer, no segment of the program is scheduled to be devoted to cable television. I find that understandable but unfortunate—for the superintendent in any school system should be familiar with the nature, needs, and potential of cable television for his schools and should keep abreast with any and all applications to the city council for franchising. In my judgment, it is important that the superintendent talk with city governing board members in advance about cable television and its importance to the school system and that he and other appropriate school officials be heard loud and clear before and during the writing of cable television ordinances and franchises. Hearings are required before a cable television franchise can be awarded, and such hearings provide an opportunity for *all* interested people to be heard.

For example, FCC requires that at least one channel be devoted free to the use of education. It is important that the public-access concept be understood and implemented by city governments and cable companies. Again, cable television franchising may not be exclusive. More than one company may be granted a franchise in a given community. Rarely, a city may even run its own cable television system.

Two-way communication is not simply a dream of the future. It already exists, both in and out of North Carolina, in the public school systems. At present most new CATV systems have a minimum capacity of 20 channels. Many older systems have fewer. Most franchises are for 15 years. Some older ones run longer. Ten years would be better. Franchise taxes now must range from 3 per cent to 5 per cent, with 3 per cent the standard and a showing of need required for anything over that. That rate represents a change from the original concept of many communities that cable television was to be primarily a revenue-producing source for the municipality. The trend now is to consider it as an essential public service.

When school superintendents, teachers' associations, and school boards ask city or county managers and governing boards for CATV channels to serve the schools, they should be prepared to use those channels in an intelligent, continuing program of instruction and communication.

Their plans should include (1) adequate professional leadership in developing the program; (2) an adequate supporting staff of teachers prepared to teach on television, graphic artists, studio personnel, and others able to guarantee quality production; (3) workshops for teachers and others to be engaged in cable television; (4) wiring of classrooms and other school facilities so that receiving equipment and distribution systems are present and available (the cost of wiring now runs about $135 per room); (5) obtaining a TV studio for school use—if necessary designing and equipping one to originate programs; (6) setting up a committee (or committees) to arrange curriculum planning and creative uses of the cable television facility. The distribution alone can provide for redistributing open-circuit educational television and cable TV programs on additional channels, showing films from a central film library over a channel (even for teachers to preview), and using channels to show different programs to different audiences. Furthermore, extra channels make possible distribution for teacher education, linking a number of schools by cable, putting information on computers; providing dial access to data, video tapes, and films; and using extra channels for special programs.

Still further, CATV with its multi-channel capacity opens vistas of adult education uses that have been limited so far to one channel on open broadcast systems. For

instance, cable TV could offer excellent instruction to prepare those seeking high school equivalency diplomas, provide vocational training for both unemployed and employed persons seeking new skills, and engage in both retraining and on-the-job training programs. It also can reach all sorts of small audiences—parents of school children in a particular school or grade, a special group of students, or a small segment of the community interested in a particular program in the arts or sciences. There is potential for response by each viewer, for two-way input is wholly in the range of cable television. For the first time, a multiple system of cablecasting will permit unheard-of response by individual viewers.

ANY EDUCATORS IN A COMMUNITY whose governing board is even thinking about franchising cable TV (or should be) should make known their interest to that governing board. They should insist on free connections to the cable system for local education institutions. The cable television operator can install "drops" to each school that the trunk passes as it is constructed. Additional arrangements may be possible for schools beyond the area the system serves. Often the CATV operator will agree to service each school within his area with a free connection. The operator also may be willing to install an internal distribution system for small cost, such as for parts and labor.

School officials also should make certain that one or more channels on the CATV are devoted to educational use. This is not only a policy, but sometimes essential to compliance with the FCC rules. Merely allotting a channel is not enough. The channel must be used, and the use must be planned.

Cable television can reach into homes, government and community buildings, libraries, hospitals, and museums as well as schools. Thus, it may make your school a more active and truly integral part of the community—if used properly. Some cities, including New York, have had special task forces on cable television studying the issues and recommending directions. A number of communities are moving ahead with educational programs. Some franchise applicants include in their proposals a linkage of the cable system in that community with those already obtained in other communities. It is important that the superintendent and, hopefully, some board members study and know the FCC rules, ordinances under consideration or adopted by local government, and the potential of CATV for the school systems. Questions need to be formulated, asked, and answered: (1) Does the franchise, proposed or enacted, fulfill school needs? (2) Which of several franchises are best suited for meeting educational needs? (3) Does the school system intend to use cable television in any form in the future, and if so, how? (4) What is needed to spread understanding and knowledge of the CATV and its potential? (5) Do the schools operate a system that would include a production facility for educational purposes? (6) Is production use of the facility planned, and is it sufficiently structured and innovative to meet community needs and goals? (7) Is an internal distribution system, within buildings, installed for broadcast TV reception? (8) Do the CATV linkups reach (or propose to reach) all schools, libraries, and meeting and instructional places in the community? (9) Is the reserving of channels for school use assured by written agreement? (10) Is free use of channels made certain by written agreement with the CATV company? (11) Is free interconnection of the community and the school production facilities and the central distribution point of the cable company provided for? (12) Does the cable television system have a one-way or a two-way communication capability—in other words, is it simplex or duplex? (13) Does the CATV franchise provide for reserving more channels for educational purposes if and as they become necessary or desirable? These are just some of the things school administrators and those responsible for schools need to ask themselves and others.

If you don't yet quite believe in the future of cable television, let me quote the Federal Communications Commission's words (Docket no. 18397):

> It has been suggested that the expanding multi-channel capacity of cable systems could be utilized to provide for a variety of new communication services to homes and businesses in a community, in addition to services now commonly offered such as time, weather, news, stock exchange ticker, etc. While we shall not attempt an all-inclusive listing, some of the predicted services include: facsimile reproduction of newspapers, magazines, documents, etc.; electronic mail delivery; merchandising; business concern links to branch offices, primary customers or supplies; access to computers, e.g., man-to-computer communications in the nature of inquiry and response (credit checks, airline reservations, branch banking, etc.), information retrieval (library and other reference materials, etc.) and computer-to-computer communications; the furtherance of various governmental programs on a federal, state and municipal level, e.g., employment services and manpower utilization; special communication systems to reach particular neighborhoods for ethnic groups within a community and for municipal surveillance of public areas for protection against crime, fire detection, control of air pollution and traffic; various educational and training programs, e.g., job and literacy training, pre-school programs in the nature of "Project Headstart," and to enable professionals such as doctors to keep abreast of developments in their fields; and the provision of a low-cost outlet for political candidates, advertising, amateur expression (e.g., community or university drama groups), and for other moderately funded organizations or persons desiring access to the community or a particular segment of the community.

Already some of our schools are moving. Salisbury has done a great deal with cable television. I commend its program to you. Winston-Salem, Charlotte, and others are becoming involved. The Fayetteville CATV station has worked up

(Continued on page 38)

be developed at the state level for uniformity and compliance.

The superintendent is ex officio secretary to the board of education.[2] As such, he is keeper of the board's minutes and caretaker of all other records of of the school system. The possibilities for interpretation are unlimited when it comes to setting down the written word to describe what action the board has taken or what policies it has promulgated and seeks to develop. A uniform system of minute-keeping should be required throughout North Carolina. Local variations, such as two minute books, should be carefully avoided. The board of education does review and approve its minutes, but this process may be perfunctory, except in extreme differences of opinion between the superintendent and the board, when it becomes a word by word, comma by comma battle.

It is an interesting question whether a contract for a superintendent is legal under the present statutes. If legal, could the contract expand upon and more decisively define the relationship between the superintendent and the board? Could it further set forth in clearer and more definitive language the grounds upon which a superintendent could be dismissed? Could the contract bind the superintendent to resign upon a majority vote of the board requesting such resignation, regardless of cause? The model contract that has been proposed by the Attorney General's Office would seem to be an effort by the superintendents to better their position without regard to any of the board's problems raised by the *James* case. I would advise any board attorney to review the model contract carefully, and I would not personally recommend its use as drafted.

II

Statutory Provisions

The superintendent is elected pursuant to the provisions of G.S. 115–39. The election is preceded by the certification of the State Board of Public Instruction and followed by the report of election from the local board to the State Board. When elected, the superintendent is required to take an oath of office before entering upon the duties of his office.[3]

The superintendent's general powers and duties are set forth in Article 6 of Chapter 115 of the General Statutes. In addition, various other sections in Chapter 115 specify other powers and duties. Also, duties are implied from certain powers and duties given the board of education. In addition, the State Board and the local unit both have rules and regulations pertinent to the superintendent's duties. Here again, the minutes of the local unit are important sources for defining these duties.[4]

While replete with sections describing powers and duties, the General Statutes are woefully meager in setting forth grounds and procedures for dismissing a superintendent. The general provisions for dismissal are contained in G.S. 115–42 and G.S. 115–57.[5] G.S. 115–42 contains four grounds for dismissal or removal from office: (1) immoral conduct, (2) disreputable conduct, (3) failure to perform duties required by law, (4) refusal to perform duties required by law. G.S. 115–57 contains two grounds: (1) failure to perform the duties set forth in 115–57, (2) failure to perform duties as may be assigned him.

It should be noted that under this latter statute there may be an additional requirement that the board prove the superintendent's failure to be "persistent."

Before considering this substantive law, a word about procedural due process. In the *James* case, the procedure unquestionably fulfilled the requirements of due process:[6] Dr. James was given the charges in some detail; he was given ample time to prepare for the hearing; he was given power of subpoena; he was given the right to have counsel present at all times; he was given the right to present witnesses and to cross-examine all witnesses against him; and he was given a full and fair hearing, of which a verbatim transcript was made by both a court reporter and tape recording.

From the point of view of substantive due process, the *James* case did not raise the interesting question of defining what the superintendent would have to do to violate the prohibitions against "immoral" or "disreputable" conduct. These two interdictions represent large areas of gray. Neither was involved in the *James* case.

2. N.C. Gen. Stat. §§ 115–26, –56.

3. G.S. 115–54 requires the oath, and G.S. 14–229 specifically provides the penalty of removal from the office for failure to take the oath. In the *James* case, a unique situation existed in that the superintendent had not taken the oath of office after being elected by a new board, which by the terms of the merger agreement between the Wayne County and Fremont city administrative units had never existed before merger.

4. G.S. 115–41 makes it the duty of the superintendent to carry out all acts, rules, and regulations of the board not in conflict with state law. G.S. 115–57 specifically provides for his dismissal if he fails to perform such assigned duties.

5. Besides these general provisions, several sections in Chapter 115 provide for dismissal for failure to perform some specific act, and others make certain acts unlawful, which should also be grounds for dismissal. At least two sections in the criminal code, G.S. 14–229 and G.S. 14–230, provide for dismissal. Certainly the confused state of the law in Chapter 115 might suggest to a board seeking to dismiss a superintendent that it consider proceeding under the criminal sections, which would eliminate many of the problems herein discussed.

6. Some interesting arguments can be made as to whether a hearing before a tribunal, some of the members of which raised the charges to be heard, is a denial of due process, I personally feel that such a procedure is constitutional and has been approved both by the *Russ* case, cited in footnote 8, and other cases that have approved analogous administrative proceedings.

Implicit in the legislative direction to the board of education to generally control and supervise all matters pertaining to the public schools and execute the school laws[7] is the idea that the superintendent must be charged with a duty of full disclosure to his board, and to execute its policies fully and faithfully, in both letter and spirit. In addition, when a clear direction is given by statute, such as in G.S. 115–80.2, as to a procedure that must be followed, it would seem explicit that the superintendent must follow these directions and his failure to follow them is a failure to perform a duty required by law.

Further illustration of implicit duties owed the board by the superintendent is in the large school/small school charge. Here the issue was not the possible disagreement among professional educators as to whether a small school was inefficient, uneconomical, and lacking in a fully enriched educational program for the children. The superintendent had strongly recommended to his board that certain small schools be closed and had secured board agreement. The issue was that subsequent to this recommendation and after he had been asked to resign, he asked certain board members to meet at his home with at least two community leaders from the areas where the small schools were located. At this meeting, as one of the attending community leaders testified, the superintendent promised that he would keep the small schools open if the board members would assure him his job. It is such conduct that was at issue in the large school/small school matter.

After a hearing and from the board action taken, appeal to the courts is a matter of right. This right has been expressed by Justice Ervin, quoting from a Minnesota case,[8] as follows:

> Criticisms have often been made of the phenomenon which permits an administrative body to serve in the triple capacity of complainant, prosecutor, and judge. . . . As a result of this combination of roles, its final judication often lacks that stamp of impartiality and a disinterested justice which alone can give it weight and authority. This anomaly in procedure makes it vitally necessary that in reviewing administrative decisions courts zealously examine the record with a view to protecting the fundamental rights of the parties, less the rules against arbitrariness and oppressiveness become a mere shibboleth. An appeal being denied, a review by certiorari and other prerogative writ must not be permitted to degenerate into a mock ceremony. The least that the courts can do is to hold high the torch of fair play which the highest court of our land has made the guiding light to administrative justice. Morgan v. United States, 304 U.S. 1, 58 S. Ct. 999, 82 L. Ed. 1129.

This quotation, while assuring protection to the accused, recognizes without criticism the fact that the board, as an administrative body, properly functions in the triple capacity of complainant, prosecutor, and judge.

To this must be added the presumption in favor of the board action contained in G.S. 115–31 (b), which places the burden of proving the board wrong on the complaining party. This type of statute is not unusual in our state; a similar statute applies the same presumption to decisions by a city council or board of aldermen.[9] Dr. James tried all avenues of appeal, or perhaps a more objective phrasing would be that he carefully preserved any rights to judicial review he might have had under the statutes, seeking to avoid a misunderstanding of the proper procedure.

Dr. James first sought judicial review under Article 33 of Chapter 143 of the General Statutes (G.S. 143–306 through –316). His quest presented a novel problem under North Carolina law. Since enactment of Article 33 in 1953, no case has been decided on the question whether a county or city board of education is an "administrative agency" within the meaning of this act.

The General Assembly has specifically excluded agencies that operate pursuant to Chapter 115 of the General Statutes from the operation of Article 33A of the General Statutes, which requires that the same rules of evidence used in the superior and district courts of the state apply at hearings by the administrative agencies covered. The trial courts in which the matter was heard in this case agreed with the board of education that its decision was not subject to judicial review under Article 33; however, in the only part of this case to be decided in the Court of Appeals, or any appellate court, the trial court was reversed and the case remanded for judicial review under Article 33.[10] The Supreme Court of North Carolina granted certiorari.[11] This does not mean that the Supreme Court would have reversed the Court of Appeals, but simply that it recognized that the legal problems raised in the case were important enough to require a final decision by our highest appellate court. As Mr. Spearman points out in his article, the problem remains open, and any other appeal in this area must go to the Supreme Court for a final decision. If another appeal were taken from a decision of a board of education, it would appear that the matter should go directly to the Supreme Court, bypassing the Court of Appeals, as provided for in Supplementary Rules of Practice in the Supreme Court, Rule 1.

7. N.C. Gen. Stat. §§ 115–27, –35.

8. Russ v. Board of Education, 232 N.C. 128, 59 S.E.2d 589 (1950). *See also* State v. Board of Education, 213 Minn. 550, 7 N.W.2d 544.

9. N.C. Gen. Stat. § 160A–79(d).

10. James v. Board of Education, 15 N.C. App. 531 (1972).

11. James v. Board of Education, 282 N.C. 152 (1972).

The arguments against including the boards of education under Article 33 of Chapter 143 may be summarized as follows:

1. By definition in the statute, only agencies of the state having statewide authority are included; school boards operate in only a limited geographical area.

2. Under the Rules of Civil Procedure, the legislature has expressly excluded city and county boards of education from the term "agency of the State." G.S. 1A–1, Rule 4.

3. Under Article 33, regardless of the city or county board decision to be reviewed, all cases would have to be filed in *Wake County*. This means that for judicial review, all 140 school administrative units, from Murphy to Manteo, would have to go to superior court in Wake County. In this connection, it should be noted that under G.S. 143–3, the court may order a trial de novo, which would require that all witnesses and records be transported to Wake County.

4. Adequate procedure for judicial review is provided in G.S. 115–34; hence G.S. 143–307 would specifically exclude the board's decision from Article 33.

Another problem that arises after the board's decision and is implicit in the appellate process is whether the superintendent should remain in office pending a final decision in the courts. Under Article 33, a stay of the board's decision may be granted in the court's discretion. Such a stay would make it far easier for the superintendent to remain in office than if he sought a temporary restraining order, as Dr. James did in the first suit filed in Wayne County. In my opinion, the courts under either proceeding should not permit the superintendent to remain in office, for the following reasons:

1. Under G.S. 115–31(b) the action of the board in removing the superintendent is presumed to be correct, and this presumption cannot be rebutted until the judicial review hearing.

2. A complete judicial review and appeals therefrom could easily take a year. The case could therefore become moot by virtue of the expiration of the superintendent's term before final decision. If the superintendent were out of office, he would still have an action for money damages if it were decided that his salary should have been paid.

3. From a practical point of view, I doubt that much could be done to further public education in the tense situation that would prevail for the board, superintendent, and staff during such a period.

Dr. James next sought judicial review under G.S. 115–34, which provides a general appeal when the board's decision affects one's character or right to teach. Whether the board's action in this case affected "one's character" is open to question. Since the right to teach is forbidden to a superintendent anyway, this was not an issue in this case.

Dr. James also sought to take advantage of the language of G.S. 115–42, which speaks of a right to try title to office.

North Carolina is a code-pleading state, which, in simplest terms, means that a litigant must comply with the General Statutes when a statute has been enacted concerning a particular cause of action. The common law writ of quo warranto has been abolished in this state, and Article 41 of Chapter 1 of the General Statutes now controls. Basically, quo warranto is a proceeding by which the court decides which of two or more *individuals* is entitled to a public office. This action envisions a proceeding by one person against another; the argument between them is that since only one of them is entitled to a particular office, which shall it be. In this case, Dr. James sought to sue the board of education to try his title to the office. Such a suit against an administrative body is not envisioned by the terms of Article 41, and fitting his action to this mold is most difficult. The fault is with the legislative language that seeks to give a remedy in ancient terms and is not suited to a dismissal by an administrative body. After the quo warranto action against the board, Dr. James did sue the successor superintendent in an action that more nearly resembled what is envisioned by Article 41. Again, we have no definitive answer in either suit, since both were settled before the court could answer the sticky substantive and procedural questions they raised.

III

Preparation and Conduct of the Hearing

I would make the basic assumption that the contested dismissal of a superintendent would involve a less than unanimous board. This is based on the unlikelihood that a superintendent would choose to oppose a solid board; however, it is not inconceivable that he would do so.

The fact that a majority of a board controls the board's action has statutory approval. G.S. 12–3(2) gives the authority of a board of three or more to a majority of its members. Unfortunately, this simple statutory language by no means quells the human emotions that arise from being in the minority. It also raises the interesting point whether the minority is entitled to separate representation. The majority speaks for the board, and it is the board of education as a separate entity that takes the action. The individual members of the board lose their identity when board action is taken. It is true that any one or all members of the board might individually retain counsel; however, I do not believe that a minority bloc of the board may retain counsel to represent a minority interest at a hearing by the board.

The existence of a minority will raise several interesting questions for any attorney seeking to repre-

sent the board. To what extent may the attorney for the board confer with one or more of the "majority" members to the exclusion of the "minority" members? Secret meetings are prohibited by Article 33B of Chapter 143, and our courts have held that no action may be taken by a board except at a regular or special meeting pursuant to G.S. 115–28.[12] This question becomes particularly important in planning the strategy and tactics of a hearing or lawsuit. Such planning requires that the "other side" not receive advance information.

What "outside" aid may the board expect? With all due respect to both the Attorney General's office and the State Board of Public Instruction, the board will find itself virtually alone. While the superintendent may expect and get a great deal of help from the North Carolina Association of Educators, the division of superintendents of the N.C.A.E., and the National Education Association, no offsetting effort will be made on the board's behalf by the National School Boards Association.

One other interesting fact of the case was the almost total lack of cooperation and sometimes open hostility from members of the superintendent's staff, employees of the board of education, toward the board. As one member of the local staff expressed it, loyalty to the board was owed through the superintendent.

It seems that to attack one superintendent is to attack all superintendents. The staff of the State Board of Education was at least passively resistant to any action against the superintendent. The Attorney General's office, in my opinion, was proper in saying that it would take neither side of the *James* dispute, once it had received full publicity throughout the state. In contrast, the Superintendent of Public Instruction appeared at the hearing as a witness for the superintendent. In no way was there a direct denial of access to information or personnel in the State Board's office; however, the reception was cool, and any information obtained was extracted in a tooth-pulling kind of operation.

Formulating the charges against the superintendent of the type here involved was somewhat tedious. Various members of the board had heard, or through personal conversations or letters with the superintendent had found, what they thought to be irregularities. These were discussed in order to make a decision whether, if proved, the irregularities would be sufficient at law as a grounds for dismissing the superintendent. When the charges were originally formulated, conferences were had with the Attorney General's Office, which gave a verbal, or parol, expression that the charges would be technically sufficient for dismissal, if proved. Collecting the evidence to substantiate these charges involved a detailed search through the records of the superintendent's office and, in some cases, through the office of the State Board of Education. Access to the local records was somewhat difficult, particularly since all of the records are kept by the superintendent's office for the board of education's use. Physical retrieval of this evidence and the process of interviewing witnesses made more and more obvious the hostile attitude of the staff toward the board for its attempts to collect such evidence, and the investigation became time-consuming.

Another point to be considered is the use the superintendent should make of the staff in collecting his evidence. For nearly thirty days the office spent much time collecting evidence for rebuttal for Dr. James and his attorneys. This work went on during the day and far into the night. This is not to say the staff neglected their other duties, but I am confident that the superintendent had easier access to the records and far more help in marshaling the evidence than the board had.

After the charges were formulated, consideration was given to the superintendent's right of privacy. Every effort was taken to keep the charges from the public until Dr. James had decided whether to make them public in the hope that the need for a hearing would be obviated if the superintendent chose to retire or resign and that any public discussion of the charges might be eliminated in that event. In light of the strategy adopted by Dr. James, this course proved a totally unwanted protection of privacy. It may also have generated another lawsuit in which the minority of the board sued the majority in an effort to have them make public the charges before the date on which Dr. James was to state whether he would resign. The basic charges were made known to Dr. James's counsel approximately two weeks before the meeting at which he was to give his decision on resignation.

Dr. James's decision for a public hearing was part of his over-all strategy to attempt to try the case in the press. His supporters and the press were therefore in attendance at the hearing, and they, including the press, cheered and booed to the extent that they thought the evidence presented favored or hurt their side. I believe that their efforts did nothing but prolong the hearing and insult the board. James, his supporters, and his attorneys made it a daily practice to give statements to the press and appear on T.V. as often as possible to comment on the hearings. I took the position as board counsel that no statements were to be made to the press and no appearances on television during the hearing to protect against any criticism the heat of the hearing may have generated and to prevent any disclosure of future tactics.

The grand-stand tactics resulted in a dismissal of Dr. James's first effort to obtain judicial review. A great rush was made to have a stay order signed at the close of the hearing in the event the board de-

12. Edwards v. Yancey County Bd. of Educ., 235 N.C. 345, 70 S.E.2d 170 (1952).

cided against Dr. James. In his eagerness to accomplish this, he had filed in the clerk of court's office in Wake County at 4:14 p.m. a petition for a stay order, when the public record of the hearing in Wayne County showed that Dr. James was not removed from office until 4:15 p.m. Such hurried diligence did result in the stay of the board's decision within two minutes of its being made. However, the next day the court recognized that it was impossible for Dr. James to be in Wayne and Wake counties at the same time and dissolved the stay order.

Much consideration was given to the physical facility for the hearing. Because the hearing would be public, a hall had to be found large enough to accommodate the board, the attorneys, the court reporter and various other technicians to record the proceedings, the witnesses, the press, and the audience. A long table was arranged across the front of the hall for the board, with a table on one side for the attorneys for the board, a table opposite for the attorneys for the superintendent, a witness chair in the center facing the board with a table in front for documents, and a table and chair for the court reporter close by the witness. Microphones were placed on all of the tables connected with a loudspeaker system and with a tape-recording system to supplement the court reporter.

The board attorneys were referred to by the defense as "prosecutors;" yet I felt that their role was simply to try to bring out by the witnesses and the documentary evidence all the facts in support of the charges for the board's consideration. As to whether the "minority" of the board should have an attorney present at the hearing representing them, I believed that it would not be proper, since the hearing was before the full board and the minority had no interest to be represented during the hearing. The attorney who had been retained by the minority members sat as associate counsel for the superintendent.

If the attorneys for the board are acting in what has been described as a "prosecutor's" role, it may be that another attorney should be present to aid the chair in ruling on procedure, evidence, and law. In this connection, remember that according to the statutes, the rules of evidence of the courts do not apply in this type of hearing. It would be the rare board chairman who has ever sat as judge of any judicial proceeding; even if he had, he should not be burdened with legal rulings during the hearing, but should be sitting in judgment of the facts.

The board has the power under G.S. 115–32 to control all of its meetings. It has the power of subpoena given by that section and also the power to punish for contempt. The board in the *James* case was most liberal with the audience in not pursuing the matter of contempt; the continued outbursts by the audience interrupted the proceedings and made the testimony at times inaudible.

As the testimony at the hearing developed, it appeared that the defense strategy included the following points:

1. The superintendent agreed that certain things had not been done, or done improperly according to the statutes; however, he maintained that prior superintendents and generally superintendents throughout the state had been doing things as he had done.

2. As a professional educator, his judgment on certain matters was superior to the board's, and if the board differed with his recommendations, he ought to follow his own judgment or seek support throughout the county and within the board to change the board to his recommendations.

3. Even if the charges were true and all proved, they were still insufficient at law to justify dismissal.

4. The hearing should be widely publicized, and the board should respect the force of public opinion for the superintendent, regardless of the evidence adduced at the hearing.

5. Clerical errors, failure to advise the superintendent properly, and mistakes in judgment by his staff were the cause of many of the charges, and, while the superintendent accepted general responsibility for his staff, such mistakes should not be grounds for his dismissal.

6. Generally, the charges were trumped up, unworthy of answer and unsupported by introduced evidence. Indeed, one of the superintendent's attorneys requested that the hearing be omitted and the matter be put directly in the courts.

IV

In Summary

As a "test case," *James v. Board of Education* must be considered a complete failure. Neither boards nor superintendents can now feel confident of the procedural or substantive law, since while many tangles and intricacies of the law were exposed, the appellate courts had no opportunity to cover them. While I may agree with Mr. Spearman that ". . . both sides had reason to be pleased with the settlement," I consider the reasons to be very unsatisfactory: The settlement had the salutary effect of stopping the expenditures and the controversy; it resolved nothing for the future.

While the central issue in the case was the relation between a board and its superintendent, even a tremendous expenditure of time and money yielded no satisfactory resolution. In that the case was not prosecuted to a definitive appellate court decision, it represented an unfinished bit of work that can be completed only with another such expenditure. Both sides, in this particular case and in general, may be somewhat reluctant to seek the final answers. Even if the process is finally completed in another case, it

(Continued on page 43)

Conservation Easements:

An effective tool in the environmentalist's kit

William A. Campbell

IN SEARCHING FOR DEVICES to protect and enhance environmental quality in urban and suburban areas, conservationists and land-use planners in many parts of the country are giving increasing attention to conservation easements. This device was given wide publicity in 1968 by William H. Whyte in *The Last Landscape*.[1] The conservation easement is a land-use technique for protecting the environment that lies somewhere between zoning regulations and outright fee simple acquisition of property. My purpose in this article is to describe the place of the conservation easement in North Carolina property law, and then to examine the local property tax and federal income tax consequences of a gift of a conservation easement by a landowner to a governmental unit, such as a city or county.

The type of easement with which most landowners are familiar is the affirmative easement, such as a utility company's right-of-way across property or an easement for a municipal water line. The affirmative easement gives the possessor a right to do some act on or across the property upon which the easement is imposed. The conservation easement, in contrast, is a negative easement, or servitude, that is in effect an agreement by the landowner *not* to take certain actions regarding his property.

Three examples will illustrate the different ways in which conservation easements may work. Suppose that in an older neighborhood in a North Carolina city there is a stand of four sycamore trees and a stone wall located on a lot across the street from a city park. A private home also sits on the lot. Most residents of the neighborhood agree that the trees and wall add much to the attractiveness of the area and create a visual extension of the park. To preserve this amenity, the owner of the lot on which the trees and wall are located might be persuaded to give the city a conservation easement to the effect that the sycamore trees will not be cut and the wall will not be significantly altered. In the second case, there is a 300-acre farm on the edge of a town, 100 acres of which form a natural buffer zone between a residential area and a suburban shopping center. The land is now zoned for agricultural uses, but realistic observers agree that eventually the zoning will be changed to permit subdivision. The town might persuade the landowner to give a conservation easement in the 100 acres, restricting its use to certain types of agricultural activities. This is sometimes spoken of as granting a conservation easement by giving up "development rights." In the third case, a small stream parallels the main highway into a town, varying from 25 to 100 yards from the highway right-of-way. The stream cuts through some wooded, rolling hills. The town council realizes that this scenic entrance greatly enhances the town's attractiveness and would like to ensure its preservation. The stream at the location in question meanders through the properties of five different landowners. Each of the five landowners might be persuaded to give the town a conservation easement to protect as much of the stream and its watershed as can be seen from the highway. Conservation easements are appropriate, then, in situations like these, when zoning is inadequate and outright acquisition of the property is impracticable.

Negative easements similar in many respects to conservation easements have been considered and approved by the North Carolina Supreme Court.[2] They are interests in real property, and they run

1. (Garden City: Doubleday 1968).

2. *See* Davis v. Robinson, 189 N.C. 589, 127 S.E. 697 (1924).

The author is an Institute faculty member whose fields include both property taxation and environmental quality.

with the land when it is sold or otherwise transferred. In most cases, conservation easements granted to local governments will be in gross rather than appurtenant; that is, they will not be an appurtenance of an adjacent tract of land. The North Carolina Supreme Court has held that easements in gross are interests personal to the grantee and terminate at his death.[3] When the grantee is a unit of local government, the easement would presumably concontinue as long as the unit exists, unless otherwise conditioned or limited. North Carolina counties and municipalities are authorized by G.S. 160–401 et seq., to accept gifts of easements "in order to preserve, through limitation of their future use, open spaces and areas for public use and enjoyment." The phrase "open space" is broadly defined in G.S. 160A–407(a) as "any space or area (i) characterized by great natural scenic beauty or (ii) whose existing openness, natural condition, or present state of use, if retained, would enhance the present or potential value of abutting or surrounding urban development, or would maintain or enhance the conservation of natural or scenic resources." This definition appears to be sufficiently broad to encompass almost all environmentally significant uses for which a conservation easement could be given by a landowner and accepted by a city or county.

THE GIFT of a conservation easement has certain consequences for property taxation. There are two branches to this question: the first concerns the tax treatment of the underlying fee simple estate; the second concerns the tax consequences for the holder of the easement—the city or county. A conservation easement affects the amount of property taxes on the land by affecting its value. G.S. 105–283 requires property to be appraised at its "true value in money" for purposes of taxation; if the easement diminishes this value, there is a tax savings to the owner. In some cases the grant of an easement will not affect the "true value in money," or market value, of the property at all—for example, when the restriction is to leave a tract in its natural state except for agricultural uses and it has no potential for any other use. In other cases, the value will be seriously affected. In the second example given above, a conservation easement in one-third of the farmer's land would significantly reduce the value of the land for tax purposes.

To bring tax relief to the owner, however, it is not enough that the grant of the easement diminishes the value of the property. For relief, authority must be found in the Machinery Act[4] for the reduction of the appraised value by the appraisal authorities. In an octennial revaluation year, the duty of the county tax supervisor to take the easement into account in appraising the property is clear. G.S. 105–317(a)(1) requires the appraiser to consider several items, including zoning and "any other factors that may affect its value." A conservation easement resembles in some ways a zoning restriction, which is specifically mentioned in the statute, and it is clearly another "factor that may affect" the value of the land. In a revaluation year, then, the grant of an easement would have to be taken into account by the appraiser and would result, in many cases, in a reduction of the tax value of the property.

In nonrevaluation years, the situation is somewhat more difficult. G.S. 105–287 governs reappraisal of real property in nonrevaluation years and permits reappraisal only for certain specific reasons. The only basis for reappraisal that appears applicable in the conservation easement situation is G.S. 105–287(b)(6), which authorizes a reappraisal when the property "has increased or decreased in value to the extent of more than one hundred dollars ($100.00) by virtue of circumstances external to the property other than increases or decreases in the general economy of the county since the last appraisal of such property." To refer again to the example of zoning restrictions, if, between octennial revaluations, the zoning of a piece of property is changed and as a result of the change the value is increased or decreased by more than $100, it would appear that an adjustment in the appraised value should be made under G.S. 105–287(b)(6). This would appear to be true even though the property owner initiated the request for the zoning change. It can be argued that the grant of a conservation easement by the landowner and the acceptance of the grant by a governmental unit should be treated the same as a zoning change—as a "circumstance external to the property" requiring reappraisal under G.S. 105–287(b)(6).

In summary, if the grant of a conservation easement causes a reduction in the value of the underlying fee simple estate, the reduction must be taken into account in appraising the property for taxation. In a revaluation year, the duty of the appraiser to make the change is clear; a strong argument can be made that in a nonrevaluation year the appraised value must also be changed.

A conservation easement held by a city or county is exempt from property taxation by virtue of Article V, section 2(3), of the North

3. *See* Shingleton v. State, 260 N.C. 451, 133 S.E.2d 183 (1963).

4. The subchapter of Chapter 105 of the General Statutes dealing with local property taxes.

Carolina Constitution, provided that it is being held for a public purpose. A cogent argument can be made that an easement the object of which is to preserve open space or the amenity of a pleasant prospect for all to enjoy is in furtherance of a public purpose, especially if the easement is shown to be part of a comprehensive land-use plan. Furthermore, G.S. 160A–402 contains an express legislative declaration that "the acquisition of interests or rights in real property for the preservation of open spaces[5] and areas constitutes a public purpose for which public funds may be expended or advanced." Although the characterization of the use of property as a public purpose for tax-exemption purposes may not be precisely the same as that for which the expenditure of public funds is authorized, there is enough similarity for the declaration contained in G.S. 160A–402 to be persuasive on the question of exemption.

THE FEDERAL INCOME TAX CONSEQUENCES for the donor of a grant of a conservation easement are governed by section 170 of the Internal Revenue Code. In a 1964 Revenue Ruling, the Commissioner of Internal Revenue was presented with a situation in which a property owner along a federal highway gave to the United States a restrictive easement in perpetuity; the restrictions concerned the removal of trees, the type and height of buildings, and so on. Asked whether such a gift qualified as a charitable contribution under section 170, the Commissioner ruled as follows:

> A gratuituous conveyance to the United States of a restrictive easement in real property to enable the Federal Government to preserve the scenic view afforded certain public properties, is a charitable contribution within the meaning of section 170 of the Internal Revenue Code of 1954. The grantor is entitled to a deduction for the fair market value of the restrictive easement, in the manner and to the extent provided in section 170 of the Code; however, the basis of the property must be adjusted by eliminating that part of the total basis which is properly attributable to the restrictive easement granted.[6]

Since gifts to local governmental units are treated as charitable contributions in the same manner as gifts to the United States,[7] it would appear that the principle of deductibility stated in the quoted Revenue Ruling is applicable to gifts of conservation easements to counties and cities. A note of caution should be added here; if the gift of an easement is made in order to extract some benefit from the governmental unit, such as a zoning change, to comply with a local ordinance, or to enhance the value of land retained by the donor, it will be denied treatment as a charitable contribution by the Internal Revenue Service.[8]

Since the easement is a contribution of capital-gain property, the election provisions of section 170 (b)(1)(D) (iii) appear to be applicable; that is, the donor may take the normal appreciated property treatment and thereby deduct an amount up to 30 per cent of his contribution base; or he may elect to take section 170(e)(1) treatment, reduce the amount of the gift by half of the long-term capital gain, and then deduct an amount up to 50 per cent of his contribution base.

Finally, it appears that the section 170(f)(3) limitations on the deductibility of gifts of partial interests in property are inapplicable to gifts of conservation easements. In the conference report on the bill that became the Tax Reform Act of 1969, the conferees stated that they intended that "a gift of an open space easement in gross is to be considered a gift of an undivided interest in property where the easement is in perpetuity."[9] This is a strong indication of legislative intent in regard to conservation easements. □

5. This phrase is broadly defined in G.S. 160A–407(a); see discussion at p. 37.

6. Revenue Ruling 64–205, 1964–2 Cum. Bull, 62–63.

7. *See* Internal Revenue Code of 1954, §170(c)(1).

8. *See* Sutton v. Comm'r, 57 T.C. 239 (1971); and Perlmutter v. Comm'r, 45 T.C. 311 (1965).

9. U.S. Code Cong. and Ad. News 2409 (1969).

CATV

(Continued from page 30)

program links with Fayetteville State University.

Yet the task is largely undone and programs are in their infancy. Today almost 3,000 CATV systems are operating in the United States, serving about 20,000,000 viewers. In some 2,500 other communities, CATV permits have been issued but construction either has not been started or is not finished. In addition to the 76 communities already served or having granted franchise to be served by cable television in North Carolina, many more towns and cities have franchise bids pending. Only recently our task force accepted a request from the City of Durham to advise on nine CATV bids from different companies. All of us will hear more, not less, about cable television in the years ahead. Whether your community moves in an enlightened way to see that CATV serves the best interests of its citizenry will depend in part upon you and the professional educators in your community—and especially upon your awareness, prescience, and determination in regard to this new medium. My advice is not only to get in the game but if possible to get ahead of the game. Only in that way can you serve your community's stake in CATV well.

of G.S. 115–42* had "failed or refused to perform the duties required of him by law." It went on to specify nineteen alleged errors of omission or commission. In five charges, the four members accused James of paying school board bills from "unauthorized accounts" or of charging valid expenditures to the wrong budget code (e.g., charging the acquisition costs of movable partitions to "repair and replacement" funds instead of capital outlay funds). No charge involved any allegation of moral turpitude. There was no charge and no intimation that James had used school funds to enrich himself or his friends or for any non-school purpose. The other charges covered a miscellany of administrative matters. These included allegations that James had: failed to follow a board directive instructing him to refer a request for meeting space to a school advisory council; permitted children living in Goldsboro to attend county rather than city schools without securing proper approval; failed to obtain a real property appraisal from appraisers recommended by the board; and supplied the board with erroneous information on building projects, budget procedures, and the number and racial composition of the school system's student body.

A final charge appeared almost comic to persons who had considered the merits and demerits of school consolidation: James was accused of furnishing "erroneous information" on the "advantages and disadvantages of small schools versus large schools."

PART II The Hearings

The hearings began in Rosewood School on the morning of January 6 and dragged on for over two weeks. James's supporters bitterly claimed that Rosewood, a small rural school in western Wayne County, had been selected as the hearing site because the political clout of his opponents was greatest in the county's rural sections. Nonetheless, the public audience seemed largely pro-James. It repeatedly cheered and applauded testimony in his favor until the board chairman warned that any cheerers would be expelled from the hall by the deputies he had requested to police the session.

The hearings began with disputes over the proper roles of the participating attorneys. The four majority members denied the three minority members the right to be represented by separately retained counsel. The minority's lawyer then joined the three attorneys representing James. James supporters protested that some unknown group of James opponents had retained additional counsel, a prominent local criminal trial attorney, to assist the board's attorneys in presenting the case against James. The board's majority refused to bar him from the hearing.

The hearing then settled down to tedious, detailed examinations of school board employees concerning the board's finances. The board's attorneys quickly established the existence of two school board bank accounts, the P.L. 874 account (consisting of federal "impacted area" funds) and a "Special Funds" account, neither of which was under the control of the county treasurer. The two accounts had been maintained separately and drawn upon by the superintendent for a wide variety of school expenses. The board's attorneys insisted that the maintenance of these accounts had not been authorized by the board, and that they violated G.S. 115–91, which requires that "all school funds" be paid over to the county treasurer.

On cross-examination, it became clear that the special accounts were not an innovation of the James administration. They had been set up by James's predecessor as superintendent, years before James was employed in Wayne County. Each year the accounts had been audited by independent CPAs and their existence repeatedly acknowledged in audit reports that the board had routinely approved. Ironically, the CPA who made the 1968 audit was serving as school board chairman and was enthusiastically seeking James's dismissal for maintaining the special accounts. In 1968, he had audited and reported on the special accounts but had not questioned their propriety.

Another theme in the hearings concerned the existence and funding of Wayne County's small rural schools. During his tenure as superintendent, James had questioned their economic feasibility, but some board members with strong political ties to these rural areas had successfully opposed their closing. The feelings clearly ran high on the small school/large school issue, but the evidence to show James had acted improperly was weak or nonexistent. No witness ever testified that James had given any advice on the issue that proved to be "erroneous." The board's attorneys sought to demonstrate that James had refused to supply information that would have revealed that the small schools were being short-changed in the board's summer renovation program. This effort failed when a tape was introduced recording the board chairman's earlier statement that the dispute

* G.S. 115–42 provides: "County or city boards of education are authorized to remove a superintendent who is guilty of immoral or disreputable conduct or who shall fail or refuse to perform the duties required of him by law. In case the State Superintendent of Public Instruction shall have sufficient evidence at any time that any superintendent of schools is not capable of discharging, or is not discharging, the duties of his office as required by law or is guilty of immoral or disreputable conduct, he shall report this matter to the board of education employing said superintendent of schools. It shall then be the duty of said board of education to hear the evidence in such case and, if after careful investigation it shall find the charges true, it shall declare the office vacant at once and proceed to elect a successor; provided, that such superintendent shall have the right to try title to office in the courts of the State."

over supplying the information was simply a "misunderstanding."

A recurrent theme in the hearings were suggestions that James had run the county schools without according proper deference to the board's desires and instructions. But, again, the evidence was not very convincing. James was charged with failing to obtain an appraisal from the appraisers recommended by the board; the evidence showed he had followed the board's instructions. Another charge asserted that James had failed to refer a request to use a facility to the proper school advisory council; the testimony revealed that he had sent the request to the school's principal, asking him to take it up with the advisory group. A lunchroom employee was shown to have been overpaid, but the board's fiscal officer testified that this resulted from a mathematical error on her part of which James was unaware. It did appear that Goldsboro pupils had been permitted to attend Wayne County schools without formal resolutions of approval from the Goldsboro board to cover each such assignment. It could be argued that this constituted a violation of G.S. 115–163, which provides that students in one administrative unit may be assigned to a school in another upon such terms as may be agreed in writing and entered on the records of the two boards. However, the transfers had been going on for years by agreements between the superintendents of the Wayne County and Goldsboro city systems with the knowledge and apparent consent of both boards.

More complicated issues of authority revolved around the methods used to withdraw funds from the county's capital reserve fund. G.S. 115–80.2 requires that withdrawals be made from the reserve fund by order of the county commissioners upon petition adopted by resolution of the county school board. The evidence at the hearing tended to show that an informal procedure had existed in Wayne County whereby the county treasurer informally indicated to the school superintendent which capital reserve requests would be honored and which would not. The board's attorneys sought to show that James was requesting and procuring capital reserve outlays without specific resolutions adopted by the board. James's evidence tended to show that he was simply instructed by the county treasurer as to which requests would be honored and that specific requests were always based upon previous school board action in adopting an initial budget. The board's attorneys countered that each withdrawal request had to be supported by a formal resolution petitioning for the specific withdrawal.

Throughout the hearings, James's attorneys continuously objected to the introduction of evidence on this issue, because the written charges contained no allegation that James had violated G.S. 115–80.2. The board's attorneys replied that James's attorneys had been verbally notified of the additional charges before the hearing. The board ultimately found as a fact that James had violated G.S. 115–80.2 and that this alone was sufficient reason to discharge him.

After voluminous testimony, the charge that James gave erroneous information on the racial composition of the student bodies remained shrouded in confusion. In the summer of 1971, the board was under intense pressure from HEW to correct racial imbalance in the county schools. The board had met night after night, proposing and evaluating alternative plans to satisfy HEW. Different desegregation plans and racial composition estimates had been presented to the board, but the evidence was never clear as to which estimates, if any, were "erroneous." Apparently, the political reality underlying the charge was a suspicion that James had favored the eastern Wayne County area in formulating desegregation plans. Board members with political allegiances to rural Wayne County felt that James had sought to minimize busing in eastern Wayne.

James put on numerous rebuttal witnesses who testified to his character and administrative ability and the legality of his actions. The former school superintendent of the Fayetteville schools, who had served as a coordinator for North Carolina districts receiving PL 874 funds, stated that James had properly handled the federal impacted-area money. The State Superintendent of Public Instruction testified in James's behalf. The head of the local North Carolina Education Association unit, a Negro, testified that James was "capable and progressive" and presented a petition signed by teachers supporting him.

When the hearings finally terminated, the board quickly decided to discharge James by the now familiar vote of 4 to 3. It concluded that he was "guilty" of all charges discussed above except for failure to obtain a land appraisal from the recommended appraisers. It also found that James was guilty of other violations not contained in the charges, including failure to retake an oath of office when he was re-elected superintendent in 1969.

PART III Judicial Review

The struggle quickly shifted from the hearing room to the courts. An hour after the board voted to dismiss James, its action was stayed by court order; James had filed suit in Wake County to review the board's decision under the State Administrative Procedure Act, G.S. Article 33, Chapter 143. The next day, the board's attorney succeeded in having the stay order dissolved on the grounds that the verification supporting the complaint was inadequately verified. That same night, James filed suit again in Wake County with a new verification, and once again the board's action was temporarily enjoined. The papers were taken to Wayne

County, and the sheriff served the new order on board members as they convened a meeting to consider electing James's successor.

At a hearing ten days later, the difficulties in obtaining judicial review of the board's decision became clear. James had brought suit under Chapter 143 of the General Statutes, which requires judicial review of state agency action in Wake County Superior Court when no other statutes provide for adequate judicial review. The board's attorneys argued that this administrative review statute was inapplicable because the Wayne County school board was not a "state agency." They suggested that any judicial review should come under G.S. 115–34, which provides for appeals to the superior court from board of education decisions affecting one's character or right to teach. They also contended that the board had not been sufficiently served with process because the summons ran to the board members individually, not to the board as a collective entity.

The court indicated that the case appeared to be a proper one to grant a stay but ruled that it lacked subject-matter jurisdiction because school board decisions were not subject to review under Chapter 143 and because service of process was improper. It thereupon dismissed the suit and dissolved the restraining order.

The decision shifted the balance of power between the parties. After January 31, James was on the outside, not exercising the powers of the office and receiving no compensation. Further delay appeared likely to weaken his position and to strengthen the board's.

James immediately appealed the superior court's dismissal and applied for a writ of supercedeas from the Court of Appeals. If granted, the writ would have reinstated James to office and preserved his job while the Court of Appeals determined whether the superior court had ruled correctly on the jurisdiction question. Numerous affidavits were filed with the motion tending to show the damage that would ensue to the Wayne County system if James were kept out of office pending review. The writ was denied, and it became clear that James would probably remain out of office until the ordinary courses of appeal were completed.

The dismissal of the Wake County suit placed James's cause in a difficult position. If the Wake County appeal were pursued but no other suit were filed, the Court of Appeals or the Supreme Court could ultimately rule that Chapter 143 was an improper vehicle for review; by the time that decision had been reached, it might have been too late to pursue other possible remedies.

Therefore, two further suits were brought. The second, in Wake County, was identical to the suit before the Court of Appeals, except that service was made by registered mail in literal compliance with Chapter 143. This was to protect James against the possibility that an appellate court might decide that Chapter 143 was the proper mode for review but also that service of process had been improper in the first suit.

A separate suit was filed in Wayne County, where James sought to try title to his office before a jury, in accordance with G.S. 115–42. In the alternative, this suit sought review on the record, by appeal or certiorari, and money damages for breach of contract. This action was brought to preserve James's right to review if an appellate court decided that Chapter 143 did not apply to a county school board's dismissal of a superintendent.

The legal skirmishing continued throughout the spring, with countless motions, briefs, and hearings. The second Wake County suit was dismissed on the grounds that the first Wake County suit constituted a prior action pending, *res judicata* (i.e., the issue was decided finally in an earlier suit), and for lack of subject-matter jurisdiction (the same reason the first Wake County suit was dismissed). Despite the plaintiff's argument that any ruling in Wayne County should be deferred until the Court of Appeals heard the first Wake County case, the Wayne County action was dismissed as well. Appeals were taken from both dismissals, putting three cases involving the same controversy before the Court of Appeals.

PART IV The Spring Primary

In the meantime, battle was being waged on the political front. Two staunch anti-James board members were up for re-election in the spring of 1973. James's supporters were active in recruiting opposition. James H. Carney and Williard Patrick, who entered the spring primary opposing the anti-James board members, were generally regarded as critics of the board's majority that had discharged James.

After a lively campaign, the anti-James members finished third and fourth in the first primary. One of them called for a runoff, but lost to the pro-James candidates. One of these was the first black ever elected to the county board of education.

The breakdown of the vote reflected the same divisions that had been apparent at the January hearings. The anti-James candidates ran strongest in the rural areas of the county, while his supporters ran ahead in the more urban areas. James's supporters regarded the election results as a clear vindication. If the new members could have taken office immediately, the controversy might have been quickly settled, possibly with James's reinstatement to office. But because the primary victors could not take office until after the fall election, the battle continued in court.

PART V Decision by the Court of Appeals

In July 1972, the Court of Appeals ruled on the suit that James had filed at the time of his discharge. The judgment reversed the trial court's dismissal and was a victory for James. The court unanimously held that the board's decision was subject to review under Article 33 of Chapter 143, the general administrative review statute. It also ruled that the review petition had been properly served on the board when the Wayne County sheriff served a copy on each member and one of James's attorneys personally delivered a copy to the board's attorney.

The court ordered the action remanded to Wake County for review under Article 33. It thus appeared that James would finally obtain review on the merits. But the board then petitioned the North Carolina Supreme Court for certiorari, suggesting that the case set a procedural precedent for future removals from office of school superintendents and arguing that a county board of education was not a "state agency" within the meaning of the review statute. After an exchange of pleadings between the parties, the Supreme Court granted the petition for certiorari. The high high court's action did not grant James a hearing on the merits, but meant only that the state's highest court would hear oral argument on whether the Wake County court had had jurisdiction to hear James's case.

PART VI Settlement

On December 3, 1972, the parties finally agreed to settle the case. On balance, James supporters concluded that the terms were favorable to him and vindicated his position. James agreed not to insist on reinstatement as superintendent and was paid $18,800 in return for dismissing his pending suits and releasing all causes of action against the board and its members. The payment was substantially equal to what James lost by not serving his full term as superintendent. The board adopted a resolution stating:

> The only matters at issue between the parties consist of good faith differences of opinion. The disagreement regarding the discretionary powers the Superintendent has vested in him by the laws of North Carolina appears to be the result of a lack of clear standards as to the specific responsibilities of the Superintendent under North Carolina law.

Indeed, both sides had some reason to be pleased with the settlement. James received a substantial monetary payment, and the resolution suggested that differences of opinion, not alleged illegalities, were the only matters at issue between him and the board. The board's majority was doubtlessly gratified because the threat of James's restoration to office by court order was removed, as was the possibility of suits against individual board members.

By the time settlement was reached, the James litigation bore some resemblance to *Jarndyce* v. *Jarndyce*, the English equity case presented by Charles Dickens in *Bleak House*, in which lawyers filed endless affidavits and counter-affidavits, but no progress was ever made toward final decision. The parties faced a situation in which after six suits and a year of time-consuming, expensive litigation, no definite decision had been reached on the basic issue of what court should hear James's appeal. No court ever considered the underlying substantive issue whether the board had acted legally in removing him from office.

Conclusion

In retrospect, the James controversy points up numerous problems that merit the attention of school board members, school superintendents and others concerned with public school education.

A school superintendent could conceivably look at the charges against James as an itemization of specific administrative areas to which he should devote attention to avoid discharge during a contract term. The James hearings did raise questions about the proper handling of school finances, federal funds, and capital reserve funds to which few board members, school attorneys, or superintendents have given careful or prolonged thought. But the *James* case is certainly no demonstration that a superintendent can adequately protect himself against discharge by meticulous attention to the letter of his statutory responsibilities. Instead, in my own opinion the specific charges were probably an afterthought.

The initial demand for resignation with no explanation, the bizarre nature of many of the allegations, the presentation of evidence relevant to none of the written charges, and the board's findings that James was guilty of charges never preferred against him all are consistent with a theory that four members had simply decided to rid themselves of a superintendent before his contract expired and were groping for plausible reasons to justify that decision. In the *James* case, the real, underlying disagreements concerned desegregation and consolidation. In fact, the case suggests that once a majority of a school board has decided to dismiss a superintendent, it will be difficult for him to win at the administrative level, whatever merit his case may have.

To protect themselves against arbitrary action, superintendents may well wish to bargain for a contract guaranteeing a full due process hearing before dismissal during the contract term. Indeed, the present standard superintendent contract now recommended by the NCAE contains such a provision. But

defects in the administrative hearing were not the critical issues in the *James* case. The hearing lasted more than two weeks; both sides were represented by several attorneys, were supplied with subpoena power, and had ample opportunity to present witnesses and to cross-examine; and a verbatim transcript was kept of all the proceedings. The principal problem was not that hearing procedures were inadequate; it was rather that the power of ultimate administrative decision lay with the four board members who had demanded that James resign long before the hearings ever began. In such a case, a hearing panel composed of board members is almost necessarily stacked, and a superintendent's real protection must lie in prompt, effective judicial review of a board's action.

The General Assembly should adopt legislation clarifying the proper procedures for obtaining judicial review of a dismissal of a superintendent during his contract term. The out-of-court settlement in the James case left standing the Court of Appeals decision holding that dismissals of superintendents are properly reviewed in Wake County under Chapter 143 of the General Statutes (the State Administrative Review Act). The advantages of this procedure are that the case would be tried in Wake County and thus removed from the local political passions and pressures that are likely to surround the dismissal of a superintendent. Chapter 143 also provides for a stay of the effectiveness of the administrative decision until judicial review is complete. Superintendents can utilize this stay provision to protect their job while review takes place in the courts. The stay provision is not mandatory, so it could be declined when a court determined after an initial hearing that the superintendent's chance for success on the merits was remote. Chapter 143 also provides relatively clear procedures as to when review may be sought and the specific standard of review to be applied by the reviewing court.

Despite the Court of Appeals decision, a cloud remains over the availability of the Chapter 143 remedy because of the Supreme Court's grant of certiorari in the James case. Should a similar controversy arise before clarifying legislation is adopted, the case could very well go to the Supreme Court, and that Court could hold that Chapter 143 is an improper vehicle for review and remand the case for a new trial wherever the dismissal occured. This possibility could and should be avoided by prompt legislative action.

Board of Education

(Continued from page 35)

may only precipitate a complete legislative overhaul of Chapter 115, which will then be untried and uninterpreted. The last need for an overhaul of such magnitude was the desegregation issue that evoked the "Pearsall Plan." The legislative response to that impetus is now codified in many sections that do not lend themselves to rational interpretation in a context that does not include desegregation.

Nevertheless, it would appear that the legislature needs to concern itself with a study of the "office" of superintendent, the relation between the superintendent and the board, and the dismissal and judicial review process. Such a study should not proceed upon the premise of advocacy, which may well engender a strong desire to annihilate the adversary within the bounds of statutory rules. It should not seek to recreate the contemporary emotions of a particular case, but might gain insight by a perspective review of such a case, gaining and profiting from later wisdom not earlier available, and lack of emotion, then too prevalent. Both boards and superintendents should fully participate in the study so that the legislature will know fully and impartially the actual trials and tribulations of day-to-day relationships for which they seek to prescribe.

I believe that the study should recommend that the superintendent be an employee of the board under a contract, which could be standardized for the state and would provide clear grounds for termination by either party. Judicial review in the county wherein the controversy arises should be clearly provided by statute.

Lack of cases under the existent statutes may well argue against any such expenditure of legislative time. An isolated case, while attracting some attention, when weighed against more demanding problems must wait at the end of a long line for action. If the wait is long, however, the boards, superintendents, and their attorneys may simply have to continue to fly in the present procedural and substantive fog. In this event, to use my favorite Bunkerism, they may be made to look like "dingbats."

Wilson always had something special...

Elmer Oettinger

It wasn't just that the city produced North Carolina's first consolidated school system. Or that in the 1920s *National Geographic* picked Nash Street as one of the six loveliest streets in the nation. Or that Wilson (along with another All-American city, Rocky Mount) could compete successfully in a professional baseball league with such larger Virginia cities as Richmond and Norfolk. Or that even before the Great Depression Wilson's high school debaters, declaimers, and dramatic clubs won far more than their share of state championships or that its students were known to finish one-two-three in the annual state competitions in Latin and French. Or that when the speaker at a Phi Beta Kappa initiation ceremony at the University lamented the state of learning in eastern North Carolina, centering around Wilson, an inductee pointed out that three of the twenty-six students there being sworn in came from Wilson (while no other place had more than one). It wasn't just these things, but they contributed to the building of local pride and a sense of excellence.

That special something was enhanced by . . . but was not *due* to . . . a relatively early decision to go to a city-manager form of government (1933) and the extraordinary number of beautiful homes and gardens and paved streets. It was encouraged by, but was not based upon, the many years in which there was a legitimate claim to being known as "the world's greatest bright leaf tobacco market." That special something was not due to a notable advance in modern health facilities. Nor to three consecutive years as state champion (playing against much larger cities) in football. The special something that exists today does not stem from, although it has gained form and substance from, the achievements of the many people who have called Wilson home—such people as Josephus Daniels (before he moved on to Raleigh to found the *News and Observer*), Supreme Court Justice George Connor, Speakers of the North Carolina House of Representatives H. G. Connor, Jr., and Larry I. Moore, State Elections Board Chairman Will Lucas, Judge Naomi Morris of the State Court of Appeals (the first woman on that court), Vice-Chancellor Joseph C. Eagles, Jr. of the University of North Carolina at Chapel Hill, Lieutenant-Governor Jim Hunt, and numerous others who have held high professional office or earned recognition through achievement in such fields as medicine, law, government, engineering, pharmacy, business, and the arts. Although all of these things and more have contributed to the heritage of North Carolina's newest all-America city, the sense of pride in being a Wilsonian derives from something more intangible. It may not matter much that Ava Gardner once attended Atlantic Christian College, but it matters that Atlantic Christian College has grown with and for Wilson and eastern North Carolina. It matters that when Wilson played host to the Eastern North Carolina Tobacco Festival some fifty years ago, the citizenry (which turned out almost en masse) reacted enthusiastically when two eight-year-old local boys in blue blazers and white duck trousers sang the town's praises to the tune of "Mr. Gallagher and Mr. Sheen":

> . . . Can you tell me why these people are all here?
> Some from Stantonsburg I see,
> From Black Creek and Elm City,
> And I believe some are from Grab Neck over there.
> They have come here just to see Wilson's great society . . .

It mattered that the words were written by a local merchant. It mattered that the two major banks, faced with massive withdrawals and imminent closure in the crisis of 1931, were saved when a leading citizen walked up to the front of the line of customers withdrawing at one bank funds and made a huge deposit and armored trucks from the Richmond Federal Reserve system pulled ostentatiously up to the street entrance of the other bank and unloaded bags

of green bills before the eyes of concerned depositors. It mattered that one courageous merchant stood up and stopped the proposed coming of a low-wage industry into the community. Later the community was able to encourage and bring in civic-minded, better-wage industry. It mattered that, long before the integration of schools, a local radio news commentary was piped into the civics classes of black and white schools alike and people of all races served on some key committees formed to serve the community.

No doubt the other thirteen North Carolina cities that have won All-America designation have something very special too. To achieve national recognition requires some very special people doing some very special things in a very special community. No doubt other Tar Heel cities and towns that have not yet won the national award have distinctive achievements and atmospheres that can and will be recognized and acknowledged. Yet Wilson is the 1972 city in point. And if it illustrates some truisms of distinctive cities, its distinctions are nonetheless all its own.

The announcement of the all-America awards to Wilson (and ten other American cities) in 1972 included a review of the accomplishments that brought all-America recognition. The section on Wilson is replete with such references as "top agricultural and tobacco market," "new, industrially based jobs," "long tradition of citizen involvement," "major clean-up effort," "annexation of underdeveloped areas," "healthier environment," "mental health treatment clinic," "police 'human relations' division," "crisis center," and "opportunity for people in trouble."

Wilson's presentation in seeking the award at Minneapolis was modest. The spokesman for the fifty-member bi-racial committee of citizens that made the trip began by noting "first thoughts . . . that we deserve no recognition for doing things we should do." He spoke of the desire to "share with others the satisfaction derived from [our] experiences" and "to suppress our own enthusiasm and permit our city to show its personality." Although the account details and analyzes specifics of achievement, it contains these paragraphs that catch the spirit and sense of a true All-America city:

"Wilson has never been a City of the Old South as we look upon them in retrospect. This is not to say it did not participate in segregation, for it did. But it has been blessed with outstanding Black leaders. Perhaps it is more a tribute to them than to us that Wilson was always moving towards a more balanced opportunity long before the court ruled that this must be the law of the land.

"Perhaps it is more of a tribute to them than to us that we have been able to do the things we have done as we have discovered human needs and have tried to meet these needs through the resources of our own people.

"Wilson today is no Shangri-la. It still has substandard neighborhoods and limited discrimination, but we have come a long way in curing our problem; and in all that we have done, the important thing is that we are finding solutions."

The detailed statement of improvements in housing, mental and physical health, human relations, medical facilities, municipal government, sewage treatment, growth, bond issues, schools, college, and arts council is impressive.

The presentation concludes: "This is the story of our City as we can best tell it in the time allotted. We love our City, and we are proud of it. Our entire delegation of fifty people, young and old, Black and White, have traveled eleven hundred miles to support this effort. They asked me to express their appreciation for the opportunity you have afforded us in making this presentation. We are a better community for having this experience."

As newspapers in other North Carolina cities have done on occasions of similar awards, the Wilson *Daily Times* ran a 76-page All-America City edition remembering the event and providing a fine record for historians.

Now, after the occasion red-white-and blue banners still festoon the city and bright bumper stickers are evident on the cars. Signs and advertisements proclaim "All-America City." The Chamber of Commerce is sponsoring a program of special events in connection with the celebration. Mayor H. P. (Red) Benton, Jr. says that the bi-racial committee that had presented the case for Wilson before the national judges has been so successful that it will continue to function in community activities. Mayor Benton, City Manager Bruce Boyette, and other community leaders promised to maintain a "steady barrage of events throughout the year." The old school song used to end: "Wilson, Wilson, grand old gold and blue; We'll always honor, love and cherish you." In its growth from town to city, in its annexation of underdeveloped areas and making them part of a better whole, in its efforts to be an ever better place to live for all its citizenry, the City of Wilson exemplifies the spirit and builds on the enthusiasm implicit in the song. Of such stuff are "All-America" cities made.

See the statement that appears on the back cover.

Wilson Named All-America City

Over the years North Carolina has distinguished itself for the number of its cities that have won top places in the All-America Cities competition. Seventeen times this honor has been awarded to Tar Heel communities. This year Wilson joins a list that includes Asheville, Laurinburg (twice), Winston-Salem (twice), Salisbury, High Point, Gastonia, Wilmington, Greensboro, Hickory, Charlotte, Rocky Mount, Lumberton, and Shelby. The following statement is a list of Wilson's accomplishments that placed it among the All-America cities for 1972.

- A top agricultural and tobacco market in Eastern North Carolina, Wilson's economy is being bolstered by new, industrially based jobs. Wilson has a long tradition of citizen involvement, and it is within this framework that problems connected with new physical growth and city services, mental health and expanded human relations activities received attention.

- A major clean-up effort by citizens and town officials, initiated at the request of residents in an adjoining unincorporated area, was conducted to rid that section of potential health and accident hazards. The 2,600-acre tract—a mixture of largely deteriorating residential properties, small businesses, and industry—was without many essential services. It became clear that the only real answer to improvement would be through annexation to the city.

- Annexation meant that Wilson could maintain a healthier environment for the residents of the area while satisfying the need for more space to accommodate its own growth. Along with annexation, an $8.5-million bond issue was approved overwhelmingly and the job of developing services was started.

- In answer to a need for at-home treatment, citizens established a mental health treatment clinic in the late 1950s. Wilson applied for construction funds under 1966 federal legislation providing assistance for treatment centers, and has developed a complete 23-bed patient service facility that includes the only alcohol detoxification unit in the region. The facility also sees outpatients. Additional funding recently approved will provide $4 million over the next eight years to complete and staff the facility.

- A human relations division has been formed in the Police Department that gives special attention to drug abuse, questions of police authority, and situations that may involve racial problems.

- A crisis center, operating around the clock, provides an opportunity for people in trouble to talk out their problems and directs them to an appropriate agency for further help.

(See the story on pages 44–45.)