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United States Supreme Court Decisions
Affecting State and Local Government

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Cover Photo: This month's issue features articles on the 1976 United States Supreme Court decisions affecting state and local governments in North Carolina. All photos were obtained from the Library of Congress.

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1976 Supreme Court Decisions Affecting State and Local Government

In its 1975-76 term the United States Supreme Court decided on an unusually large number of cases especially pertinent to state and local government. Because of the interest that governmental officials will have in these cases, this entire issue of *Popular Government* is devoted to the Court's decisions in the recent term that affect state and local governments. The following material discusses the impact of these cases on government, with particular emphasis on the implications for North Carolina state and local governments.

The cases are arranged under these subject headings: Capital Punishment, Corrections, Courts, Election Law, Environmental Law, Health Law, Law Enforcement Procedure, Personnel, Property Taxation, Public Schools, and Social Services. Some subject areas have been covered by a single author. In other areas, however, the cases deal with several different facets of the subject. In these instances, several authors have contributed to the coverage of that area. Each case discussion is followed by the name of its author. All authors are Institute of Government faculty members.

When the Editorial Board originally planned this issue, it had hoped that some general conclusions could be drawn about these 1975-76 decisions of the Court, because at first glance it appeared that there was a trend by the Court toward allowing the local governments to decide governmental and personnel matters for themselves. But for every case that fit within that trend, another one did not.

The Board hopes that this issue of *Popular Government* will be generally informative to all citizens who read it. In particular, the Board hopes that this discussion of cases will enable officials to assess whether the governmental practices for which they are responsible meet the Court's standards and to change the practices if the standards have not been met.

Joan G. Brannon

Capital Punishment

Perhaps the most important and certainly the most talked about decision of the United States Supreme Court was its approval on July 2 of the death penalty for murder in the statutes of Georgia, Florida, and Texas, and disapproval of it under the laws of North Carolina and Louisiana. Although the five decisions (49 L. Ed. 2d 859 through 999) answered many questions about capital punishment, there are still others up in the air. This review of the cases will not be a critique—which could be fairly extensive since the opinions are not particularly well written and some of the better logic appears in dissent—but rather an attempt to summarize the Court's reasons for its decisions and to outline the North Carolina General Assembly's rather limited options if it wants to restore capital punishment.

Although the five decisions include two dozen separate opinions by the nine justices, and although there was never a majority in agreement on the *reasons* for affirming or reversing the state courts' decisions, some general statements can be made: (1) a clear majority of the Court, seven justices, rejected the argument that death is always a cruel and unusual punishment; (2) that same majority held that the death penalty's unique and irreversible character requires that it be imposed under procedures stricter than those for other penalties; (3) the three swing votes within that majority favored death-penalty statutes that narrowly define the kinds of crimes for which the penalty may be imposed, have separate proceedings for determining guilt and sentencing, require the sentencer to consider specific lists of aggravating and extenuating circumstances, and provide for appellate review to avoid capricious and disproportionate sentences; (4) a mandatory death penalty may be permissible in very narrow circumstances, such as for murder by a prisoner serving a life term; and (5) there is no good basis for predicting the Court's disposition of statutes providing death for rape and other offenses, though it may be that capital punishment will not be allowed for anything other than murder.

Effect on North Carolina

The immediate effect of the Court's decision in the North Carolina case, *Woodson v. North Carolina*, 49 L. Ed. 2d 944 (1976) was to nullify the capital sentences for all those convicted of first-degree murder in this state. Although the state's death penalty for first-degree rape was not specifically considered by the Court, it is clearly also unconstitutional under the new standards. State legislation enacted in 1974 to provide capital punishment for those two crimes specified that if this penalty were found unconstitutional, all death sentences would be commuted to life imprisonment. North Carolina's Supreme Court is now implementing that provision; life imprisonment will be the new sentence for all the 100-plus prisoners who were on death row at the time of the *Woodson* decision. Capital punishment cannot be reinstated in North Carolina until a new statute is enacted by the legislature.

Death penalty not unconstitutional per se

All the justices except Brennan and Marshall agreed that the death penalty is not cruel and unusual punishment of and by itself. However, very tight restrictions must govern the use of this punishment. Justice Stewart, who deals most extensively with this question in the Georgia case, begins by recognizing that the cruel and unusual punishment clause has a meaning that may change with public opinion. The Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." Thus, the Court must assess contemporary values to determine whether a particular criminal sanction is cruel and unusual.

Objective indicators show that the American public accepts the death penalty. There has been a long history of capital punishment in this country; capital punishment has been implicitly recognized in a number of the Court's decisions over the years, and both the Fifth and Fourteenth amendments assume its existence by prohibiting deprivation of life without due process. Moreover, 35 states and the Congress passed new capital punishment statutes after the 1972 *Furman v. Georgia* decision invalidated laws that left jurors too much discretion. Also, the death penalty has been approved overwhelmingly in the only state referenda since then, and juries have chosen that punishment in over 460 cases since *Furman*.

However, the public's attitude is not conclusive on the question of cruel and unusual punishment. The Eighth Amendment is intended partly to safeguard individuals from the abuse of majority legislative power. In addition to being acceptable to the public, a penalty must not offend "the dignity of man." In brief, it must not be excessive—it "must not involve unnecessary and wanton infliction of pain," and "must not be grossly out of proportion to the severity of the crime." The death penalty for murder is not unnecessary or

wanton since it serves two legitimate social purposes: retribution and deterrence. Retribution is "essential in an ordered society that asks its citizens to rely on legal processes rather than self-help to vindicate their wrongs." The value of capital punishment as a deterrent is debatable, but questions of that nature are for the legislatures, not the Court, to decide. The Court only considered cases in which the defendant had deliberately taken the life of another, and the justices would not say that death is always a disproportionate penalty for such a crime.

The death penalty in the five states

When the Court considered specific aspects of the five states' death penalties, there were many differing views. The heart of the controversy in each case was whether the statute allowed the arbitrary and capricious imposition of death. The Court approved statutes that limited the kinds of acts punishable by death and required that the characteristics of individual defendants and their crimes be considered, but disapproved statutes that allowed death for a broad range of activity and failed to focus jury attention on the particular defendant and his acts. The five cases seemed to be decided in roughly the order of the Court's approval of the states' statutes—Georgia's came first and was approved as legally sound; Florida's was somewhat less commendable; Texas' barely squeaked by; North Carolina's was unacceptable; and Louisiana's just as bad. The discussions of the individual cases will follow that order.

Georgia. Defendant Gregg hitchhiked a ride with two men, and in the course of robbing them, shot and killed them. He was convicted on two counts of murder—defined broadly under Georgia law as a premeditated killing or a killing committed in the course of a felony. A separate hearing before the same jury decided his punishment. Before choosing death over life imprisonment, the jury had to find one of ten statutory aggravating circumstances beyond a reasonable doubt. For Gregg's case, the jury was instructed on three of these circumstances: (1) that the murder was committed in the course of another capital felony (which armed robbery is under Georgia law); (2) that it was done to obtain money or other property; and (3) that it was outrageously and wantonly vile and inhuman. The prosecutor and defense counsel argued before the jury and could have introduced evidence on aggravating and mitigating circumstances.

The jury found the first two aggravating circumstances and imposed capital punishment. (At their discretion, the defendant could have had a life sentence.) The trial record and a lengthy questionnaire completed by the judge about the circumstances of the trial went to the Georgia Supreme Court, which was required to consider whether the death penalty was imposed because of passion and prejudice, whether the evidence supported the jury finding of aggravating circumstances, and whether the death penalty was excessive or disproportionate to penalties imposed in similar cases.

The Court approved the Georgia procedure because it eliminates the possibility that capital punishment will be imposed in an arbitrary and capricious manner. When a jury is considering the death sentence, it should be given standards for guidance (like the statutory list of aggravating circumstances) and should take into account the circumstances of the crime along with the defendant's character and propensities. A separate sentencing hearing is best (though not absolutely required), since there is information relevant to sentencing that should not be heard in determining guilt. Although some of the aggravating circumstances are stated vaguely, the Georgia Supreme Court has interpreted them narrowly and has given juries additional guidance. The Georgia statute also calls for appellate review, which specifically considers whether death has been imposed arbitrarily or disproportionately. The Georgia Supreme Court's record indicates that it has taken this responsibility seriously; for example, the court has vacated the death penalty for armed robbery because it is not generally imposed by Georgia juries.

The Court was not persuaded by arguments that the death penalty is applied arbitrarily and capriciously since the prosecutor has discretion in trying and plea-bargaining cases, the jury may choose life imprisonment even though an aggravating circumstance is found, and the governor and board of paroles may commute death sentences. No cases support the view that it is unconstitutional to provide a convicted defendant with opportunities for mercy, and it is doubtful that our criminal justice system would function at all without some discretion.

Florida. Defendant Proffitt, in the course of burglarizing a man's house, stabbed and killed him. Following the conviction of murder (broadly defined as in Georgia), a separate sentencing hearing was held before the same jury. Additional evidence included the defendant's prior record and a statement he made to a physician admitting an uncontrollable desire to kill. After considering a statutory list of eight aggravating and seven mitigating circumstances, the jury recommended death. The judge, who has the final decision in Florida, ordered an independent psychiatric evaluation of the defendant, and then chose death for him. As required by Florida law, the judge issued written findings to support his sentence, listing no mitigating circumstances and the following aggravating factors: the murder was premeditated and committed in the course of a felony; it was especially heinous and atrocious; defendant has a propensity to murder; and he knowingly created a great risk of serious injury and death to many persons.

The Florida Supreme Court was required to review the death sentence. That court has no specific charge to direct its review but has decided that its authority includes determining whether the punishment is too great.

The U.S. Supreme Court found the Florida capital punishment scheme acceptable for essentially the same reasons as the Georgia law. The fact that a judge, rather than a jury, chooses the sentence may actually result in greater consistency in sentencing. Some of the statutory aggravating and mitigating circumstances are vague, but the state court has defined them more precisely by case law. And although the supreme court has no specific instructions on how to review capital sentences, it has chosen to insure that similar results are reached in similar cases, and in fact, has vacated eight of the 21 death sentences reviewed thus far.

Texas. Defendant Jurek choked, strangled, and drowned a ten-year-old girl after kidnapping and forcibly raping her. This murder in the course of kidnapping and rape was one of only five narrowly defined acts for which capital punishment could be imposed under Texas law. (The others include: murder of a peace officer; murder while escaping from prison; murder for hire; and murder of a prison employee by an inmate.) Upon conviction, a separate sentencing hearing was held before the same jury, with additional evidence introduced on defendant's character. The jury was asked to determine: (1) whether the murder was committed deliberately and with the expectation that death would result; and (2) whether the evidence was established beyond a reasonable doubt that the defendant would be likely to commit acts of violence that would be a continuing threat to society. (If the evidence had warranted, the jury could have been asked whether the defendant's act was an unreasonable response to provocation.) The jury answered yes to both questions, and the judge was required by statute to sentence the defendant to death. Review by the state criminal court of appeals followed.

The Court approved the Texas procedure but was not as enthusiastic as for Georgia's and Florida's. The Texas procedure probably represents the minimum safeguards that the Court will accept. Although Texas has not adopted a list of aggravating circumstances as the other two states did, it has focused the sentencing jury's attention on the nature of the particular crime by limiting the death penalty to a much smaller class of murders. The statute does not, however, provide for consideration of mitigating circumstances, and this is required for the law to be constitutional. The Texas appellate court has saved the statute by construing the question of whether the defendant is likely to commit additional "criminal acts of violence" and be a "continuing threat to society" to allow the defendant to bring to the jury's attention such mitigating circumstances as his age, whether he was acting under duress, and whether he was under extreme mental or emotional pressure.

The Court did not describe the Texas appellate review procedure other than to indicate that it reviews the sufficiency of the evidence supporting the jury's sentence.

North Carolina. Defendants Woodson and Waxton participated in an armed robbery of a convenience store, and Waxton shot and killed the cashier. They were tried and convicted of first-degree murder under G.S. 14-17 as rewritten by the 1974 General Assembly. The statute defines first-degree murder as any premeditated and deliberate killing, any killing committed in the course of a felony dangerous to life, and any killing by means of poison, lying-in-wait, imprisonment, starving, or torture. Upon conviction, defendants were automatically sentenced to death as required by the statute.

The Court rejected North Carolina's capital punishment provisions for three reasons. First, the mandatory death penalty "departs markedly from contemporary standards respecting the imposition of the punishment of death. . . ." That conflict with contemporary standards is evidenced by a long history of rejection by juries and legislatures of mandatory death sentences for a very broadly defined crime of murder. Second, the statute does not really answer *Furman's* objections of unbridled jury discretion. Throughout this country's history, juries have consistently refused to convict a significant proportion of persons charged with murder under mandatory death statutes. North Carolina has neither provided guidelines for juries to use in deciding when to impose death nor given its appellate courts power to check arbitrary and capricious sentencing. Third, the North Carolina law fails to allow "the particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death."

The Court's decision was with two justices in the majority who believe the death penalty is always unconstitutional. The opinion previously discussed is that of the three other justices in the majority (Stewart, Powell, and Stevens). The Court did not reach the question of whether death is an excessive punishment for someone such as Woodson who participated in the crime but did not himself kill anyone, but the fact that this point was mentioned may indicate the Court's disapproval of capital punishment for accessories.

Louisiana. Defendant Roberts robbed a gas station and killed an attendant by shooting him four times in the head. Louisiana law provides a mandatory death penalty for first-degree murder but defines that crime more narrowly than North Carolina. In Louisiana first-degree murder can be committed only five ways: by killing in the course of certain felonies; killing a peace officer; killing for hire; killing with the intent to inflict harm on more than one person; and killing after a previous conviction for murder or while serving a life sentence.

The Court struck down the Louisiana statute for essentially the same reasons as in the North Carolina case. Although the statute narrowed the categories of first-degree murder, the majority believed that the diversity of circumstances present in those five categories is still substantial. The jury's wide discretion has not been narrowed, as in Texas, by a consideration of aggravating and mitigating circumstances in the sentencing hearing, or by appellate review of the death sentence.

An additional problem was found in the Louisiana law. In all first-degree murder cases the jury is instructed on lesser offenses of second-degree murder and manslaughter, regardless of whether the evidence could support a lesser charge. Such a procedure "invites the jurors to disregard their oaths and choose a verdict for a lesser offense whenever they feel the death penalty is inappropriate," increasing the chances of arbitrary and capricious decisions. (It is not clear why a jury in Louisiana is more likely to disregard its oath in finding guilt than a jury in Georgia, Florida, or Texas in setting the sentence.)

The death penalty for other crimes

A number of states, including North Carolina, have statutes providing capital punishment for crimes other than murder. In the present term the Court will consider several Georgia cases in which the death sentence was imposed for rape. The Georgia scheme for capital punishment in rape cases is essentially the same as for murder: after conviction, the jury must consider a list of aggravating circumstances (though the number of aggravating factors relevant to rape

is less than for murder) and must find at least one before death can be imposed; then the state supreme court reviews to see that the penalty is not disproportionate.

The Court left itself an opening in the five murder cases it could use to strike down capital punishment for rape. At several points the opinions emphasized that the death penalty is not disproportionate for murder since the defendant has himself deprived someone of life. "It is an extreme sanction, suitable to the most extreme of crimes." No other crime falls into that category. Also, the objective indicators of the public's attitude—jury verdicts and legislative enactments—do not indicate that capital punishment is nearly as well accepted for rape as for murder. Although thirty-five legislatures passed new death penalty statutes for murder after *Furman*, only six decided to punish rape that way.

Mandatory death penalties

Although the only mandatory capital punishment statutes before the Court were struck down, there were hints that a very limited mandatory statute could be constitutional. One example mentioned several times was an automatic death penalty for someone who murders while serving a term of life imprisonment. The definition of this crime is so specific that it may meet the constitutional requirement of individual consideration of the defendant and his crime. The fact that the defendant is already serving a life sentence may tell as much about him as the jury needs to know.

North Carolina's options

If North Carolina wants to punish murder by death, the General Assembly must first of all substantially limit the kinds of killings that can receive that penalty. In doing so, the legislature has really only two choices; it can follow the Georgia-Florida model or the Texas model. The Georgia-Florida approach would be to leave first-degree murder broadly defined (though it might be necessary to specify and limit the felonies that trigger the felony-murder rule), and make a list of aggravating factors, at least one of which would be required for the death penalty. To follow the Texas example, new legislation would use some of the aggravating factors to narrow the definition of the crime itself. For example, the legislature could decide that the death penalty is appropriate only when a policeman is killed or when two or more people are killed at once. At that point, the choice would be either to redefine first-degree murder to include only killings of policemen and multiple killings or to retain the present definition of first-degree murder (any premeditated and deliberate killing) but not allow the death sentence unless a sentencing hearing finds one of those two aggravating circumstances. The choice depends mainly on how much the legislature wants proved at the "guilt phase" and how much at the "sentencing phase" of the proceeding.

Whether the aggravating factors are incorporated into the definition of murder or listed separately for consideration in sentencing, the death-penalty states seem to agree on what the aggravating factors should be. These are the factors that other states have decided make a murder worthy of consideration for the death penalty:

— Defendant has a prior conviction for a capital offense;
— The killing was committed in the course of a felony dangerous to life;
— Defendant has a history of serious assault convictions;
— There was danger of death or injury to many;
— There were multiple victims;
— The victim was a policeman, fireman, guard, or judicial official;
— The killing was done for monetary gain;
— The killing was done as a means of escape from prison;
— Defendant was a hired killer;
— The killing was done by the use of explosives;
— Defendant was already serving a life imprisonment sentence;
— The killing was done to disrupt government or law enforcement;
— Defendant intended and expected the victim to die;
— Defendant poses a continuing threat to society.

In addition to aggravating circumstances, the jurors must be allowed to consider mitigating factors. Since such information is not relevant to determining guilt, a separate sentencing hearing is about the only choice. The sentencer could be the judge, the same jury that found guilt, or a different jury. The jury could either decide the question or simply make a recommendation to the judge. (It has been argued that North Carolina's Constitution entitles the defendant to a jury at the sentencing hearing if additional evidence is to be considered, but that is not certain.)

Other states have also reached a consensus on what mitigating factors should be considered:

(Continued on p. 14)

Chief Justice Warren E. Burger

Corrections

Decisions of the U.S. Supreme Court during the 1975-76 term affected two areas of correctional law: prisoner discipline and transfer of prisoners between institutions. This article will summarize the decisions and compare North Carolina procedures with the Court's requirements.

Inmate disciplinary procedures

Revocation of "good time" and solitary confinement. The Supreme Court's decision last term on prison discipline (*Baxter v. Palmigiano*, 47 L. Ed. 2d 810 (1976)) cannot be understood without describing the Court's 1974 decision in *Wolff v. McDonnell*, 418 U.S. 539 (1974). The plaintiff in that case, Robert McDonnell, an inmate in a prison known as the Nebraska Penal and Correctional Complex, brought a suit under § 1983, 42 U.S.C., as a class action on behalf of all inmates in the prison. In addition to issues concerning prisoners' rights to send and receive mail and legal assistance to prisoners, the suit involved infractions of prisoner conduct rules that had been punished by loss of accumulated "good time" (time off for good behavior). Inmates represented in the lawsuit alleged that this punishment had been imposed for a variety of offenses, including taking part in an "insurrection" by black inmates, cursing an officer and threatening his life, being involved in a fight with another inmate, refusing an order to work, failure to get a "conforming haircut," "messing up" the "countup" (apparently a rollcall), and the like. They complained that (1) they had not been allowed either to call witnesses in their support at the disciplinary hearing or to confront their accusers and had not been informed of the charge before the hearing, and (2) the accusing officer had in some instances not appeared at the hearing as prison rules required. McDonnell asked the federal district court to declare that Nebraska prison disciplinary procedures did not comply with the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution and to order the prison system to adopt proper procedures. (McDonnell also sought other relief not relevant to this discussion.) The case reached the Supreme Court on appeal. The Court held that the Nebraska procedures were constitutionally deficient and spelled out the minimum requirement of due process in prison disciplinary proceedings that may result in loss of good time or solitary confinement.

Nebraska law authorized the chief officer of each prison to punish inmate misconduct. When serious misconduct—assault, escape, or attempted escape—was involved, the punishment could include revocation of good time and/or confinement in a disciplinary cell as well as extra duty and loss of privileges. (Some of the inmates' offenses listed earlier—for example, failure to get a "conforming haircut"—obviously did not fall into the category of serious misconduct, and the federal district court ordered that good time taken away for such nonserious offenses be restored.) The only statutory requirement concerning disciplinary procedures was that the inmate be "consulted regarding the charges of misconduct." The prison's disciplinary procedure began with a charge of misconduct, or "writeup," by a prison officer. The chief supervisor reviewed all "writeups" daily. The convict charged was called to a conference with the chief supervisor and the officer who charged him. After the conference, a conduct report was sent to an adjustment committee. This committee held a hearing with the inmate present; if he denied the charge, the inmate was allowed to question whoever accused him of misconduct. The committee could conduct additional investigation if it wished. After the hearing and further investigation, if any, punishment was imposed.

The Supreme Court began by deciding that prison disciplinary proceedings are subject to the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution, which provides:

> No state shall . . . deprive any person of life, liberty, or property, without due process of law . . . .

The Court held that although a prisoner has no constitutional right to good time, once the state creates the right, it becomes a form of "liberty" that the state may not take away without the due process of law. The Court made clear, in dictum, its view that due process requirements must also be met before solitary confinement can be imposed as a punishment, since solitary confinement would be a "major change in the conditions of confinement," and thus a relative loss of liberty. (Some of the inmates in the *Wolff* case had been punished by solitary confinement as well as loss of good time but did not complain about it in their lawsuit.)

In deciding what process is due before good time can be taken away or solitary confinement imposed, the Court balanced society's need to punish and restrain criminals with the individual's constitutional right not to suffer a loss of liberty by arbitrary government action.

> Of course, as we have indicated, that a prisoner retains rights under the Due Process Clause in no way implies

> that this right is not subject to restrictions imposed by the nature of the regime to which he has been lawfully committed . . . Prison disciplinary proceedings are not part of a criminal prosecution, and the full panoply of rights due a defendant in such proceedings does not apply . . . In sum, there must be mutual accommodation between institutional needs and objectives and the provisions of the Constitution that are of general application.

While deprivations of good time and solitary confinement are serious sanctions, they are not as serious to the individual as parole revocation, the Court said in refusing to require as strict a procedure in prison discipline as it had two years earlier in parole revocation.[1] The Court also noted that the state's interest in prison discipline differs from its stake in parole revocation. Unlike parole revocation hearings, prison disciplinary proceedings "take place in a closed, tightly controlled environment peopled by those who have chosen to violate the criminal law and who have been lawfully incarcerated for doing so." (As a North Carolina prison official recently put it, "These people aren't in prison for singing too loud in church.") There is continual tension between guards and inmates; there may be violent retaliation against inmates who help prison authorities enforce discipline. Discipline needs to be swift and sure:

> . . . there would be great unwisdom in encasing the disciplinary procedures in an inflexible constitutional straitjacket that would necessarily call for adversary proceedings typical of the criminal trial, very likely raise the level of confrontation between staff and inmate and make more difficult the utilization of the disciplinary process as a tool to advance the rehabilitative goals of the institution.

The Supreme Court made the following specific rulings as to the minimum requirements of the Due Process Clause in prison disciplinary proceedings where loss of good time or solitary confinement may be imposed:

1. The inmate must receive written notice of the charges against him at least 24 hours before the disciplinary hearing.
2. The hearing body [in Nebraska, the Adjustment Committee] must prepare a written statement of the evidence it relies on and the reasons for its disciplinary action.
3. At his disciplinary proceeding, the accused inmate has a right to be present, call witnesses, and present documentary evidence in his defense, "when permitting him to do so will not be unduly hazardous to institutional safety or correctional goals . . . Prison officials must have the necessary discretion to keep the hearing within reasonable limits and to refuse to call witnesses that may create a risk of reprisal or undermine authority, as well as to limit access to other inmates to collect statements or to compile other documentary evidence."
4. The inmate has no constitutional right to confront and cross-examine those who give evidence against him.
5. The inmate has no constitutional right to the assistance of counsel—neither counsel appointed for him nor privately retained counsel—at his disciplinary hearing. However, the inmate "should be free to seek the aid of a fellow inmate, or if that is forbidden [by prison rules], to have adequate substitute aid . . . from the staff or from a sufficiently competent inmate designated by the staff," if the inmate is illiterate or the issue is so complex that it is "unlikely that the inmate will be able to collect and present the evidence necessary for an adequate comprehension of the case."
6. Nebraska's adjustment committee is a sufficiently impartial hearing body. This committee, made up of the Associate Warden for Custody, the Correctional Industries Superintendent and the Reception Director, does not act with unlimited discretion, the court noted. Its regulations direct that it give full consideration to causes of adverse behavior, the circumstances in which it occurred, the inmate's accountability, and correctional treatment goals, and that punishment never be imposed for the purposes of revenge.

One qualification should be added to the Court's decision in *Wolff*. The Court was not dealing with an emergency like a prison riot or strike. It seems clear that inmates may be placed in solitary confinement to protect prison security in a bona fide emergency and compliance with the *Wolff* standards postponed until the emergency is past.[2]

Disciplinary procedure when inmate conduct may constitute a crime. Nicholas Palmigiano was a Rhode Island prison inmate serving a life sentence for murder. Early one evening, a fellow prisoner became violently ill. When no medical assistance had been provided by 8:50 p.m., Palmigiano allegedly advised other prisoners not to return to their cells for the 9:00 lock-up as a protest against the failure to provide medical attention. Prison officers charged him with inciting a disturbance that might have resulted in a riot. He was brought before the prison disciplinary board and told that he might be prosecuted for violating state law, that he should consult his attorney (although the board did not allow his attorney to be present at the disciplinary hearing), and that he had a right to remain silent during the hearing but if he remained silent his silence would be held against him. (He was offered the assistance of substitute counsel—a staff member or another inmate—at the hearing but it is not clear from the court decision whether he in fact had this help.) Palmigiano remained silent at the hearing. The disciplinary board found him guilty of the infraction charged and imposed a punishment of thirty days in punitive segregation. (Punitive segregation involved being locked in a solitary cell full time, receiving meals in the cell, and deprivation of recreation and exercise.) According to the First Circuit Court of Appeals, "[t]he disciplinary board based its decision entirely upon the written statement submitted by a correctional officer who had witnessed the alleged infraction."[3] Like McDonnell, Palmigiano sued in federal district court, claiming that his disciplinary hearing violated the Due Process Clause.

1. Morrissey v. Brewer, 408 U.S. 471 (1972).

2. Blair v. Finkbeiner, 402 F. Supp. 1092 (N.D. Ill. 1975); Tate v. Kassulke, 409 F. Supp. 651, 656-57 (W.D. Ky. 1976) (dictum); Berch v. Stahl, 373 F. Supp. 412 (W.D.N.C. 1974) (dictum).

3. Palmigiano v. Baxter, 487 F. 2d 1280, 1282 (1st Cir. 1973).

When the case reached the Supreme Court, the main issue was whether permitting an inmate's silence to be used against him in a disciplinary hearing, in a situation in which his alleged misconduct could also be subject to criminal prosecution, made the hearing constitutionally invalid. The Supreme Court held that it did not.

The issue involved the privilege against self-incrimination established by the Fifth Amendment to the U.S. Constitution, which provides:

> No person . . . shall be compelled in any criminal case to be a witness against himself. . . .

In 1964 the Supreme Court held this privilege to be incorporated in the Due Process Clause of the Fourteenth Amendment,[4] and thus to apply against a state government as well as the federal government. In 1965, the Court held that in a criminal trial, the judge may not instruct the jury that it may draw an inference of guilt from the defendant's failure to testify; to do so would violate the defendant's privilege against self-incrimination.[5] From 1967 to 1973, the Court considered a series of cases in which state governments had imposed various noncriminal penalties on people for exercising their privilege against self-incrimination and found that these penalties violated the Fifth Amendment. (For example, in *Lefkowitz v. Turley*, 414 U.S. 70 (1973), two architects were summoned to testify before a grand jury investigating charges of corruption relating to work they had done under state contracts. They refused to testify, relying on their Fifth Amendment privilege. A state law provided that if they refused to testify, their existing contracts had to be canceled and they would be ineligible for future contracts for five years. The Court held that the state government could not compel possibly incriminating testimony without granting immunity from prosecution.) Palmigiano's argument was essentially that, whether the imposition of prison disciplinary punishment is regarded as "criminal" or "noncriminal," the Fifth Amendment as interpreted in these various recent cases prohibited the prison disciplinary board from using an inmate's refusal to testify against him in his disciplinary hearing.

The Court, in an opinion by Mr. Justice White, who had written the opinion in the *Wolff* case, rejected Palmigiano's argument. It said that the prison disciplinary hearing was not a criminal proceeding, that the state was not attempting to use Palmigiano's silence in any later criminal prosecution (in fact, Palmigiano was apparently not criminally prosecuted for his "insurrection," perhaps because he was already serving a life sentence), and that Palmigiano had been told of his privilege to remain silent and warned of the consequences of silence. Under Rhode Island law, the Court noted, disciplinary decisions "must be based on substantial evidence manifested in the record of the disciplinary proceeding." (The Court seems to have assumed that "evidence manifested in the record" could not include an inmate's silence; also, as the court of appeals had said, the board's decision was apparently based on the written statement of a correctional officer.) This fact, the Court said, made Palmigiano's case different from the architects' case, in which silence *by itself* had triggered the noncriminal penalty (loss of contracts).

> There [in the architects' case and similar cases], failure to respond to interrogation was treated as a final admission of guilt. Here, Palmigiano remained silent at the hearing in the face of evidence that incriminated him; and as far as this record reveals, his silence was given no more evidentiary value than was warranted by the facts surrounding his case. This does not smack of an invalid attempt by the State to compel testimony without granting immunity or to penalize the exercise of the privilege.

It is important to consider the limitations of the Supreme Court's decision on this point. First, although the state could have prosecuted the inmate for a crime after his disciplinary hearing, it could not have used his silence in a hearing against him at his criminal trial; such an action would have violated his Fifth Amendment rights.[6] The Court said that if the state had wanted to investigate the prison insurrection, it could have given the inmate "use immunity"—that is, guaranteed that his testimony could not be used to prosecute him; if he still refused to testify, the Court said, it would not be unconstitutional to "draw whatever inference from his silence that the circumstances warranted." However, if he were granted immunity and testified, the testimony could not be used in criminal prosecution, nor, presumably, in his disciplinary proceedings if the grant of immunity extended to that as well as criminal prosecution.

It is also important to note that the prison inmate retains *Miranda* rights. (The prison authorities in *Baxter v. Palmigiano* were clearly aware of this when they told Palmigiano of his right to silence and to consult with his lawyer about criminal prosecution.) In *Miranda* the Supreme Court held that the prosecution in a criminal trial may not use statements made by a defendant in custody that stem from questioning of law enforcement officers unless his privilege against self-incrimination has been secured by telling the defendant that: (1) he has the right to remain silent; (2) whatever he says can and will be used against him in court; (3) he has the right to consult with a lawyer and to have the lawyer with him during interrogation; (4) if he is indigent a lawyer will be appointed to represent him; and (5) he can stop answering questions at any time. These "Miranda warnings" certainly apply to questioning of a prison inmate by law enforcement or correctional officers. The inmate can waive his privilege to remain silent, but before his statements can be used in his trial, it must be clear from all the circumstances that he did so intelligently and voluntarily.

Now suppose a prison official wants to question a prison inmate about an infraction of prison discipline, in a situation in which the inmate could also be charged with a crime for his alleged misconduct, before any disciplinary hearing is held. In order to use the prisoner's incriminating statements against him at a later disciplinary hearing, must the prison official first give him *Miranda* warnings? Apparently not. The question is not answered by *Baxter v. Palmigiano*: the inmate in that case was not questioned until his disciplinary hearing and did receive warnings. However, federal courts

4. Malloy v. Hogan, 378 U.S. 1 (1964).
5. Griffin v. California, 380 U.S. 609 (1965).
6. Griffin v. California, 380 U.S. 609 (1965); Miranda v. Arizona, 384 U.S. 436, 468 n. 37 (1966).

of appeals and state courts have widely held that the Exclusionary Rule—the rule announced in *Mapp v. Ohio* that evidence seized in violation of suspects' constitutional rights cannot be used against them in state trials—does not apply to probation and parole revocation proceedings.[7] As pointed out earlier in the discussion of *Wolff v. McDonnell*, the Supreme Court considers those who are subject to prison disciplinary proceedings to be entitled to somewhat less due process protection than those who are subject to probation and parole revocation proceedings. It seems to follow that if the Exclusionary Rule does not apply to the latter, it does not apply to the former.

During the 1975-76 term, the Supreme Court considered but did not decide an issue closely related to the Fifth Amendment issue in *Baxter* that is significant for parole officers. In *State v. Gallagher*,[8] a defendant in Ohio was arrested and charged with armed robbery. On the morning after his arrest, policemen gave him *Miranda* warnings and then questioned him, but the trial court excluded his statements at that questioning session on the grounds that they were induced by police promises of lenient treatment and were thus involuntary. The suspect was held in jail awaiting trial. Four days later, his parole officer went to talk to him about the alleged robbery as a possible parole violation, without giving him *Miranda* warnings. The defendant refused to discuss it, but when the parole officer visited him again in jail one week later, he gave the officer a detailed account of his participation in the crime. At the trial, the parole officer testified to the defendant's incriminating statement, and the defendant was convicted. The Ohio Supreme Court reversed the conviction on the ground that this testimony was inadmissible. In 1976, the case reached the Supreme Court, which did not decide any constitutional issues but instead sent the case back to the Ohio Supreme Court for clarification: did the Ohio Supreme Court mean that the parole officer's testimony was inadmissible on federal constitutional grounds or on the basis of the Ohio Constitution or other state law? On remand, the Ohio Supreme Court said that the case depended on whether the defendant's confession had been voluntary, not on whether *Miranda* warnings were required. A parolee, it said, is "under heavy pressure" to answer inquiries made by his parole officer, and it found that the defendant's confession in this case had not been voluntary. The parole officer's testimony was therefore inadmissible under a provision of the Ohio Constitution establishing a privilege against self-incrimination, as well as under the Fifth Amendment to the U.S Constitution.

Thus, both parole officers and prison officials, when they question a person in prison regarding possibly criminal conduct, will have difficulty in using the prisoner's statements in a later criminal trial without *Miranda* warnings and an intelligent, voluntary waiver of the Fifth Amendment privilege against self-incrimination—although (as explained earlier) the failure to give *Miranda* warnings will not by itself make the statements inadmissible at prison disciplinary hearings or parole revocation hearings.

North Carolina prison regulations. North Carolina law (G.S. 148-11 and 148-13) gives the Secretary of Correction the authority to issue regulations governing the state prison system, conduct of prisoners, grades of custody, and time off for good behavior. (Corporal punishment is barred by G.S. 148-20.) The Department of Correction recently received a federal grant from the Law Enforcement Assistance Administration to hire attorneys to rewrite its regulations on probation, parole, and prison administration. The process of revising old regulations was difficult because it involved not only keeping up with court decisions on correctional law—a constantly expanding area—but also careful review by prison officials. The result seems to be worth the difficulty; the new regulations provide clearer guidance for correctional officials than the old ones and generally conform better to what the courts require. Although not subject to the Administrative Procedure Act (G.S. Ch. 150A), the Department has issued its regulations in the standard form used by other state agencies and filed them with the Attorney General.

In considering the new prison regulations,[9] we will mainly be concerned with inmate conduct rules and infractions that can result in segregated (i.e., solitary) confinement or loss of good time, since the Supreme Court decisions discussed above focused on those subjects. (Regulations concerning transfer of inmates from one state prison unit to another will be discussed briefly in the next section.) The regulations include rules for the conduct of inmates, a copy of which is given to each newly admitted inmate and is available to others upon request. "Major offenses" can result in up to fifteen days of segregated confinement and loss of up to thirty days of good time, as well as suspension of privileges and extra work. They include using profane or threatening language or gestures directed at officials or the public; willfully disobeying an order of a prison official; participating in an insurrection or inciting others to do so; holding any person hostage; assaulting any person with a deadly weapon or any means likely to produce bodily injury; assaulting any person with a blunt instrument, or by stabbing or cutting, or with intent to commit a sexual act; committing or inciting others to commit any sexual act; assault by fighting without use of instruments; possessing a weapon or instrument to aid in escape, assault, or insurrection; possessing alcoholic beverages, narcotics, or other controlled substances; possessing unauthorized clothing; stealing; inflicting self-injury to avoid work; escape; unauthorized leave; willfully damaging the property of the state or another person; offering or accepting a bribe; and accepting compensation for legal assistance. ("Minor offenses"—which can result only in reprimand, suspension of privileges, and extra work—include a variety of misconduct such as gambling and failing to go to bed when lights are dimmed. In *Baxter*, the Supreme Court held that the procedures required for due process by the *Wolff* decision did not apply when punishment consists of deprivation less serious than segregated confinement or loss of good time. This does not mean, of course, that inmates

7. United States v. Vandemark, 522 F.2d 1019 (9th Cir. 1975), and cases cited in 1020-21; ISRAEL & LAFAVE, CRIMINAL PROCEDURE IN A NUTSHELL 288-89.

8. State v. Gallagher, 38 Ohio St.2d 291, 313 N.E.2d 396 (Ohio Sup. Ct. 1974), *cert. granted*, 420 U.S. 10 (1975).

9. 5 N.C. Admin. Code §§ 28.0200, 28.0300.

accused of minor offenses have no due process protection at all.)

The prison disciplinary procedure operates as follows. An official who observes misconduct must take immediate action to stop it; counseling may be sufficient, and the inmate may if necessary be placed in "administrative segregation" (described further below). If the misconduct is serious or the inmate does not respond to counseling, the official must report the incident to an investigating officer designated by the prison unit's superintendent. If further disciplinary proceedings seem necessary, the investigating officer obtains written statements within twenty-four hours, from all persons concerned (including the accused), makes searches, collects physical evidence, and makes written notes. The results of the investigation must be reported to the superintendent, normally within forty-eight hours. The superintendent may dispose of the matter by counseling, but if he decides formal disciplinary action is required, he fills out an offense report. (In the meantime, if he places the inmate in administrative segregation or denies him any privileges, he must write his reasons in the case record.) He then gives the accused written notice of the charge.

If the superintendent decides that the offense should be classified as "major,"[10] he refers the charge to the area disciplinary committee for his area within forty-eight hours after receiving the investigation report. (An "area" is one of the six sections of the state into which the prison system is divided.) The area disciplinary committee consists of three to five members appointed by the area administrator from personnel within his command. (Apparently, when the alleged misconduct takes place in one of the prison system's "institutions"—the Correctional Center for Women or Central, Odum, Caledonia, Blanch, or Halifax prisons—the Disciplinary Committee is appointed by the head of the institution rather than the area administrator.) No one may be a committee member who initiated the charge, was a witness to the incident, or is a staff member of the prison unit in which the accused is confined. (This makes the disciplinary committee at least as impartial as the Nebraska adjustment committee that the Supreme Court approved in *Wolff v. McDonnell*.) The committee must conduct a hearing within seven days of receiving the charge from the superintendent, and must give the accused written notice of the hearing at least seventy-two hours before it is held. (This is longer than the twenty-four-hour written notice that *Wolff* requires.) The accused may request that a particular member of his unit's staff be appointed to represent him at the hearing; the unit superintendent must allow this request unless the accused requests one of his accusers or some other inappropriate person, in which event the superintendent must select another staff member. The staff member so chosen must actively help the accused in preparing for the hearing and at the hearing, even though he may believe the accused is guilty. (This requirement of substitute counsel goes beyond *Wolff*, which held that no substitute counsel need be furnished except in unusual circumstances.)

10. If the offense is "minor," a procedure similar to the one for major offenses is followed except that a unit disciplinary committee is involved, there is notice in writing but not necessarily 72 hours before the hearing, and no provision for counsel substitute at the hearing.

The disciplinary committee then reads the charges to the accused, asking him whether he admits committing the offense; if he denies it, the evidence is presented. The accused has an opportunity to refute or explain evidence against him and to present evidence and make a statement in his own behalf (this is consistent with *Wolff*). To protect an informer from reprisal, the chairman of the committee may tell the accused of the informer's testimony without identifying him. (Again, this is consistent with *Wolff*, which held the accused has no right to confront adverse witnesses.) After all the evidence has been presented, the chairman enters the committee's findings and the reasons for the findings on the record (as *Wolff* requires). If the committee finds the accused guilty, it may impose one or more of the punishments authorized for the type of offense the accused committed. If the accused objects to the committee's decision, he is told that the area administrator or the head of the institution will review the decision within seven days. The reviewing authority will then decide whether the inmate received a full and fair hearing; it may approve the committee's decision, or if it finds it clearly erroneous or unfair, may reduce the punishment, order a rehearing, or dismiss the charge. If the accused is still not satisfied, he may appeal to the North Carolina Inmate Grievance Committee, consisting of five members appointed by the Governor pursuant to G.S. Ch. 148, Art. 11, which may hold a new hearing on the matter and make recommendations to the Secretary of Correction. (The *Wolff* decision did not find that due process necessitates any review at all.) Clearly, when good time is revoked or segregated confinement is imposed for misconduct, North Carolina prisoners receive due process of law as interpreted by *Wolff* if these regulations are followed.

Segregated confinement imposed as punishment, known as "punitive segregation," may be up to fifteen days for each infraction, not to exceed a total of thirty days. There are two other forms of segregated confinement: "indefinite nonpunitive segregation" (also known as "INS") and "administrative segregation." The purpose of INS, according to the regulations,[11] is to isolate inmates who pose an imminent threat to the life or health of other inmates or the prison staff. An inmate may be placed in INS if the officer in charge has good cause to believe that he has committed an aggravated assault, or if he has been found guilty of participating in a riot or holding a hostage, or the officer in charge has good cause to believe that his presence in the general population "poses a clear and present danger to the physical well-being of other inmates or members of the staff." Thus, in theory INS is based on the need to take precautions to avoid danger rather than the need to deter misconduct. The procedure for imposing INS is similar to that for imposing punitive segregation. The inmate receives a hearing by the central classification board. (This board has at least five members appointed by the Chief of Classification and Psychological Services, a top-level prison official; four of the members perform their board duties as a full-time job.) The inmate receives the procedural protection required by *Wolff*—twenty-four hours' written notice of the hearing, an opportunity for the inmate to appear and submit evidence on his behalf, and a right to substitute counsel when he is

11. 5 N.C. Admin. Code § 2C.0400.

illiterate or the issue is complex. Thus, the *Wolff* standards are met in the INS procedure—not exceeded, as in the disciplinary procedure described previously. Does *Wolff* apply when segregated confinement is imposed to protect the prison community rather than to punish misconduct? One federal court has held that it applies whenever segregated confinement is imposed "because of specific prior conduct";[12] probably most instances of INS would involve specific acts of the inmate that suggest to officials that he is dangerous. Apparently there is no limit on INS; the regulations say only that the inmate's INS status must be reviewed by the Board within six months of his initial assignment.

Administrative segregation, like INS, is, in theory, to be imposed to maintain security within the prison and not for punishment.[13] INS is imposed to protect the staff and other inmates from harm by the inmate and also to protect the inmate from self-injury or harm by others and to minimize the risk of his escaping. (An inmate may request that he be placed in administrative segregation, although his request will not necessarily be granted.) Administrative segregation may be used to hold inmates for a twenty-four-hour "cooling off" period in the discretion of the officer in charge; this may be done, for example, in the early stages of a disciplinary investigation. When the period of administrative segregation exceeds fifteen days, the inmate receives a hearing before a three-member classification committee in which he is told why he is being held in segregation and given an opportunity to speak in his own behalf. The inmate may then be held, in the committee's discretion, for up to seventy-five more days. If the conditions on which his segregated confinement was based are still present at the end of that time, the unit superintendent is required to refer him to the central classification board for possible assignment to a unit with stricter security than the one where he is presently held. Since administrative segregation, like indefinite nonpunitive segregation, may often be imposed because of specific conduct by the inmate, it can be argued that the *Wolff* standards should apply. The regulations do not meet those standards. They contain no requirement of notice to the inmate, substitute counsel, or written findings by the classification committee. Administrative segregation involves somewhat less deprivation of comfort than punitive segregation—for example, those in punitive segregation may spend money only for postage stamps but not for canteen orders, as those in administrative segregation may, and they are forbidden all reading matter except legal and religious material and personal mail, while those in administrative segregation may have other material.[14] Nevertheless, administrative segregation is a drastic change in confinement for most prisoners; they are allowed to exercise outside the cell for only one hour twice per week, may shower and shave only twice per week, and take their meals in their cells apart from other inmates. While isolating an inmate from other inmates and the prison staff for a short period of time in an emergency is clearly necessary at times, there seems to be no reason for not complying with the *Wolff* standards before holding him for a longer period; if the danger he poses to himself or others is clear, it can easily be shown in a hearing that conforms to the *Wolff* standards. The fact that the prison regulations require a *Wolff* type of hearing in connection with indefinite nonpunitive segregation indicates that it would not be too great an administrative burden to hold it before imposing administrative segregation that lasts longer than fifteen days.[15]

Thus far we have considered the Department of Correction's disciplinary procedures, which are substantially in compliance with *Wolff v. McDonnell*. The Department has kept up with court decisions after *Wolff* was decided and has recently adopted a regulation regarding disciplinary infractions that may be crimes, in conformity with *Baxter v. Palmigiano*. This regulation[16] authorizes the unit superintendent or institution head to "consult law enforcement and prosecutorial officials" when he thinks a crime has been committed, subject to approval by his immediate superior. Presumably, this may mean that he is reasonably sure a crime has been committed and wishes to begin prosecution, or it may mean that he wants a law enforcement agency to investigate a possible crime or wishes to consult the local district attorney as to whether certain conduct constitutes a crime and whether prosecution is advisable. "Whenever a disciplinary infraction may be prosecuted as a criminal offense," the investigating officer must tell the accused inmate that (1) he is subject to prosecution; (2) he has a right to remain silent; (3) anything he says can and will be used against him; (4) he has a right to seventy-two hours' notice before his disciplinary hearing; (5) he may consult his attorney regarding the criminal charge at any reasonable time; and (6) though his attorney may not represent him at the disciplinary hearing, he may have help from a prison staff member at the hearing if he desires. If the accused inmate chooses to remain silent at the disciplinary hearing, "the [disciplinary] committee may consider his silence as relevant evidence against him;" but silence "is not, in and of itself, conclusive evidence of guilt," and the decision of the disciplinary committee "must be based on substantial evidence."

This regulation follows the Rhode Island prison procedure approved in *Baxter v. Palmigiano* almost to the letter and leaves no doubt that as in Rhode Island, silence alone does not establish that a disciplinary infraction occurred. If the investigating officer in a North Carolina prison wishes to question the accused inmate about the alleged infraction before the hearing, the inmate's answers may be used in the hearing if the officer first gives the warnings that the regulation calls for. However, if he wants to be sure that the in-

12. Daigle v. Hall, 387 F. Supp. 652 (D. Mass. 1975).
13. 5 N.C. Admin. Code § 2C.0300.
14. 5 N.C. Admin. Code § 0303.

15. *Daigle v. Hall*, 387 F. Supp. 652 (D. Mass. 1975), held that a *Wolff* type procedure and hearing are required when segregation is imposed for past conduct, even if it is not called "disciplinary." *Kelley v. Brewer*, 525 F. 2d 394 (8th Cir. 1975), disagrees; the Court of Appeals held that a full *Wolff* proceeding is not required to keep an inmate in administrative segregation, although due process requires some review of the inmate's confinement status. *Daigle* involved an inmate who allegedly stabbed another inmate. *Kelley* involved two inmates whose misconduct was more serious; both had long, violent criminal records; one had attacked and stabbed a guard, the other had killed a guard while in administrative segregation; both had been convicted of crimes. Thus in a sense the inmates in *Kelley* had already received due process with regard to their past assaultive conduct—their criminal trials.

16. 5 N.C. Admin. Code § 2B.0400 (effective in mid-1976; supersedes earlier regulation effective February 1, 1976).

mate's statements can be testified to in a later criminal trial, the officer should give the inmate the full "Miranda warnings" and obtain the inmate's intelligent and voluntary waiver of his privilege against self-incrimination, preferably in writing. In addition to the warnings called for by the regulation, *Miranda* requires telling the inmate that (1) he has a right to consult a lawyer and have the lawyer with him during questioning by the prison officer; (2) if he is indigent a lawyer will be appointed to represent him; and (3) he can stop answering questions at any time.

Disciplinary procedures in North Carolina jails. What implications do *Wolff v. McDonnell* and *Baxter v. Palmigiano* have for North Carolina's jails? Jailers have to maintain order and security in jails, and, like prison officials, have to deal with troublesome and dangerous behavior by prisoners. Jail prisoners have at least the same degree of constitutional protection as state prison inmates and probably more if they are being held awaiting trial—as most are—rather than serving a sentence. The only purpose of holding these pretrial detainees is to guarantee their presence at trial; their detention cannot be justified as punishment, and thus no restrictions should be imposed on their freedom and comfort that are not absolutely necessary for jail security.[17] This does not mean, though, that there can be no punishment imposed on pretrial detainees by jailers for infraction of conduct rules; such punishment has not been held unconstitutional in cases that have considered the issue.[18]

Mecklenburg County Jail, the largest in North Carolina, follows strict disciplinary rules because it is under a federal court order to do so. In *Berch v. Stahl*, 373 F. Supp. 412 (W.D.N.C. 1974), the federal district court ordered that a specific disciplinary procedure be followed for disciplinary infractions. If the punishment is only a minor one, the inmate must at least be told why he is being punished. If the punishment involves a "grievous loss," the court—writing before the Supreme Court's decision in the *Wolff* case—held that a procedure had to be followed similar to what the Supreme Court required in *Wolff*, but somewhat stricter. For example, the court held that the prisoner has the right to confront and question his accusers at the disciplinary hearing. Is this requirement still legally binding after the *Wolff* decision? The answer is unclear, but it could be argued that, although it set higher standards than *Wolff* did, *Berch v. Stahl* involved prisoners who were pretrial detainees and therefore were entitled a higher standard of due process.

What punishments involve a "grievous loss?" The district court made it clear that it was talking about not only segregated confinement but also the prolonged denial of certain privileges— for example, denial of exercise outside the cell for thirty-three days, telephone use for thirty-three days, and visitation privileges for two weeks. In this respect also, *Berch* goes beyond *Wolff*, but here again it could be argued that pretrial detainees' due process rights are broader than those of prisoners serving a sentence.

Jail administrators in North Carolina might profitably examine the Department of Correction's new prison disciplinary regulations. If it seems desirable to adapt some or all of these to jail needs, this may be a good way of keeping up with demands of the courts in an expanding area of constitutional law. Jailers, especially in the western federal court district, where *Berch v. Stahl* is controlling, may want to extend their disciplinary procedures to include infractions that may result in prolonged loss of privileges such as outside exercise, telephone use, and visitation, as well as those that involve segregated confinement.

Transfer of inmates between institutions

The procedural due process protection that prison inmates now enjoy regarding transfer between prison units can be summed up in one word: none. There had seemed to be a trend when the Supreme Court first ruled in 1972 and 1973 that parole or probation revocation was a "grievous loss" requiring due process, and then in 1974 ruled the same regarding solitary confinement and revocation of good time. Some lower federal courts held that demotion from "honor grade" (a status in which the prisoner may participate in work release, study release, and other community programs) required due process,[19] and others that transfer from one prison unit to a more restrictive one required due process.[20] The two Supreme Court decisions discussed here seem to have put a stop to this development, at least for the time being, by holding that transfer to a prison unit with less favorable conditions is not a loss of "liberty" protected by the Due Process Clause of the Fourteenth Amendment.

Meachum v. Fano, 49 L. Ed. 2d 451 (1976), involved inmates who were transferred from Norfolk prison in Massachusetts, a medium-security institution, to Walpole Prison, a maximum-security institution. The transfer was made by a classification board on the basis of reports from informers that the prisoners had been responsible for nine serious fires at Norfolk. The prisoners were given hearings regarding a change in their "classification" (degree of custody) at which they were represented by counsel; however, all the evidence against them was given in closed session outside of their presence at which the superintendent recited information confidentially furnished to him by informers. Before the classification hearing the prisoners were notified that the "information received through reliable sources" indicated that they were linked to the fires and other misconduct such as possession of weapons and trafficking in drugs, but were never informed of the dates and places of these alleged offenses.[21] The board decided to transfer the inmates; after its decision was approved by the Massachusetts Commissioner of Corrections, the transfer was carried out. No solitary confinement, loss of good time, or other punishment was imposed on their arrival at the maximum security prison.

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17. Brenneman v. Madigan, 343 F. Supp. 128 (N.D. Cal. 1972), *cited in* KRANTZ, THE LAW OF CORRECTIONS AND PRISONERS' RIGHTS, at 128.

18. *E.g.*, Tate v. Kassulke, 409 F. Supp. 651 (W.D. Ky. 1976); Berch v. Stahl, 373 F. Supp. 412 (W.D.N.C. 1974).

19. Graham v. State Department of Correction, 392 F. Supp. 1262 (W.D.N.C. 1975) (demotion from "honor grade" requires due process); *accord*, Lokey v. Richardson, 527 F. 2d 949 (9th Cir. 1975).

20. Gomez v. Travisono, 510 F. 2d 537 (1st Cir. 1974).

21. This fact was not explained clearly by the Supreme Court's opinion, but was stressed by the court of appeals; Fano v. Meachum, 520 F. 2d 374 (1st Cir. 1975).

The prisoners contended that they had a right to a hearing of the type that *Wolff* requires before revocation of good time. The lower federal courts decided that *Wolff* applied and that the *Wolff* requirements had not been met here because the prisoners had not received notice of the time and place of their alleged misconduct, and had not been told what the informants had said at the hearing, as the prison's own regulations required. The Supreme Court reversed the lower courts. In an opinion by Mr. Justice White (the author of the opinion in *Wolff* and *Baxter*), the Court said that *Wolff* was different from this case. State law had created the right to good time and had specified that it was to be forfeited only for serious misbehavior; thus, the state was bound by the Due Process Clause not to take away good time arbitrarily. Here, the Court said, Massachusetts law allowed the Commissioner of Corrections to transfer a prisoner from any unit to any other—not conditionally upon the occurrence of specified events such as misconduct, but for any reason at all or no reason. Thus, the Court concluded,

> Whatever expectation the prisoner may have in remaining at a particular prison so long as he behaves himself, is too ephemeral and insubstantial to trigger procedural due process protections . . . .

Montanye v. Haymes, 49 L. Ed. 2d 466 (1976), involved a somewhat different set of facts. Rodney Haymes was an inmate of Attica Prison in New York. He was removed from his assignment as inmate clerk in the prison law library, apparently because he had disregarded the prison rules that inmates could not provide legal assistance to other inmates without the superintendent's approval. He then circulated a petition, which eighty-two inmates signed, saying they were being deprived of legal assistance because of Haymes' removal from the library (the petition was addressed to a federal judge but sought no specific relief). The next day, with no hearing, Haymes was told that he would be transferred to Clinton Correctional Facility, which, like Attica, was a maximum-security prison. No loss of good time, segregated confinement, loss of privileges, or other punishment was imposed. Haymes contended that the transfer and the seizure of his petition violated his right to communicate confidentially with the federal court and petition it for redress of grievances (a right courts have tended to guard).[22] The Supreme Court did not deal with this issue; its decision (again written by Justice White) dealt only with an issue raised by the federal court of appeals: whether Haymes was entitled to a hearing before he could be transferred. On the same reasoning it used in *Meachum v. Fano*, the Court held that the Due Process Clause does not apply to transfer even when the transfer is based on misbehavior. The Court noted that New York law, like Massachusetts law, permits the Commissioner of Corrections to transfer inmates for any reason whatever.

Mr. Justice Stevens, joined by Justices Brennan and Marshall, dissented from both the *Meachum* and *Montanye* decisions. (The latter two justices had also dissented in *Baxter*, in which Justice Stevens took no part.) Justice Stevens wrote in *Meachum* that men's liberty derives not from the Constitution or state law, as the majority opinion suggested, but from their Creator. A hundred years ago, prisoners had been considered totally deprived of their liberty—"slaves of the state." That view had gradually changed, he said, culminating in the Supreme Court's decision in *Morrissey v. Brewer*, 408 U.S. 471 (1972), which had held that a parolee's conditional liberty is protected by the Due Process Clause. The significance of *Morrissey*, he said, was that even while in legal custody, "the individual possesses a residuum of constitutionally protected liberty." If the inmate's protected liberty interest is no more than the state chooses to allow, he is really little more than the slave of the state. Justice Stevens acknowledged that the state must have wide latitude in determining and changing conditions of confinement and in preserving order and discipline; nevertheless, if the change in an inmates's custody status "is sufficiently grievous," he must receive due process, and in Meachum's case it had been sufficiently grievous.

North Carolina prison regulations on transfer and classification. North Carolina law (G.S. 148-4), like the state laws in the *Meachum* and *Montanye* cases, authorizes the Secretary of Correction to confine any state prisoner within any prison unit:

> Any sentence to imprisonment in any unit of the State prison system, or to jail to be assigned to work under the State Department of Correction, shall be construed as a commitment, for such terms of imprisonment as the court may direct, to the custody of the Secretary of Correction or his authorized representative, who shall designate the places of confinement within the State prison system where the sentences of all such persons shall be served.

There are some exceptions to this general rule. Judges may sentence felons directly to Central Prison (G.S. 148-28), and, under provisions of G.S. Ch. 148, Art. 3A, they may sentence offenders under twenty-one years of age as "committed youthful offenders," in which case the Secretary must confine them apart from older offenders "insofar as practical" (G.S. 148-49.7). (In practice, all offenders under twenty-one when they are committed to prison, whether or not they are sentenced as "committed youthful offenders," are separated from older offenders.) Also, under his general authority to issue regulations (G.S. 148-11, -13), the Secretary may issue regulations relating to custody grades of prisoners.

Custody grades need to be explained.[23] "Maximum" and "close" custody are very similar. Maximum custody exists only at Central Prison; Blanch Prison is considered close custody, as are some portions of Caledonia and Odum Prisons. These custody grades involve very strict security measures; normally, inmates confined in them may be taken out of "enclosures approved for them" only with the approval of the Director of Prisons (except that close custody inmates may perform certain work outside their "enclosures"). Medium custody, which is the grade of most of the imprisoned felons who are not in maximum or close custody, exists at Caledonia and Odum Prisons and about twenty smaller units distributed throughout the state. Medium custody inmates may not be taken out of their "enclosures" without the

22. KRANTZ, *op. cit. supra* note 17, at 681-737.

23. 5 N.C. Admin. Code § 2F.0600.

Director's approval except for approved work, trips in a security bus, and closely regulated activities at other prison units. Minimum custody exists at the remaining units in the system, about fifty in number, many of which are former highway camps. Minimum custody inmates may by good behavior earn the privilege of participating in any authorized activity, including work release, study release, activities away from the prison (for not over six hours) under the supervision of community volunteers, and under certain circumstances family visits.

There seem to be no prison regulations on transfers from one prison unit to another if they involve no change in custody. When an inmate's custody grade is changed—which usually means a transfer to a unit for confinement in the new custody grade—Department of Correction has provided some procedural protection for the inmate, even though the Supreme Court has ruled that none is constitutionally required. Classification of an inmate in custody grade occurs as soon as he is admitted and may be changed as it is periodically reviewed.[24] The basic procedure consists of a meeting of a classification committee. The inmate has no right to be present at the entire meeting but may appear for an "interview," "if appropriate," so that his attitudes and preferences may be learned and so that he can ask questions and present additional information. The inmate is told of what the committee decides and may ask "reasonable questions," but presumably need not be told all of the committee's reasons for its decision.

The regulations require a much stricter procedure when the inmate's grade is reduced from minimum to medium or from medium to close or maximum.[25] Every inmate for whom such a demotion in grade is contemplated is entitled to an impartial hearing before the central classification board (defined in the previous section.) He must receive twenty-four hours' written notice of the hearing, which must "reasonably inform" him of the grounds for demotion. At the hearing, the inmate must be shown any relevant information indicating that demotion is necessary, although confidential information may be withheld if the threat of reprisal exists, and the content of psychiatric, psychological, and classification reports need not be released. The inmate has an opportunity to refute the information presented and may submit any relevant information on his own behalf. The classification board makes findings of fact entered on its written record. The inmate does not receive a written statement of the board's findings, but if he is demoted, he has the right to review by the same board within twelve months. Thus, in this area, as in the area of prison discipline, North Carolina's Department of Correction has given the inmate more procedural protection against arbitrary administrative decisions than the Constitution now requires.

Stevens H. Clarke

24. 5 N.C. Admin. Code § 2C.0100.

25. 5 N.C. Admin. Code § 2C.0700.

Capital Punishment

(continued from p. 5)

— Defendant has no substantial criminal history;
— Defendant was young;
— Defendant was under the influence of extreme mental or emotional disturbance;
— The victim participated voluntarily in the activities that precipitated the killing;
— Defendant was under duress or domination by another;
— Defendant was not the killer but only a participant in a felony in which another person killed the victim;
— Defendant's capacity to appreciate the nature of his act was diminished.

Aggravating and mitigating factors must be weighed against each other. If aggravating factors—which must be found beyond a reasonable doubt—outweigh mitigating ones, capital punishment is allowed. The sentencer may still be given discretion to choose life (as in Georgia and Florida), or death may be mandatory on finding the aggravating circumstances (as in Texas). The decision may be made by either the judge or the jury, and the reasons for the decision must be included in the written record.

As an additional constitutional safeguard, the legislature should provide for appellate review of the death sentence. The narrowest way to do so would be the Texas procedure of simply having the state supreme court, which reviews all capital cases anyway, include a review of the sufficiency of the evidence that supports the findings of aggravating circumstances. The other approach would give the court authority to consider whether death is a disproportionate penalty in light of the results in similar cases. Such authorization might include something like Georgia's elaborate scheme, in which each trial judge must complete a questionnaire on the circumstances of the trial—for example, evaluating the quality of defendant's counsel and stating whether race was a significant factor in the trial—and a special staff in the supreme court collects information on similar cases.

The Court clearly rejected as a constitutional requirement the need to limit the district attorney's discretion in choosing which cases to prosecute for the death penalty. Nevertheless, the legislature may receive proposals to do this as another means of lessening the impact of any new capital punishment statute. Presumably fewer cases would actually be sent to the jury to consider death if the district attorney had to list his reasons for charging first-degree murder instead of a lesser offense.

Michael Crowell

Courts

Nonlawyer judges okayed

In *North v. Russell*, 49 L. Ed. 2d 534 (1976), the United States Supreme Court held (6-2) that it is not a denial of due process for a state to authorize a nonlawyer judge to sit in a criminal court of first instance, provided the accused has the absolute right to appeal to a second-tier court for a trial de novo presided over by a lawyer judge. Surprisingly, the Court did not follow the *Argersinger* analogy and rule that a lawyer judge is necessary at the initial trial of an accused either sentenced to confinement or exposed to such a sentence. The only effect of this decision in North Carolina is to require that superior court judges be lawyers. Since for many decades all superior court judges in this state have been lawyers, and nonlawyers rarely run for the office, no immediate action seems required. However, it would probably be wise to amend the state Constitution to conform to the *North* decision. Several times in recent years the General Assembly has rejected an amendment requiring that district court judges be lawyers, so it is probably not feasible at present to seek an amendment requiring that *all* judges be lawyers. (The *North* opinion did not deal with the educational qualifications of appellate court judges.)

C. E. Hinsdale

Two-tier nonjury trial

In *Ludwig v. Massachusetts*, 49 L. Ed. 2d 732 (1976), the Supreme Court upheld a Massachusetts statute requiring a nonjury trial of an offender in a first-tier court, with a right to appeal to a second-tier court for trial de novo with jury. The Court rejected the argument that forcing the defendant to appeal to receive his right to trial by jury, as provided by the Sixth and Fourteenth amendments, is an undue burden on his exercise of that right. The decision was 5 to 4, with the majority agreeing that the reasoning in *Callan v. Wilson,* 127 U.S. 540 (1888), was not applicable to this case. *Callan* held unconstitutional a District of Columbia statute providing a jury trial only on appeal after the defendant has been convicted in a court of first instance without a jury. The minority, in a persuasive opinion, felt that the *Callan* case settled the issue, and that the right to jury trial meant jury trial *in the first instance,* whether the trial court was federal or state.

Only nine states, including North Carolina, now *require* trial in a first-tier court without a jury, with a jury furnished only on appeal at a trial de novo. The *Ludwig* decision affirms this procedure. The 5-4 decision, however, indicates that the holding may not be carved in stone. It may be challenged in a few years when there is a change in the make-up of the Court's majority in this case.

C. E. Hinsdale

Jury voir dire — racial bias

In *Ristaino v. Ross*, 47 L. Ed. 2d 258 (1976), the defendant Ross, a black, was charged in a Massachusetts state court with armed robbery and other crimes of violence against a white security guard. The trial judge on voir dire questioned prospective jurors as to general prejudice, but refused a defense request to question them specifically as to racial bias. The Supreme Court found no denial of due process in the refusal.

Before the Supreme Court, the appellant relied heavily on *Ham v. South Carolina*, 409 U.S. 524 (1973), in which the defendant, a black civil rights worker, was charged with possession of marijuana. The trial judge refused a timely request to ask prospective jurors questions designed to bring out any racial prejudice against blacks, and the Court held this to be error.

In *Ross*, the Court made clear that the *Ham* case did not establish a new constitutional rule; it turned on its own peculiar facts. Ham was a well-known civil rights worker facing a southern jury, and the Court felt that "the essential demands of fairness" of the Due Process Clause of the Fourteenth Amendment demanded an inquiry into the possible racial bias of potential jurors. The Court said, "Racial issues . . . were inextricably bound up with the conduct of the trial." On the other hand, in *Ross*, the Court found nothing of a racial nature in the fact that a person of one race was accused of assaulting a person of another.

C.E. Hinsdale

Free press — fair trial

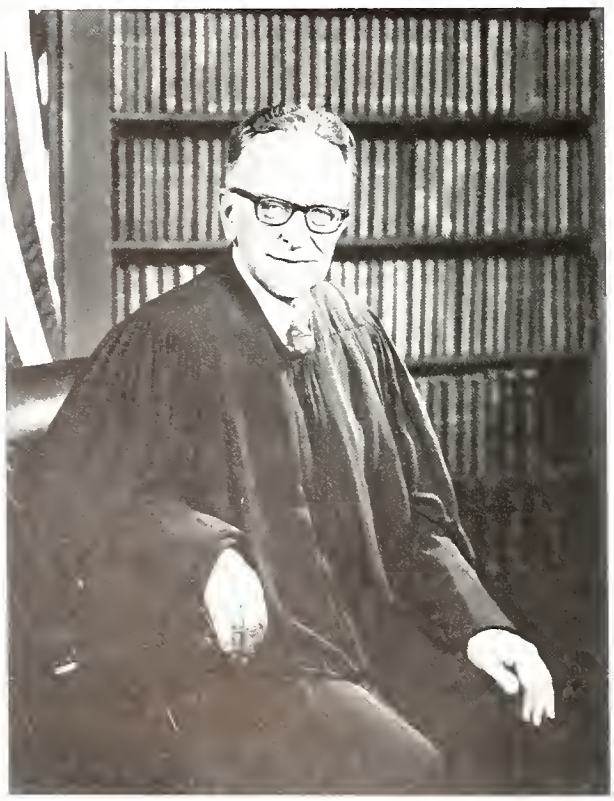
In *Nebraska Press Association v. Stuart,* 49 L.Ed. 2d 683 (1976), the Supreme Court severely limited the use of restrictive orders by judges to ban or limit press reporting of criminal pretrial matters. The decision was unanimous but had four concurring opinions that seem to indicate that this

Court may never uphold a prior restraint on the press to protect the defendant's right to a fair trial.

On October 18, 1976, six members of the Henry Kellie family were found murdered in Sutherland, Nebraska. The crime immediately attracted a great deal of attention in local, state, and national news media. Erwin Charles Simants was arrested for the crime and arraigned the following morning. Due to the extensive publicity, the prosecutor and defense attorney jointly petitioned the county judge to enter a restrictive order limiting the news media in what they could disclose about the case. Both attorneys argued that a restrictive order was necessary to preserve Simants' right to a fair trial by an impartial jury. The county judge entered the order, and about a week later a district court judge held a hearing on the matter and issued a modified order. Finally, the Nebraska Supreme Court reviewed the order and after further modification, upheld it.

At issue before the United States Supreme Court was the restrictive order issued by the Nebraska Supreme Court. That order prohibited the reporting of (1) the existence and nature of any confessions or admissions made by the defendant to law enforcement officers; (2) any confessions or admissions made by the defendant to any third parties except members of the press; and (3) other facts "strongly implicative" of the accused. The order was to expire when the jury was impaneled since at that point the jury could be sequestered and protected from prejudicial publicity.

The Court, in an opinion written by Chief Justice Burger, held that the restrictive order was not permissible. He reaffirmed the principle that, although the First Amendment guarantee of freedom of the press is not absolute, any prior restraint on the press is presumptively unconstitutional, and the burden of overcoming the presumption is extremely heavy. In this case the Court found that the burden had not been met. The opinion seems to say that three criteria must be met for any prior restraint order of the press to be upheld—the pretrial news coverage must be so prejudicial and so extensive as to be likely to interfere with a fair trial; it must be unlikely that other measures would mitigate the effects of unrestrained pretrial publicity; and the restraining order would effectively prevent the danger.



Associate Justice Harry A. Blackmun

The Court found that the judge who issued the order was justified in finding that the pretrial publicity was extensive and might impair the defendant's right to a fair trial; thus, the first criterion was satisfied. However, as the Court points out, it is impossible to determine whether certain publicity in a particular case would actually prevent the impaneling of an impartial jury. (An impartial jury does not require twelve jurors who have never heard or read anything about the case.)

As to the second criterion, that other measures would be unlikely to mitigate the effects of unrestrained pretrial publicity, the Court found the gag order deficient. The Court listed several alternatives that the judge might have considered to protect the defendant's right to a fair trial. These included (1) relocating the trial to a place less exposed to intense publicity; (2) postponing the trial until public attention has subsided; (3) carefully questioning prospective jurors to screen out those who have already decided the defendant's guilt or innocence; (4) emphatically and clearly instructing jurors on their sworn duty to decide the issues only on evidence presented in open court; (5) sequestering jurors; (6) prohibiting all officers of the court—prosecutors, defense attorneys, clerks, and law enforcement officers—from commenting publicly on matters relating to the case; and (7) closing pretrial proceedings with the defendant's consent. The last alternative, which was mentioned by the Court in a footnote, is one that will probably be frequently discussed in the future. (In fact, by mentioning these possibilities, the Court was not stating that all of them are definitely constitutional.) Certainly if a judge can prohibit all court officers from commenting publicly on a case and close all pretrial proceedings to the public, he can effectively cut the press off from its sources and thereby halt most pretrial publicity.

In this case the Court found that the judge who issued the order had not considered whether other methods would have protected Simants' rights. Presumably, in order to issue a gag order, the judge must show what alternatives were considered and not selected because they would not protect the defendant's right to a fair trial.

The Court also found the restraining order deficient when measured against the third criterion—that the restraining order would effectively have prevented the threatened danger. First, the Nebraska courts did not have jurisdiction over many of the news reporters interested in the case, and therefore could not enforce a gag order against them. Their compliance, then, would be voluntary. If they chose to publish prohibited material about the case, prospective jurors might still be exposed to it. Second, the Court noted that it is difficult to predict what evidence will be so prejudicial as to

prevent the impaneling of an impartial jury. Moreover, when a judge issues a gag order, he cannot anticipate all of the evidence that will develop, and it may be that information of a highly prejudicial nature developed after the order was issued could be published without violating it. Third, the Court pointed out that the Kellie murders took place in a town with a population of 850. Even without media reports, rumors would run rampant in the town, and in fact, might be more damaging than accurate news accounts. Thus, the Court concluded that the record in this case did not show that prior restraint would protect Simants' rights.

The Court then looked at the specific provisions of the restrictive order and found substantial defects in those provisions. The first two provisions of the order restricted publication of confessions or admissions made by the defendant. However, this evidence had been introduced at the preliminary hearing, which was open to the public, and the Court stated that a gag order can never be used to restrict reporting on evidence introduced at a public hearing. The third provision of the order prohibited reporting facts "strongly implicative" of the defendant. The Court found this provision too vague and broad to be upheld.

Considering the criteria that the Court has set out for a gag order and its analysis of the Nebraska order, it may be impossible for any judge to fashion a gag order that would be upheld. A judge would have to find based on the evidence, that pretrial publicity would be extensive and likely to preclude a fair trial, that no other alternative would mitigate the effects of unrestrained pretrial publicity, and that the restraining order would effectively protect the defendant's right to a fair trial. The provisions of the order could not be vague or too broad.

Even if a gag order met all of these requirements, it is likely that this Court would not uphold it. At least five of the justices indicated in concurring opinions that prior restraint of the press could never be used to protect the right to a fair trial. Justice Brennan, writing an opinion in which Stewart and Marshall joined, agreed with Burger's opinion in accepting the principle that the First Amendment freedom of the press is not an absolute right, but said that the only three exceptions to the prohibition against prior restraint are for obscene publications, incitements to acts of violence and to the overthrow by force of orderly government, and publication of material endangering military security during wartime. Thus, prior restraint could never be used to insure a fair trial. Justices White and Stevens, in separate concurring opinions, both seemed to be strongly leaning in the direction of no prior restraint.

Joan G. Brannon

Accepting guilty pleas — Defendant's understanding of charge

In *Henderson v. Morgan*, 49 L. Ed. 2d 108 (1976), Morgan, a retarded youth of nineteen, had been indicted for first-degree murder in New York in 1965. The evidence indicated that he entered the sleeping quarters of his employer during the night with the intention of collecting his back wages from her and fleeing, since she had recently threatened to return him to a state institution for mental defectives. The employer awoke and screamed, and the defendant stabbed her many times with a knife he was carrying. The defendant took some money, fled in her car, and was apprehended 80 miles away with the knife in the glove compartment. The employer died.

Upon the advice of counsel (conceded to be competent), the accused pleaded guilty to murder in the second degree, having been advised of the difference in penalty for the two offenses. The accused stated to the trial judge that his plea was based on the advice of his attorneys, that he understood that he was accused of killing his employer, that he was waiving his right to a jury trial, and that he knew he would be sent to prison. At trial, the elements of second-degree murder were not discussed, and no reference was made to the second-degree requirement of intent to cause the death of the victim. There was no indication that the nature of the offense had been explained to the defendant. The plea was accepted, and a sentence of 25 years to life imposed. There was no appeal.

In 1970 the accused initiated collateral proceedings to vacate his conviction on the ground that his plea was involuntary. An evidentiary proceeding was held in federal district court. The accused testified that he would not have pleaded guilty if he had known that an intent to cause the death of his victim was an element of the offense of second-degree murder. At this hearing the district judge found that the accused had not been advised by the trial court or counsel of the elements of any homicide offense before his plea, and had never been advised that an intent to cause or a design to effect the death of the victim was an essential element of second-degree murder. The court therefore held as a matter of law that the plea of guilty was not intelligently or knowingly entered and was thus involuntary, voiding the conviction.

This view was upheld by the Supreme Court. In an opinion by Justice Stevens, the Court pointed out that normally a record contains either an explanation of the trial judge's charge to the accused or at least a representation by defense counsel that the nature of the offense has been explained to the accused. In this case the federal district judge who held the habeas corpus proceeding found as a fact that the element of intent had not been explained to the defendant.

Footnote 18 of the majority opinion states that there is no need to decide in this case "... whether notice of the true nature, or substance, of a charge always requires a description of every element of the offense; we assume it does not. Nevertheless, intent is such a critical element of the offense of second-degree murder that notice of that element is required."

Three justices (Stewart, Blackmun, Powell) joined in a concurring opinion authored by Justice White. They pointed out that the constitutional rule relevant to this case is that the defendant's guilt is not deemed established merely by entry of a guilty plea, unless he also admits that he committed the crime charged or enters his plea knowing what the elements of the crime are. As to the admission requirement, footnote 2 provides: "In those cases in which the indictment is read to the defendant by the court at arraignment or at the

(Continued on p. 30)

Election Law

Campaign financing

It is sometimes unwise to paraphrase but it appears that "Might makes right and money is mighty." The truth of this statement is evidenced by the General Assembly's amendments to the state's campaign finance act in 1974 and 1975[1] and by the opinion of the United States Supreme Court in *Buckley v. Valeo*, 46 L.Ed. 2d 659 (1976).

In *Buckley*, the Supreme Court upheld portions of the Federal Election Campaign Act of 1971, as amended in 1974,[2] and struck down others. This decision could eventually prompt further amendments to the North Carolina campaign finance laws. The purpose of this article is to discuss *Buckley* and how the provisions of the state campaign finance act compare with the federal act as construed by the Court.

The *Buckley* decision would have been remarkable, if for no other reason, for the length and diversity of views that the legal issues provoked among the Justices. The opinion of the Court is 227 pages long. The Chief Justice wrote 23 pages of a concurring opinion, and Justices White, 30 pages, Marshall, five pages, Rehnquist, five pages, and Blackmun, one page; each concurred and dissented in part.

In a nutshell, the *Buckley* Court (a) upheld limits on the contribution that persons may make to candidates for nomination or election to a federal office, (b) struck down limits on the expenditures that candidates or others may make, (c) upheld the requirements that candidates and others keep reports of campaign contributions and expenditures and file those reports with a federal campaign oversight commission, (d) upheld "thresholds" of $10 and $100 in the record-keeping and reporting provisions, (e) upheld a system of public financing of campaigns for nomination and election to federal offices, and (f) struck down the method of appointing members of the Federal Election Commission.

The most convenient way of relating *Buckley* to the North Carolina act is to discuss portions of the *Buckley* opinion and then compare them to state law.

Limits on contributions. The federal act limits political contributions by an individual or group to candidates for federal elective office to $1,000 and by a political committee to any single candidate to $5,000 per election, with an overall annual limit of $25,000 by an individual contributor. The Court upheld these provisions on the ground that they prevent political corruption, advance the interests of representative democracy, infringe only slightly on the First Amendment freedom of speech (the contribution is a symbolic act of speech), do not invidiously discriminate between incumbents and their challengers, and do not discriminate against minor-party and independent candidates or in favor of major-party candidates.

The North Carolina campaign finance act limitations on contributions are consistent with *Buckley*. The state law provides that no individual or political committee may contribute to any candidate or other political committee more than $3,000 in money or other contributions for any single election. (A single election is a primary, a run-off, or the general election—hence, the limit for a total campaign effort is $9,000.)

Limits on expenditures. Guided by the general principles that direct and substantial restraints on the quantity of a person's speech are unconstitutional and that limits on political expression, which is at the core of the electoral process and the First Amendment, likewise are unconstitutional, the Court struck down the federal act's $1,000 limitation on expenditures by noncandidates "relative to a clearly identified candidate." In the Court's view, the public interest against preventing political corruption may not constitutionally override the interest of citizens in independently advocating for their chosen candidates. Moreover, the limitation would not necessarily prevent the abuses generated by large, independent expenditures. Nor does the interest in independent advocacy pose a great danger of corruption. Finally, the limit heavily burdens a person's First Amendment right of speech.

North Carolina law places no limitations on the amount of money a non-candidate may spend "relative to a clearly identified candidate;" hence, the individual's right to advocate for his chosen candidate is not restricted.

Under the federal act, a candidate was limited in the amount of funds he could spend from his personal or family resources. The Court struck down this provision as being a substantial restraint on the candidate's First Amendment rights, irrelevant to the interest of preventing corruption, and an unwarranted effort by the government to equalize expenditures among the candidates. North Carolina law specifically exempts from the $3,000 restriction any expenditures by a candidate or his spouse, parents, brothers, and sisters. It also exempts state, district, or county executive committees of any officially recognized political party.

1. N.C. GEN. STAT. §§ 163-278.6 through -278.35.
2. P.L. 92-225, 86 Stat. 3, as amended, P.L. 93-443, 83 Stat. 1263.

Again, North Carolina law "comes clean" under *Buckley*.

The federal act attempted to limit a candidate's expenditures in any one election to $.08 per voter in each electoral district. A primary, second primary, and general election were treated as separate elections. The Court decided that the threat of political corruption was not sufficient to warrant the limitation, and that Congress could not justify an attempt to equalize the resources of candidates without infringing on their First Amendment rights. Under North Carolina law, a candidate's media expenses may not exceed $.10 for every state resident of voting age estimated for that election. This limitation applies only to candidates for the offices of Governor and Lieutenant Governor and the Council of State offices. It appears to run afoul of the *Buckley* decision and is in jeopardy of a successful challenge based on infringement of First Amendment rights.

Reporting contributions and expenditures. The federal law requires candidates and political committees to keep records of their contributions and expenses and report these to the federal election oversight commission. The Court rejected a challenge to these provisions, justifying them on the grounds that they serve the purposes of informing the electorate, deterring corruption, and exposing violations of contribution limits. The Court added that disclosure is the least restrictive method that could be applied to curb the evils of ignorance and campaign corruption. The federal law also requires people other than candidates and political committees who make contributions exceeding $100 annually other than to a candidate or committee to file a report thereof. The Court sustained this provision, finding that it is independent of the unconstitutional limitation on the amount of expenditures or contributions a person may make and enhances the interest in disclosure (the informed electorate, deterrence of corruption, and detection of violations).

North Carolina law requires candidates and campaign committees to file reports of their organization and their campaign contributions and expenditures and to keep accounts of these expenses. The accounts are subject to inspection by the State Board of Elections. It also requires them to report media and nonmedia expenditures separately. With respect to noncandidates, state law provides that no individual may make any monetary contribution over $100 that is not in the form of a check, draft, or money order. An individual may make contributions or expenditures in behalf of or in opposition to a candidate or political committee subject only to the $100-by-check rule and the $3,000 limitation. However, if he makes contributions or expenditures over $100 other than by contribution to a candidate or political committee, he must file a statement with the State Board of Election within ten days after making the contribution or expenditure. It appears that *Buckley* will have no adverse effect on any of these provisions.

"Thresholds" in record-keeping and reporting. Under federal law, political committees must keep detailed records of contributions and expenditures, including the name and address of each individual contributing more than $10. If a contribution exceeds $100, the records must also show the contributor's occupation and principal place of business. In the Court's view, the requirement for reporting information even on contributors who donate small amounts of money is reasonable for the purposes of preventing corruption and keeping the electorate informed.

Under North Carolina law, a treasurer of a candidate or campaign committee need not report the name of any North Carolina resident who makes a total contribution of less than $50, but for each contribution he is required to report the fact that he has received a total contribution of $50 or less, the amount of the contribution, and the date of receipt. (There is an exception for funds received at a single event, e.g., at a barbecue dinner fund-raising event, if the funds were received from different people and are less than $50.) The treasurer must report the name of any person who paid more than $50 for any single service or goods, the amount received, and the date of receipt, but if the price or value received does not exceed $50, he need report only those services or goods rendered or sold, the nature of them, the aggregate amount received for them, and the date of receipt. Finally, all media expenditures in any amount must be accounted for and reported separately, and all nonmedia expenditures of more than $25 must be accounted for and reported individually. Nonmedia expenditures under $25 may be accounted for and reported in an aggregate amount. If the treasurer reports expenditures in the aggregate, he must report having made each expenditure of less than $25, giving the amount, date, and purpose.

Although one might quarrel with the thresholds set by the General Assembly, it appears that the reporting principle will be sustained, as it was in *Buckley*, on the grounds that it tends to prevent corruption and to inform the electorate.

Public financing. The federal act provides for public financing of campaigns for nomination and election to federal elective office. Funds are also available for presidential nominating conventions. Major parties (those whose candidates received 25 per cent or more of the vote in the most recent election) receive full funding. Minor parties (those whose candidates received at least 5 per cent but less than 25 per cent of the vote in the last election) receive only a percentage of the funds that major parties may receive. "New" parties (all other parties) may obtain funds after the election only if their candidates received at least 5 per cent of the vote. To qualify for matching public funds for a presidential campaign, a primary candidate from a political party must receive more than $5,000 from private sources in each of 20 states. Any amount above $250 donated by one person cannot be counted toward the $5,000 goal. The Court held that the public financing provisions are not contrary to the Constitution's general welfare clause, and that they enhance, rather than restrict, First Amendment freedom by using public money to facilitate and enlarge public discussion and participation in elections. These provisions do not violate Fifth Amendment substantive due process because public financing generally imposes fewer restrictions on the public's access to the electoral process than ballot-access regulations, which were struck down in earlier franchise-access cases. The public financing provisions do not discriminate unduly against minor and new parties and their candidates, considering the history of two-party dominance of American politics.

Under North Carolina law, each (officially recognized) political party in the state may receive a maximum of $200,000 annually in General Funds, subject to certain re-

strictions, for "legitimate" campaign purposes.[3] Since *Buckley* upheld the use of federal funds to finance the campaigns of political parties, it appears that the North Carolina provisions will not violate any federal constitutional law.

Federal Election Commission. The Federal Election Commission was established by Congress to oversee and administer the federal election laws. Because Congress reserved unto itself the power to appoint members of the Commission, which exercises executive authority, the Supreme Court found that it had violated the separation of powers clause (Art. III, Sec. 2, Clause 2) of the Constitution. Congress has amended the law so that the President now will appoint all Commission members.

Under North Carolina law, executive authority for administering the state's election laws is vested in the State Board of Elections, whose five members are appointed by the Governor on a bi-partisan basis. Since the separation of powers clause applies only to the federal government, no violation of the federal Constitution can occur under state law.

Conclusion. There was worried discussion in the legislature when the state campaign finance act was rewritten in 1974 and amended in 1975. Some legislators were afraid that its limitations on contributions and expenditures might violate the First Amendment's guarantee of free speech. Their worst fears now seem unfounded since it appears that the state act's limitation on media expenses may be the only provision in jeopardy under *Buckley*. A proper legislative response might be to amend the campaign finance act by deleting that provision.

H. Rutherford Turnbull, III

Reapportionment and voting procedure changes

In the 1975-76 term, the United States Supreme Court decided one case that dealt with reapportionment of electoral districts and another case that dealt with changes in voting laws and the Voting Rights Act.

In *East Carroll Parish School Board*, 47 L. Ed. 2d 296 (1976), the Court held that a United States district court abused its discretion in not ordering a single-member reapportionment plan in preference to a multi-member at-large plan in a county that was admittedly not properly apportioned. The Court stated its rule, applicable in one-man, one-vote cases under the Fourteenth Amendment, that when United States district courts must fashion reapportionment plans to supplant state legislation conceded to be invalid, single-member districts are to be preferred, absent unusual circumstances, over multi-member at-large districts. The reason, very simply, is that racial minorities have a better chance of electing "their" candidates in "their" districts by using bloc voting or single-shot voting techniques than under at-large systems. This is so because in multi-member districts, the racial minority's power tends to be diluted by the fact that several candidates will vie for more than one single position and bloc voting and single-shot techniques are less effective. Moreover, in at-large systems, the minority vote is diluted by being pitted, vote for vote, against the bloc or single-shot techniques of the "majority" voters. The significance of the case lies in the Court's reiteration of its long-standing preference for single-member districts, a fact that must be considered by state and local governments that are engaged in the type of reapportionment covered by the facts of *East Carroll*—namely, court-ordered reapportionment in counties that are admittedly improperly apportioned.

In *United States v. Beer*, 47 L. Ed. 2d 629 (1976), the Court held that Section 5 of the Voting Rights Act applies prospectively and not retroactively and thus covers only those changes in voting procedures that occur after 1965. It also emphasized that *changes* occur only when a *difference* in voting procedures is undertaken. The facts of the case were that the city council of New Orleans in 1961 had redistricted the city in such a manner that there were five districts and two at-large seats. In one councilmanic district, Negroes constituted a majority of the population but only about half of the voters. From 1961 until the reapportionment in 1970, no Negroes were elected to the city council from any district. In 1970, another reapportionment occurred. Under the 1970 plan, the Negro population in two councilmanic districts would have populations that were more than 50 per cent black and one of them would have a voting registration that was more than 50 per cent black.

Section 5 provides that a city may not enforce a change in voting procedures unless the change has received the prior approval of the United States Attorney General or has been approved by a declaratory judgment of a United States district court on the ground that the change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color." Pursuant to Section 5, the Attorney General objected to the 1970 redistricting, and the city sought a declaratory judgment.

The United States Supreme Court held that: (1) since Section 5 provides that it applies only to proposed changes in voting procedures, and since the district and at-large seats had existed before the 1961 or 1970 reapportionments, the 1970 reapportionment plan, as it affects the at-large seats, is not subject to review under Section 5, and (2) even if Section 5 applied, the plan does not abridge Negroes' voting rights since it increases the likelihood that Negroes will control at least one and possibly two councilmanic seats.

The case is instructive because it makes clear that the act applies only to reapportionment plans that effect a change. In the New Orleans case, the at-large plan existed before the act became effective, and, therefore, modifications in the at-large plan made after the act are exempt from it. The case gives a prospective, not retroactive, reading to Section 5 and should provide comfort to redistricting officials who prefer to make minor alterations, particularly those that enhance minority voting power, in the details of election procedures but not such alterations as will change the procedures altogether or will violate the constitutional one man-one vote requirement (the constitutional issue was not raised, the case being decided only on Voting Rights Act grounds).

H. Rutherford Turnbull, III

3. N.C. Gen. Stat. § 105-155.2; N.C. Gen. Stat. §§ 163-278.36 through -278.38.

Environmental Law

Economic or technological infeasibility and the Clean Air Act

In *Union Electric Co. v. E.P.A.*, 49 L. Ed. 2d 474 (1976), the Supreme Court resolved one of the major questions that had arisen concerning the technology-forcing approach of the Clean Air Act Amendments of 1970. Under the 1970 Amendments each state is required to submit to the Environmental Protection Agency an implementation plan that demonstrates how that state plans to achieve the national ambient air quality standards.[1] If EPA finds that the implementation plan meets eight criteria specified in the statute,[2] it must approve it. EPA's action approving a plan may be challenged in a federal court of appeals within thirty days of the approval. Judicial review of a plan may be sought more than thirty days after approval if newly discovered information justifies subsequent review.

One portion of the Missouri implementation plan dealt with reducing the level of sulfur dioxide in the St. Louis Region, the only air quality region in the state in which the sulfur dioxide level exceeded that prescribed by the national air quality standards. This part of the plan contained sulfur dioxide emission limitations applicable to sources of that pollutant in the St. Louis Region. EPA approved the Missouri plan on May 31, 1972. Union Electric Company operates three coal-fired electric generating plants in the St. Louis area that are major sources of sulfur dioxide. The company did not challenge EPA's action approving the Missouri plan within thirty days of approval; instead, it applied for and received variances from the appropriate state and local air quality agencies. On May 31, 1974, EPA informed the company that its three plants were in violation of the emission limitations contained in the Missouri implementation plan. Shortly thereafter Union Electric filed a petition in the Court of Appeals for the Eighth Circuit seeking a review of EPA's approval of the Missouri plan. The company's basis for seeking the review was that economic and technological difficulties had arisen more than thirty days after approval of the plan that rendered compliance with the plan's emission limitations impossible. The issue before the court of appeals was whether considerations of economic or technological infeasibility were permissible grounds for disapproving a state's implementation plan.

The court of appeals first held that the grounds on which it could review approval of an implementation plan were the same whether review was sought within thirty days of approval or afterwards. It then reasoned that in reviewing EPA's approval of a plan it had to use the same criteria that EPA used in deciding to approve the plan. That is, in deciding whether EPA acted arbitrarily in approving a plan, the court was not free to go beyond the criteria that bound EPA in its decision to approve. The court could find nothing in the statute that would permit EPA to disapprove a plan on grounds of economic or technological infeasibility and therefore held that it was without jurisdiction to review approval of a plan on those grounds.

The Supreme Court affirmed.[3] After reviewing the legislative history of the Clean Air Act Amendments and the applicable statutory provisions themselves, the Court stated that in establishing the implementation plan requirements Congress adopted the concept of "technology forcing." According to this view of pollution control, environmental quality standards must be set even though the technology necessary to meet those standards may not be currently available or may be prohibitively expensive. If the technology does not become available in time, then the source of pollution may have to close down. The Court agreed with the court of appeals that EPA had no legal authority to disapprove an implementation plan on grounds of technological or economic infeasibility and that therefore a court is without jurisdiction to review EPA approval on those grounds. The Court stated that this is true even though the implementation plan may impose more stringent emission standards than are necessary to meet the national ambient air quality standards.

The Court said that while technological and economic considerations have no place in state implementation plans,

1. EPA establishes both primary and secondary national ambient air standards for various air pollutants. The primary standards are those necessary to protect the public health; the secondary standards are designed to protect the public welfare. The state implementation plans must be capable of attaining the primary standards within three years of the approval date of the plan, and of attaining the secondary standards within a reasonable time thereafter. For a detailed discussion of the national standards and federal-state relations under the Clean Air Act Amendments, see Campbell, Rathff, Boyers, Johnston, and Leach, *Air Pollution Controls in North Carolina*, Ch. 1 (Institute of Government, 1973).

2. The eight criteria are set forth in 42 U.S.C. § 1857c-5 (a)(2).

3. In affirming the decision of the Court of Appeals for the Eighth Circuit, the Court disapproved the following contrary decisions from other circuits: Buckeye Power, Inc. v. E.P.A., 481 F. 2d 162 (6th Cir. 1973), Appalachian Power Co. v. E.P.A., 477 F.2d 495 (4th Cir. 1973), Duquesne Light Co. v. E.P.A., 481 F. 2d 1 (3rd Cir. 1973), and Getty Oil Co. V. Ruckelshaus, 467 F. 2d 349 (3rd Cir. 1972).

they are given weight in other sections of the Clean Air Act Amendments. As an example the Court discussed the provision whereby the governor of a state may apply to EPA for a postponement of the deadline for meeting emission standards for individual sources or classes of sources on the ground that they cannot meet the standards because of economic or technological infeasibility. The Administrator of EPA may grant such a postponement if he finds that the facts support the claim of infeasibility. This is permitted by the statute even though attainment of the national air quality standards will be delayed in the state concerned. The Court also pointed out that even when a source is found to be in violation of an implementation plan, EPA may issue a compliance order, rather than seeking civil or criminal enforcement, and claims of technological or economic infeasibility must be taken into account in fashioning a compliance order. The Court expressly refused to comment on whether infeasibility claims may under some circumstances constitute a defense to a civil or criminal enforcement proceeding.

This case eliminates any doubts concerning the mandatory nature of the national air quality standards and the deadlines for attaining those standards. It also illustrates some of the risks involved in the technology-forcing approach to environmental quality. If a source of pollutants is unable to meet the emission limitations because the control technology is unavailable or because it cannot afford the necessary technical changes and no variance or postponement can be obtained, then the source must cease operating. In this particular case it would mean that a major producer of electric power in a large metropolitan area would be forced to close down.

William A. Campbell

States' authority over federal facilities in pollution control

In *EPA v. State Water Resources Control Board*, 48 L. Ed. 2d 578 (1976), the Supreme Court had before it the question whether states have authority under the Federal Water Pollution Control Act Amendments of 1972 to require permits of federal facilities. Under the statutory scheme established by the 1972 act, EPA is to set effluent limitations for all point sources[1] of water pollution. These effluent limitations are not in most cases tied to the quality of the water in the receiving stream, but rather are to reflect the best available control technology. For point sources other than publicly owned treatment works, the effluent limitations must be such as to require sources to apply the "best practicable control technology currently available" by June 1, 1977, and application of the "best available technology economically achievable" by June 1, 1983. The method established for achieving these effluent limitations and for enforcing them against individual sources is the National Pollutant Discharge Elimination System (NPDES). No person may discharge pollutants into waters of the United States without obtaining an NPDES permit and complying with its terms. The permit contains a time table for compliance with the effluent limitations and reflects the limitations on both quantity of pollutants that may be discharged and the rate of discharge. Initially, the NPDES permit system is administered by EPA, but EPA may leave administration of the program to a state if it is satisfied that the state has adequate legal authority and administrative capability to conduct the program. On May 14, 1973, EPA approved California's request to administer its own NPDES program and withdrew the EPA program with regard to all sources except agencies and instrumentalities of the federal government. EPA took the position that the 1972 amendments did not authorize it to turn regulation of federal facilities over to the states, and therefore it retained NPDES permit authority over such facilities. California filed a petition for review of EPA's action in the Court of Appeals for the Ninth Circuit, contending that the act required EPA to leave NPDES authority over federal facilities with the state if the state had an approved program for nonfederal sources. The court of appeals agreed with the state's contention.

The Supreme Court reversed. California and the court of appeals had placed their primary argument for state permit authority on section 313[2] of the federal act, which provides in part that federal agencies and instrumentalities discharging pollutants "shall comply with Federal, State, interstate, and local requirements respecting control and abatement of pollution to the same extent that any person is subject to such requirements. . . ." California argued that this provision required federal agencies to be subject to state NPDES authority if its general permit program had been approved by EPA. The Court declined to find such a requirement in section 313. It stated that under general constitutional principles of federal supremacy, federal agencies and instrumentalities are not subject to state regulation unless Congress clearly and unequivocally so provides. Section 313 is not such a clear and unequivocal provision; it does require federal agencies to comply with substantive state regulations controlling water pollution, but that is all. It does not require federal compliance with state permit procedures.

The result of this decision is to remove from the states enforcement of effluent limitations where federal facilities are concerned. This is true even though the state may have imposed more stringent limitations than are required by EPA. This approach to regulation of dividing NPDES authority between EPA and the states will prove effective only if EPA is aggressive and vigilant in its administration of the system where other federal facilities are concerned and if there is full and cordial cooperation between EPA and the state water pollution control agency.

In a similar case decided under the Clean Air Act of 1970, *Hancock v. Train*, 48 L. Ed. 2d 555 (1976), the Court held that although federal facilities must comply with the substantive requirements of state implementation plans designed to attain the national air quality standards, they do not have to apply for and obtain state permits issued pursuant to the plan. The Court found no clear indication in the act that Congress intended to submit federal facilities to state permit requirements.

William A. Campbell

1. A point source is defined as "any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged." 33 U.S.C. § 1362 (14).

2. 33 U.S.C. § 1323.

Health Law

Abortion and family planning

The abortion question has created more dissension than any political issue since school busing. In the 1976 elections, it plagued both Republican and Democratic candidates for the Presidency. The Republican platform contained a plank urging support for the "efforts of those who seek enactment of a constitutional amendment to restore the protection of the right to life for unborn children." The Democrats decided against supporting an amendment banning abortions. Consequently, "right to life" advocates often heckled the Democratic candidate, Carter, during his campaign appearances.

The Supreme Court decisions, *Roe v. Wade*, 410 U.S. 113 (1973), and *Doe v. Bolton*, 410 U.S. 113 (1973), sparked the abortion controversy in 1973. These cases held that during the first three months of pregnancy, women have the right to obtain abortions without interference from the state. After the first trimester of pregnancy, the state can impose regulations that safeguard maternal health. Later, when the fetus has become "viable," the state may regulate abortions in order to protect the life of the fetus and may even prohibit abortions, except those necessary to preserve the mother's life or health. The Court defined "viability" as the time when the fetus is "potentially able to live outside the mother's womb albeit with artificial aid."

During the summer of 1976, the Court again addressed the abortion issue. In a series of cases, it expanded the rights of adult women and extended some of these rights to minors. One of the cases, *Planned Parenthood v. Danforth*, 49 L. Ed. 2d 788 (1976), made immediate passage of an amendment banning abortions seem even more imperative to "right to life" advocates. In that case, the Court ruled that a minor could have an abortion during the first trimester of pregnancy without the prior consent of her parents or guardian. Opponents of the right to abortion argued that this ruling infringed upon the integrity of the family unit by ignoring both the parents' concern for their pregnant daughter's welfare and the daughter's need for parental counseling before deciding whether to have an abortion. Those who supported the right to abortion, on the other hand, felt that the *Planned Parenthood* decision was merely a logical extension of the *Roe* and *Doe* holdings. They argued that since adult women have the right to abortions, so also should minors. Whatever its merits, the Court's ruling had once again brought the abortion controversy to public attention.

Prior North Carolina law. To understand the impact these cases will have on North Carolina law, it is necessary to examine the law as it was before these rulings were issued. The North Carolina abortion statute[1] provides that a licensed physician may perform an abortion during the first twenty weeks of pregnancy so long as the abortion takes place in a certified facility. After twenty weeks, the physician may perform an abortion only if there is a substantial risk that pregnancy will "threaten the life or gravely impair the health of the mother." The later abortions must be performed in a licensed hospital. The statute also imposes recordkeeping and reporting duties upon hospitals and clinics where abortions are performed but provides that the confidentiality of the patients' records shall be protected.

Anyone performing an abortion who does not comply with the above statute could be charged with committing *two* felonies. In North Carolina, it is a crime to administer any medicine or to use any instrument "with intent thereby to procure the miscarriage" of a woman.[2] Another statute punishes the use of any instrument or medicine with "the intent thereby to destroy" a "quickened" fetus.[3] A fetus is quickened when the mother has felt it move. This usually occurs by the fifth month of pregnancy. A person convicted of both of these crimes could face up to fifteen years in prison and a fine set by the court.

Although the abortion statutes do not require a minor to obtain parental consent before having an abortion, the effect of the law established by court rulings is the same as if such a statute existed. According to case law, a doctor must obtain consent before performing any medical procedure, including abortions. Usually the patient is the proper person to give consent, but if the patient is unconscious, mentally incompetent, or otherwise incapacitated, someone legally responsible for him, such as a guardian or spouse, can provide the necessary consent. Minors cannot legally consent to medical treatment because the law presumes that they lack the maturity to act for themselves. Thus, the parent with the duty to support the minor has the authority to consent for him. Usually the father has this authority but if he does not exercise his authority or does not provide support, the mother or

1. N.C. Gen. Stat. § 14-45.1 (Supp. 1975).
2. N.C. Gen. Stat. § 14-45 (1969).
3. N.C. Gen. Stat. § 14-44 (1969). Case law has held that the child must be "quick" before the offense is committed. State v. Jordan, 227 N.C., 579, 42 S.E. 2d 674 (1947).

the person who takes the place of the father, such as a guardian, may provide the necessary permission. If the physician does not procure the consent of the parent or guardian, he could be criminally liable for committing a battery (an unlawful touching of another person). He could also be liable in money damages for civil battery and for interference with the parents' right of control over the minor.

There are four exceptions to the requirement of parental consent. *First*, an "emancipated" minor may consent to treatment. A minor becomes emancipated in one of three ways: (1) when he marries; (2) when the parent relinquishes both his right to the minor's earnings and services and the custody of the minor; or (3) when the parent abandons or does not support the minor.[4] This exception provides little guidance to doctors, however, since it is often difficult to determine whether a minor has been "emancipated" by his parents.

A *second* exception to the requirement of parental consent appears in Chapter 90 of the General Statutes. Under that chapter, a physician may treat a minor without parental consent when an emergency has arisen and the time necessary to secure parental consent would unduly delay treatment so as to endanger the child's health.[5] If the treatment consists of surgery, the doctor must attempt to find another licensed physician who agrees that the surgery is necessary.[6] Parental consent is implied in these emergency situations because the law assumes that if the parent could have been reached, he probably would have consented to the treatment.

A *third* exception is found in North Carolina's provisions for abused or neglected children.[7] If a child's health is in danger, the district court judge may order an officer of the court to assume custody of the child. The judge is required to hold a hearing within five days after the officer assumes custody, or the child must be released. If the judge determines at the hearing that the child needs medical care, he may order a doctor to examine and treat him even if the parents refuse to consent. Because this procedure interferes with parental rights, judges use it only when the danger to the child's health is serious. For example, it might be used when a parent for religious reasons refuses to allow his child to have a needed blood transfusion.

The *fourth* North Carolina exception permits minors to consent to treatment for venereal diseases and other communicable diseases that have been declared "reportable" by the Commission of Health Services.[8] The legislature, in passing the statute, subordinated the parents' interest in controlling their offspring to society's interest in encouraging everyone who has one of these diseases to receive medical assistance. If parental consent were required, a minor who did not want his parents to know that he had a venereal disease might not seek treatment. Not only would the minor's health be jeopardized, but also he could spread the disease to others. A similar consideration led the General Assembly to except other communicable diseases, including smallpox, malaria, and polio. The delay involved in obtaining parental permission could be critical in curing the disease and arresting its spread.

The exceptions for emancipated minors and communicable diseases deal with the conflict between the minor who wants to receive medical services and the parent who cannot or will not give consent. However, the opposite problem has also arisen: the parent wants medical treatment for the child but the child refuses. North Carolina law apparently requires only parental permission and disregards the minor's wishes. Although research has not found any cases in point, an Attorney General's opinion confirms this result.[9] The question before the Attorney General concerned a pregnant thirteen-year-old whose parents wanted her to have an abortion. The girl refused to consent. The Attorney General ruled that only the parents' permission would be necessary and that the girl's parents could force her to undergo an abortion that she did not want.

Thus, under North Carolina law as it existed before last summer's Supreme Court decisions, a physician had to obtain parental consent before treating a minor unless one of the four exceptions applied: (1) the emancipated minor rule; (2) the emergency rule; (3) the abused or neglected child exception; or (4) the exception for certain communicable diseases. In other instances, including those in which the parent and child disagreed, it was the parent alone who made the final decision about whether treatment was in the child's best interests. Consequently, *Planned Parenthood v. Danforth* effected a radical change in North Carolina law.

Planned Parenthood involved a Missouri statute enacted in response to the *Roe* and *Doe* decisions of 1973. Among the provisions of the statute under attack were: (1) a requirement of parental consent before an unmarried minor could have an abortion unless the the abortion was necessary to preserve her life; (2) a definition of "viability" different from the Court's definition in *Roe* and *Doe*; and (3) a requirement that every health facility and physician compile and report data on the abortions that they performed.

Parental consent. The Court struck down the provision requiring parental consent for abortions performed during the first twelve weeks of pregnancy. It agreed that not every minor, regardless of age or maturity, should be able to give consent for an abortion, but held that the state could not give parents "blanket" control over the abortion decision. Because the statute permitted parents to veto an abortion regardless of their reasons for doing so, it was overly broad. The Court felt that the family unit would not be strengthened by granting parents absolute power in a situation involving such a fundamental decision as whether to have an abortion. It also felt that the parents' right to control the minor was no greater than the minor's right to decide whether to bear a child. In effect, the state failed to present a sufficient justification for so drastically restricting the minor's freedom.

In the second case of the summer, *Bellotti v. Baird*, 49 L. Ed. 2d 844 (1976), the Court indicated the type of parental consent statute that might pass constitutional muster. The

4. Gilliken v. Burgage, 263 N.C. 317, 322, 139 S.E. 2d 753, 757 (1965).
5. N.C. Gen. Stat. § 90-21.1 (1975).
6. N.C. Gen. Stat. § 90-21.3 (1975).
7. N.C. Gen. Stat. § 7A-277 to -289 (Article 23).
8. N.C. Gen. Stat. § 90-21.5(b) (1975).
9. 41 N.C.A.G. 709 (1972).

case concerned a Massachusetts law that required parental consent but also provided that if the parents refused to give consent, a judge of the superior court "for good cause shown" could override the parents' decision. The statutory scheme assures that the parents are at least informed of their daughter's pregnancy and her desire to have an abortion and gives them an opportunity to help her make a decision. It also protects the minor by providing for judicial review of the parents' decision.

Because the statute had not been construed by the Massachusetts Supreme Court, the United States Supreme Court refused to decide whether the statute was constitutional. The Supreme Court desired the state court's interpretation of the statute before ruling since the state court's interpretation might avoid or modify the federal challenge to the statute. Had it been impossible for the statute to be upheld, the Supreme Court would not have returned the case to state court. Therefore, the high Court's action implies that, depending upon the state court ruling, the statute may be constitutional.

A question left unanswered by these two cases is whether a state can require parental consent after the first trimester. Under the *Roe* and *Doe* decisions, the state may regulate an adult's right to an abortion after the first trimester. Since even the rights of adults are limited during this later period, the rights of minors may likewise be restricted. Thus, a parental consent requirement applicable after the first trimester of pregnancy may be constitutional.

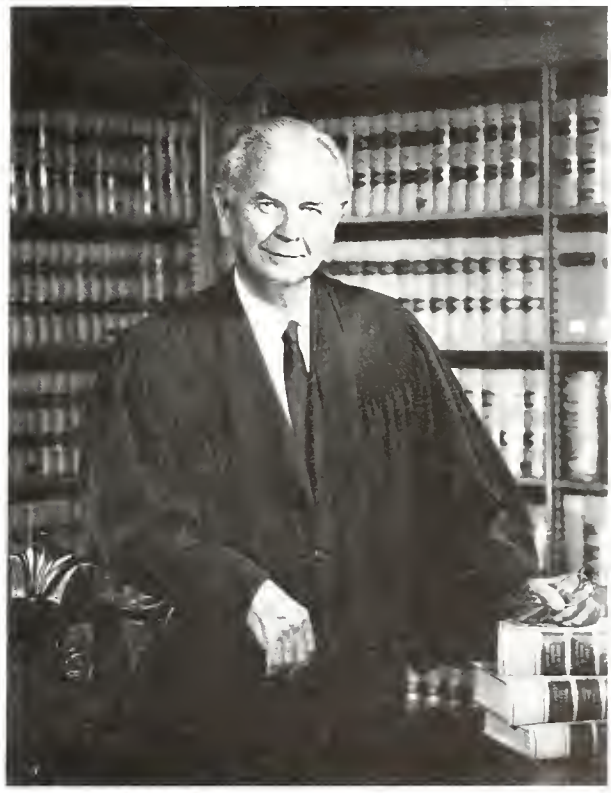
Viability. In the *Planned Parenthood* case, the Court determined the constitutionality of the Missouri statute's definition of "viability." Under the *Roe* and *Doe* decisions, the state may prohibit abortions, except those necessary to preserve the mother's health or life, only after the fetus has become "viable." The Missouri statute did prohibit such abortions and defined "viability" as "that stage of fetal development when the life of the unborn child may be continued indefinitely outside the womb by natural or artificial life-supportive systems." In *Roe* and *Doe*, the Supreme Court had defined "viability" as the point at which the fetus is "potentially able to live outside the mother's womb, albeit with artificial aid" and noted that viability usually occurs by the twenty-eighth week of pregnancy. The plaintiffs in *Planned Parenthood* objected to the Missouri definition because it did not refer to a specific time in the pregnancy at which viability occurs. It is not clear why the plaintiffs felt that this made the definition unconstitutional.

The Court upheld the Missouri definition. It reasoned that since the time that a fetus becomes viable may vary with each pregnancy, only a doctor should determine when viability has occurred. The Court stressed that "it is not the proper function of the legislature or the courts to place viability, which essentially is a medical concept, at a specific point in the gestation period."

Since the Court has held that a state may prohibit abortions (except those necessary to preserve the life or health of the mother) only after viability and that the legislature may not establish a certain point in the pregnancy at which viability occurs, the North Carolina abortion statute is unconstitutional in this respect. This statute provides that after the twentieth week of pregnancy, abortions may not be performed unless the continuation of the pregnancy would "threaten the life or gravely impair the health of the woman." Under North Carolina law, then, a woman who is more than twenty weeks pregnant is denied an abortion regardless of whether the fetus is actually viable. By failing to key the prohibition to "viability" and by imposing a time limit where the Court has expressly forbidden this, the statute unconstitutionally denies such a woman her right to an abortion.

Recordkeeping. Finally, the Court addressed the Missouri recordkeeping and reporting section of the abortion statute. The plaintiffs objected to this section as an "extra burden of regulation." The Court, however, found that the state had an interest in protecting the health of its female citizens and that the records would serve as a "resource that is relevant to decisions involving medical experience." It also noted that since the statute contained a provision for preserving the confidentiality of the records, women would not be deterred from obtaining abortions because of the reporting requirements. On these grounds, the Court upheld this portion of the statute. Since the part of the North Carolina statute requiring recordkeeping by physicians and health facilities also provides for maintaining the confidentiality of these records, it likewise should survive constitutional attack.

CLOSELY RELATED to the question of a minor's right to an abortion is whether she has a right to obtain family planning services without her parents' consent. Four specific issues that arise in this area include: (1) whether health care



Associate Justice William J. Brennan

personnel may lawfully counsel youth about the availability and use of contraceptive devices; (2) whether health care personnel may lawfully provide nonprescriptive contraceptive devices to minors; (3) whether doctors may lawfully prescribe contraceptives for minors; and (4) whether pregnancy tests may be administered to minors.

T____ H_____ v. Jones. In the third case of the summer, *T____ ___ H_____ v. Jones*, 48 L. Ed. 2d 811 (1976), the Court addressed these issues as they affect minors who are eligible for AFDC and Medicaid funds. The Court held that when family planning services are provided pursuant to these federally funded programs, minors may receive them without prior parental consent. The Court reasoned that since Congress had attempted to fully describe those persons eligible for AFDC and Medicaid benefits, any attempt by states to impose additional requirements, such as prior parental consent if the applicant is a minor, would violate the supremacy clause of the Constitution. Thus, health care personnel may provide family planning services to recipients of AFDC and Medicaid funds without fear of liability.

It is important to remember, however, that since *Jones* was an interpretation of the AFDC and Medicaid statutes, it does not authorize the provision of family planning services to minors who are not eligible for these funds. In *Jones*, the Court expressly refused to consider whether minors not under these programs have a constitutional right to receive family planning services without obtaining prior parental consent. Therefore, with regard to all such patients, the following discussion is applicable.

Advising and counseling. No definitive ruling has been given on whether health care personnel may counsel minors about methods of contraception, but medical personnel could be liable for providing these services to minors without parental consent. In a 1974 opinion concerning the distribution of nonprescriptive methods of birth control to minors, the Attorney General states, "from the very nature of the type of information . . . involved . . . it would appear that, absent consent, a very sound and valid basis for a damage suit by the parent . . . would be created. In fact, it is entirely possible that in certain cases personnel . . . could well be subject to criminal prosecution."[10] If by the "type of information . . . involved" the Attorney General means birth control counseling, it would seem that such counseling is not permissible. Health care personnel who furnish this information to minors could be prosecuted for contributing to the delinquency of a minor and could also be civilly liable for invasion of the parents' right of privacy and of their right to teach their children about sex matters in their own homes. Parents in other states have claimed interference with these rights in suits against school boards that provide similar information to minors in sex education classes.[11] Thus, if health care personnel engage in such counseling, they should realize that they may be sued by irate parents for doing so.

Providing nonprescriptive contraceptives. As stated above, the Attorney General has ruled that providing nonprescriptive contraceptives to minors without their parents' permission could subject health care personnel to civil and criminal action. The civil action referred to could be either an action for interference with the parental right of control of their children or battery. The criminal action could be battery or contributing to the delinquency of a minor.

Prescription of contraceptives. No legal authority exists that would permit a doctor to prescribe contraceptives for a minor without parental consent. Although it would seem only logical that if a minor could decide to terminate her pregnancy, she should be able to decide not to get pregnant in the first place, the Supreme Court has not yet addressed the question. Thus, any physician who prescribes contraceptives for minors should be aware that he faces possible civil and criminal liability.

Pregnancy tests. Pregnancy tests are medically required as part of the abortion procedure. Consequently, any right that a minor has to an abortion includes the right to obtain a pregnancy test. Because *Planned Parenthood* gave minors the right to abortions in the first trimester, minors also have a right to pregnancy tests during that time. The right to such tests after the first trimester has not yet been established. Moreover, since under the *Roe* and *Doe* decisions the states may regulate abortions after this time, they likewise may regulate pregnancy tests.

THESE RECENT Supreme Court decisions have radically altered North Carolina's laws concerning a minor's consent to treatment. The most significant changes are: (1) minors have the right to consent to abortions during the first three months of pregnancy; (2) minors have the right to obtain pregnancy tests during the first trimester; and (3) minors who are eligible for AFDC and Medicaid funds may receive family planning services without their parents' permission. Also, in light of the *Planned Parenthood* ruling, the section of the North Carolina abortion statute which prohibits abortions after the twentieth week of pregnancy except when necessary to save the mother's life or health, is unconstitutional. The recordkeeping and reporting provisions of the statute, however, should survive a constitutional attack.

Patrice Solberg

Mental health treatment

In one of its rare decisions on mental health law,[1] *O'Connor v. Donaldson*, 45 L. Ed. 2d 396 (1975), a unanimous Supreme Court held that "a state cannot constitutionally confine without more [treatment] a nondangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members and friends."

The plaintiff Donaldson had been confined for almost fifteen years for care, maintenance, and treatment as a mental patient in a Florida state hospital. He had frequently

10. Letter from the Attorney General to Mr. William R. Schmidt, May 14, 1974.

11. Mercer v. Michigan State Bd. of Education, 379 F. Supp. 580 (D.C. Mich. 1974); Medeiros et al. v. Kyosaki et al., 478 P. 2d 314 (Hawaii Sup. Ct. 1971); Cornwell v. State Bd. of Education, 314 F. Supp. 340 (D.C. Md. 1969) aff'd 428 F. 2d. 471 (1969).

1. Other cases are Jackson v. Indiana, 406, U.S. 715 (1972); McNeil v. Director, Patuxent Institution, 407 U.S. 245 (1972); and Shelton v. Tucker, 364 U.S. 479 (1960).

asked to be released, but his requests had been denied by the attending physician and hospital superintendent, Dr. O'Connor, and by other staff of the hospital, notwithstanding the following circumstances: responsible people in the community had offered to care for Donaldson, if necessary; he was not dangerous to himself or others; and he had received no psychiatric or other treatment during his confinement. Indeed, the Supreme Court characterized Donaldson's confinement as a "simple regime of enforced custodial care, not a program designed to alleviate or cure his supposed illness."

Donaldson brought an action against O'Connor and other staff members for damages under 42 U.S.C. § 1983,[2] alleging that he had been intentionally and maliciously deprived of his constitutional rights to liberty and treatment. O'Connor defended on the grounds that he had believed Donaldson was unable to make a "successful adjustment outside the institution," and that he had acted in good faith and therefore was immune from any liability for monetary damages under Section 1983. He contended that state law, which he believed was valid, authorized indefinite custodial confinement of the "sick" even if they are not treated and their release would harm no one.

The district court awarded damages to Donaldson against O'Connor and the other defendants. The court of appeals affirmed the district court's judgment, holding that when, as in Donaldson's case, the rationale for confinement is that the patient is in need of treatment, the Constitution, under the Fifth and Fourteenth amendments, requires that minimally adequate treatment in fact be provided (a right-to-treatment theory). The court of appeals also stated that, regardless of the grounds for involuntary civil commitment, a person confined against his will in a state mental institution has a constitutional right to receive individual treatment that will give him a reasonable opportunity to be cured or to improve his mental condition. In the Supreme Court's view, the court of appeals "conversely ... implied that it is constitutionally permissible for a State to confine a mentally ill person against his will in order to treat his illness, regardless of whether his illness renders him dangerous to himself or others."

The Supreme Court declined to decide the "difficult constitutional issues" raised by the court of appeals; instead it limited its holding to the narrow grounds that a state may not constitutionally confine "without more" (presumably, without treating the person) a nondangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members and friends. Thus, the case was decided on right-to-liberty rather than right-to-treatment grounds. The Court also remanded the Section 1983 damages issue. It stated that since the court of appeals did not consider whether the trial judge erred when he refused to give a jury instruction O'Connor requested about his claim that he relied on a state law as authority to continue Donaldson's confinement, and since neither the trial nor the appeal court had the benefit of the Supreme Court's *Wood v. Strickland*[3] decision, the issue of damages should be reconsidered.

Donaldson is easy to overread—it has many implications. It is important, however, first to read *Donaldson* narrowly and then to derive its implications.

The Supreme Court specifically refused to decide whether mentally ill persons dangerous to themselves or to others have a right to treatment when they are involuntarily confined by the state, or whether the state may compulsorily confine a nondangerous mentally ill individual for the purpose of treatment. The case, of course, did not address the issue of the criminally insane—persons found guilty and confined, persons found not guilty but confined, and persons confined pending a verdict. Moreover, it did not address the rights of the mentally retarded, who also receive mental health services and are subject to involuntary confinement in state institutions.

The Court rejected the notion that mental patients can be exiled by a community that finds their presence undesirable: "May the state fence in the harmless mentally ill solely to save its citizens from exposure to those whose ways are different? One might as well ask if the state, to avoid public unease, could incarcerate all who are physically unattractive or socially eccentric. Mere public intolerance or animosity cannot constitutionally justify the deprivation of physical liberty." The Court also said that mental illness alone may not serve as the grounds for "simple custodial confinement," and it raised doubts that a person may be confined because he will be "better off" in an institution: "That the state has a proper interest in providing care and assistance to the unfortunate goes without saying. But the mere presence of mental illness does not disqualify a person from preferring his home to the comforts of an institution."

The Court also noted that adequacy of treatment is a justiciable question, that states have a continuing duty to review periodically the justification for individual commitments, and that mental health officials can be held personally liable for bad-faith violations of a person's constitutional right to liberty. It suggested that "dangerousness" should be defined narrowly, that the "least restrictive alternative" principle will protect mental patients from unnecessary institutionalization, and that the term "mental illness" itself may be unconstitutionally vague.

Under North Carolina's involuntary commitment statute, G.S. Ch. 122, Art. 5A, a person may be involuntarily committed only if he is both mentally ill or inebriate and imminently dangerous to himself and others. A person is mentally ill, according to G.S. 122-36(d) and G.S. -58.2(2), if he has an illness that so lessens his capacity to use his customary self-control, judgment, and discretion in conducting his affairs and social relations as to make it advisable for him to be under treatment, care, supervision, guidance, or control. Many North Carolina district courts seem reluctant to commit a person unless the evidence shows that he will injure himself or others in the immediate future. It appears that the courts do not focus on the standard of mental illness as much as on that of imminent danger. The consequence, according

2. 42 U.S.C. § 1983 makes a public official liable to a citizen whose constitutional rights he has abridged. See Hogue, *Personal Liability of Governing Board Members: New Developments in the Law*, 41 *Popular Government* 44-52 (1976).

3. 420 U.S. 308 (1975), holding that school board members can be sued personally for damages for violating students' constitutional rights.

to some mental health professionals, is often that persons who clearly need help are denied it since they do not wish (or have the mental capacity) to admit themselves voluntarily to a hospital for treatment, and since "imminently" is so time-limited that many involuntary commitment cases are dismissed at the district court hearing. Of course, the involuntary commitment statute helps prevent unnecessary institutionalization provided that the least restrictive alternative doctrine is followed, and reduces mental health professionals' potential liability for wrongful confinement. Finally, the statute provides for periodic rehearings after the initial order of commitment—the first is held ninety days after the initial hearing and periodically thereafter.

In the view (which I believe is correct) of the Mental Health Law Project, which represented Donaldson, the states "must re-evaluate all of their involuntarily hospitalized patients to identify non-dangerous individuals who are being held against their will in custodial confinement. They will have to establish procedures to review periodically the status of all patients in the system. They would also be well advised to re-evaluate the standards and procedures for commitment under their state laws, since the *Donaldson* opinion indicates that many may be unconstitutionally vague and are likely to be reviewed by the Supreme Court in the not too distant future."[4] The Project correctly cautions that the number of persons affected by *Donaldson* is not easy to determine, and that hospital administrators may change the status of many patients to "voluntary" in an effort to avoid the impact of *Donaldson*, which applies only to involuntary commitments.[5]

Personal liability. *Donaldson* is rife with implications for mental health law reformers. In the first place, it furnishes them with the weapon of personal liability; mental health professionals may be made personally liable under Section 1983 for infringing mental health patients' constitutional rights to liberty. Since law reformers already have the weapon of institutional liability—the power to hold state institutions liable under right-to-treatmemt theories[6]—*Donaldson* seems to be a logical and necessary extension of the principle of accountability.[7]

Personal accountability in the mental health professions is particularly troublesome in light of *Donaldson* and two other recent cases—*Tarasoff v. Regents*[8] and *Semler v. Wadeson*.[9] In *Donaldson*, the defendants' personal liability is grounded on their violation of Donaldson's right to liberty—they denied him his liberty because they believed that he could not "make a successful adjustment outside the institution." It can be argued that their reasoning took into account the possibility, probability, or likelihood that Donaldson would be dangerous at least to himself and possibly to others. Yet, if they are held liable to Donaldson, it would appear that they may not engage in prophesy or prediction with absolute impunity.

Ironically, under *Tarasoff* and *Semler*, mental health professionals are required to do just that—to predict a person's future activity. *Tarasoff* and *Semler* stand for the proposition that a mental health professional is liable to persons whom his patient injures if the professional could have foreseen that his patient would be likely to injure another but failed to foresee that and warn the prospective victim.

Mental health workers will claim, with justification, that they are being whipsawed. *Donaldson* holds them liable for confining a person whom they believe will injure himself or others, but *Tarasoff* and *Semler* hold them liable for releasing a person who later injures another. *Donaldson* says that mental health professionals cannot predict a patient's behavior very accurately, but *Tarasoff* and *Semler* say that these professionals have good predictive abilities.

In North Carolina, G.S. 122-24 provides that no personal liability will attach to an administrator or chief of medical services of any state hospital or any staff member under their supervision for any act or thing done under or in pursuance of any of the provisions of G.S. Ch. 122. The statute does not apply to mental health professionals who work in community-based (area or local) mental health centers or in institutions for the mentally retarded. Moreover, the state's Supreme Court has decided only one case under it, *Bollinger v. Rader*.[10] In this case the director and administrator of a state hospital for the insane, acting under the discharge-from-custody provisions of Ch. 122, discharged a patient who subsequently killed another person. The defendants were found not responsible for damages resulting from their alleged negligence in discharging the patient. This holding is of limited comfort.

Least restrictive alternative. *Donaldson* advances the principle of "the least restrictive alternative"—when the state acts either to commit a person without his consent or place him in a special education program, it must act in the way that least infringes on the person.[11] *Donaldson*, when considered alongside *Dixon v. Weinberger*[12] (which held that under federal statutes, mental patients in the District of Columbia's St. Elizabeth Hospital have a right to be placed in less restrictive appropriate facilities and that the responsible authorities are obliged to create such facilities if they do not exist) gives meaning to the mental patient's claim to community placement and community services. A.A. Stone, a distinguished Harvard psychiatrist and professor of law, says that *Donaldson* and *Dixon* are the "operational guarantees of community services."[13] They are also the judicial basis for deinstitutionalization—depopulating the state institutions and preventing persons from being inappropriately placed in them.

Undercutting the right to treatment. Third, despite some attempt to weaken the precedential value of a long line of recent right-to-treatment cases, the Supreme Court does not

4. Friedman, *The Supreme Court Unlocks the Doors*, Mental Health Law Project Summary 12-13 (Sept., 1975).

5. Marker, *How Many Kenneth Donaldsons Are There?* Mental Health Law Project Summary 18 (Sept., 1975).

6. Turnbull, *Effects of Litigation on Mental Retardation Centers*, 40 Popular Government 44-52 (1975).

7. Turnbull, *Accountability*, 41 Exceptional Children 427-33 (1975).

8. 118 Cal. Reptr. 129, 529 P. 2d 553 (1974).

9. No. 74-2345 2346 (4th Cir., Feb. 27, 1976).

10. 151 N.C. 383 (1909).

11. Chambers, *Right to the Least Restrictive Alternative Setting for Treatment*, Legal Rights of the Mentally Handicapped, The Practising Law Institute and The Mental Health Law Project 991-1014 (1973).

12. Dixon v. Weinberger, Civ. Act. No. 74285, ____ F. Supp. ____, Opinion filed Dec. 23, 1975.

13. Stone, *Overview*, 132 Am J. Psychiatry 1130 (1975).

seem to have changed the principle in those cases. The Court's last footnote, appended to the last word of its opinion, reads: "Of necessity our decision vacating the judgment of the Court of Appeals deprives that court's opinion of precedential effect, leaving this Court's opinion and judgment as the sole law of the case." The significance of the footnote is that the court of appeals had used its *Donaldson* right-to-treatment decision as the basis for its decision in the leading right-to-treatment case, *Wyatt v. Aderholt.*[14] The Supreme Court has tried to undercut the value of *Donaldson* as decided by the court of appeals on right-to-treatment grounds, as a precedent for its decision in *Wyatt* and other right-to-treatment cases. The question is whether *Wyatt* and its progeny can be relied upon in future right-to-treatment cases. I believe the answer is yes.

Unlike *Donaldson*, *Wyatt* was a class action case. Its aims were institutional reform and institutional liability, not personal damages and personal accountability. *Wyatt* was decided on the theory that the quid pro quo of depriving a person of his liberty is the treatment he receives, whereas *Donaldson* did not reach the "treatment" issue but turned on "liberty" grounds (the Court specifically rejected an opportunity to decide the case on the "more difficult" principle of right to treatment). *Wyatt* involved both the mentally ill and the mentally retarded, but *Donaldson* involved only the mentally ill; the implication is that any attempt to undercut *Wyatt's* precedential value will apply only to the mentally ill. *Donaldson* addressed the issue of a person's right to be free when he is able to exist in the community without danger to himself or others and when the institution offers no treatment, whereas *Wyatt* focused on the problems of those institutionalized who may not be able to exist in the community without harm and on the inadequacy of the treatment available to them in state institutions. Finally, *Donaldson* rested on the present availability of community resources for Donaldson, whereas Wyatt had no occasion to take such resources into consideration.

Right-to-treatment cases are pending in North Carolina but have not yet been decided at the trial court level. In *The North Carolina Association for Retarded Citizens v. North Carolina*, (C.A.No. 3050, U.S.D.C., E.D., N.C., filed 1972), the North Carolina Association for Retarded Citizens and individual plaintiffs allege, among other things, that residents of the state's four mental retardation facilities are being denied their constitutional rights to treatment. Another case involves charges against the state concerning the John Umstead Hospital for the mentally ill. Even if the federal courts hearing these cases respond favorably to the Supreme Court's meager and unwise attempt to undercut the right-to-treatment cases, residents of the centers and the hospital will nevertheless have statutory rights to treatment under the Patients' Rights Act, G.S., Ch. 122, Art. 3, Parts 2 and 3, and, in the case of voluntarily admitted patients, the rights of voluntary discharge, G.S. 122-56.3.

Not surprisingly, *Donaldson* does not begin to answer all the questions of mental health law. For example, instead of offering even a tentative resolution of the right-to-treatment argument, *Donaldson* confuses the precedential value of the right-to-treatment cases. By sidestepping this issue, it leaves unresolved the conundrum of the right to refuse treatment and the issues of coercive psychiatry, mandatory treatment for those compulsorily committed because of their dangerousness.

As Dr. Stone correctly points out, *Donaldson* raises even more problems when the quid pro quo of commitment with treatment is considered in a broader dimension. The district court had relied on a pure quid pro quo argument. The court of appeals went still further and said that the right to treatment exists even when the motive for commitment is to relieve families of the burden of caring for chronically disturbed members. Stone argues that the right to treatment, as formulated by the court of appeals, runs into difficulty when no treatment exists to cure or improve a person's mental disability. He asks whether *Donaldson* means that a chronically incurable patient may ever be involuntarily confined to a hospital.

If the answer is no, the state's *parens patriae* role in alleviating the burdens of the family and of the mentally ill person himself will probably be substantially reduced. The result may be that involuntary commitment on behalf of the chronically incurably ill and their families is never undertaken (whether in a community setting—the less restrictive alternative, or in an institution—a more restrictive one).

To complicate the issues further, the Chief Justice filed a separate concurring opinion, setting out at length his own observations. He believes that the right-to-treatment rationale of the court of appeals, "in light of its importance for future litigation in this area, . . . has no basis in the (past) decisions of this Court." The Chief Justice then referred to the Court's earlier cases involving involuntary commitment and made it clear that, in his view, the court of appeals improperly relied on them—there is no historical basis for imposing a treatment quid pro quo on a state's power, and the civil commitment cases likewise lend no support to that rationale. He next argued that "the existence of some due process limitations on the *parens patriae* power (to commit a person for the purposes of protecting a person who is unable to act for himself) does not justify the further conclusion that it may be exercised to confine a mentally ill person only if the purpose of the confinement is treatment." Finally, after pointing out that "despite many recent advances in medical knowledge, it remains a stubborn fact that there are many forms of mental illness which are not understood, some of which are untreatable in the sense that no effective therapy has yet been discovered for them, and that rates of 'cure' are generally low," the Chief Justice argued that "given the present state of medical knowledge regarding abnormal human behavior and its treatment, few things would be more fraught with peril than to irrevocably condition a State's power to protect the mentally ill upon the providing of 'such treatment as will give (them) a realistic opportunity to be cured.' Nor can I accept the theory that a State may lawfully confine an individual thought to need treatment and justify that deprivation of liberty solely by providing some treatment. Our concepts of due process would not tolerate such a 'trade-off.' Because the Court of Appeals' analysis could be read as authorizing those results, it should not be followed."

In the Chief Justice's view, then, the right-to-treatment rationale simply has no part in mental health law. Ironically,

14. 344 F. Supp. 373 (M.D. Ala.), *aff'd sub. nom.* Wyatt v. Aderholt, 503 F. 2d 1305 (5th Cir. 1974).

his position cuts two ways. It rests on the "higher" ground of liberty from confinement rather than the "lower" ground of confinement with treatment, and it thus impels the law toward creating outpatient community-based services and preventing institutionalization whenever practicable. But by specifically not relying on the treatment rationale, it rejects the constitutional doctrine most widely used and most effective for reforming the states' mental institutions, for holding mental health professionals accountable, and in providing a basis for a patient's refusal (ironically on First Amendment grounds) of certain treatments (such as electroconvulsive or insulin shock therapy, psychosurgery, seclusion, or some of the more noxious and intrusive forms of behavior modification). The other constitutional doctrine used by mental health reformers is based on the Eighth Amendment ban of cruel and unusual punishment.

Donaldson establishes the higher ground of liberty in lieu of confinement without treatment, leaves an indefinite space for the advancement of the right-to-treatment rationale and the concomitant right-against-treatment principle, impels state services to meet the test of accountability, and gives strength to the least restrictive alternative principle, hence encouraging services for the mentally ill in the community rather than in an institution. What *Donaldson* fails to do (see above) is not necessarily precluded for all time under the language of the opinion, unless the Chief Justice's concurring opinion is later adopted by a majority of the Court.

As the Court's first dip into the murky waters of mental health treatment law, *Donaldson* is not an unwelcome opinion, but it leaves too much for future litigation. It heightens the tension between mental health institutions and society at large: do the institutions serve custodial functions, as places of control, or therapeutic functions, as places of habilitation? Under *Donaldson*, institutions may well serve the custodial function for those persons dangerous to themselves and others, but they may not serve the habilitation function that the right-to-treatment rationale seeks for such persons as well as for the chronically ill or incurable. If this is the outcome of *Donaldson*, the Court will have contributed little of value to the law concerning patients and professionals in the increasingly complex web of mental health, criminal, and social services law.

H. Rutherford Turnbull, III

Accepting guilty pleas — Defendant's understanding of charge

(continued from p. 17)

time of his plea, his plea of guilty may well be deemed a factual admission that he did what he is charged with doing such that a judgment of conviction may validly be entered against him." As to the alternative requirement that the defendant knows what the elements of the crime are, the opinion does not say how this might be established beyond successful challenge at a later date.

Mr. Justice Rehnquist, joined by the Chief Justice, dissented. Their opinion observed that the majority was narrowing the case law test for voluntariness of a plea in state courts by applying retroactively the federal test of voluntariness embodied in Rule 11 of the Federal Rules of Criminal Procedure, a standard heretofore only statutory and prospective. They further observed that by this decision, the Court "... opens the door to countless similarly situated prisoners to withdraw their guilty pleas many years after they were entered." The practical effect of such a ruling, they say, "... will be to release these prisoners who at one time freely admitted their guilt."

Superior court judges in North Carolina have understandably been disturbed by the case. Opinions have differed as to just what the record in a guilty plea case must show to withstand a subsequent charge by a defendant that his plea was constitutionally involuntary. Further cases may be required to settle these varying points of view. In the meanwhile, the standard Transcript of Plea Form, which was undergoing revision when this case was decided, has been further revised and reissued in an effort to take the *Morgan* case into account. In Question 6 on that form the judge asks the accused, "Have the charges been explained to you by your attorney and do you understand the nature of the charges?" On the same form the defense attorney's certification has been expanded to include, "I further certify that I have fully explained to the defendant the nature and elements of the charges to which he [the defendant] is pleading." Whether the majority in *Morgan* would be satisfied with this ritualistic treatment is uncertain, but it is perhaps the best that can be done without a direct and time-consuming in-court interrogation of the accused by the judge on such sophisticated concepts as felonious intent. Such a procedure would not only tend to duplicate the function of defense counsel but also undo counsel's labors to the defendant's disadvantage.

C. E. Hinsdale

Law Enforcement Procedure

And now for a quick quiz on the United States Supreme Court.

Check one:

- ☐ The Burger Court is undoing the excesses of the Warren Court.
- ☐ The Burger Court is undoing the advances of the Warren Court.
- ☐ The Burger Court is taking off in directions of its own.
- ☐ All of the above.
- ☐ None of the above.

In the area of criminal procedure, nobody should be too sure of the answer. But for the law enforcement officer, "none of the above" probably comes closest to the truth.

Hardly anyone would have answered "all of the above." About the Warren Court it can be said that one man's excesses were another man's advances. And not many have either accused or applauded the Burger Court for placing new demands on law enforcement officers. Nobody, regardless of what he thought about the Warren Court, has said that.

But haven't broadcasters and newspaper columnists and others been telling us that the Burger Court is reversing the Warren Court's positions on criminal procedure? They have, but they have been misleading us. They may not be out-and-out wrong, but they have been misleading.

If what they mean is that the Burger Court is reversing the *trends* of the Warren Court, they may be right, but even that is uncertain, for who is to say what the Warren Court would have done in a particular case? Some guesses on that matter may be better than others, but they are still guesses.

We can say with certainty, however, that *there is almost nothing that the Warren Court had told the law enforcement officer to do that the Burger Court has said he no longer needs to do.*

The Court's decisions on law enforcement procedure in the last year (that is, the fall term of 1975 and the spring term of 1976) illustrate this. None of those decisions undoes any law ever pronounced by the Warren Court, although some of them shy away from doing things that some people feared—and others hoped—the Warren Court might eventually have gotten around to. A look at these decisions may give us a better notion of how the Burger Court is dealing with the law that the Warren Court made.

First, a very important distinction must be kept in mind—the difference between saying what a rule is and saying what will happen if the rule is broken. For example, the Court might adopt the rule that an officer may not arrest for a misdemeanor not committed in his presence unless he has a warrant or unless there is a danger of escape or harm if no arrest is made (this rule is already in effect in North Carolina). But even when the rule is in effect, we do not know what will happen if the rule is violated. Will the case against the defendant be dismissed? Will evidence seized after the arrest be inadmissible at his trial? Will the officer who made the arrest be subject to civil liability? The answers to all of these questions are completely independent of the rule.

Bearing that distinction in mind, we can make these observations about the Burger Court:

1) It has reversed or "loosened" almost none of the *rules* established by the Warren Court to govern the activities of law enforcement officers.
2) It has refused to expand the rules to limit activities of law enforcement officers further.
3) Under the Warren Court the most important consequence of breaking the rules was that evidence obtained by violating the rules was inadmissible in court —the "exclusionary rule." The Burger Court has moved in the direction of limiting the application of the exclusionary rule.

All of these observations are reflected in the Court's decisions on matters of law enforcement procedure during the last year.

Arrest without warrant

When the United States Supreme Court considers the constitutionality of an arrest, it is applying the command of the U.S. Constitution's Fourth Amendment that "the right of the people to be secure in their *persons*, houses, papers, and effects, against unreasonable searches and *seizures*, shall not be violated."

That provision has long been applied differently to regulate searches for things from the way it is applied to regulate seizures of persons. For a search for things, the general rule has been that if it is feasible to obtain a search warrant before carrying out the search, then the warrant must be obtained. On the other hand, no similar rule has applied to arrests, or seizures of persons. That is, arrests have always been regarded as proper when made without a warrant even under circumstances when time was available to obtain a warrant first.

This inconsistency has often been pointed out, and many

observers, noting the Warren Court's stress on the importance of obtaining a warrant before making a search, anticipated that that Court would extend that idea to arrests, permitting an arrest without a warrant only if taking the time to obtain a warrant would result in the suspect's avoiding arrest.

In *U.S. v. Watson*, 46 L. Ed. 2d 598 (1976), the Burger Court had the opportunity to consider this discrepancy. In that case, a postal inspector had ample reason, based upon the reports and activities of a reliable informer, to arrest the defendant for the felonious theft of credit cards from the United States mails. Although the inspector had ample time to obtain a warrant for the defendant's arrest, he went to the public restaurant where the defendant was know to be, arrested him, and removed him to the street to complete the arrest process.

The federal statute under which the postal inspector had authority to make the arrest clearly authorized such an arrest without a warrant. The question was whether the procedure authorized by the statute was constitutional. (North Carolina also has a statute providing that arrests for felonies may be made without a warrant even though there is ample time to obtain a warrant first.)

The Court upheld the federal arrest statute and with it the arrest laws of most states. It made almost no attempt to reconcile this result with the approach applied in search cases—requiring that a warrant be used absent special circumstances. Instead, it relied upon the long and undisputed acceptance of felony arrests without warrant and refused to overturn a long-standing and consciously accepted tradition.

But the Court carefully avoided suggesting how it might answer a related and very important question: What if the person arrested had not been in a public place but in the privacy of his own home? In that case, would it be necessary to have a warrant before arrest if the opportunity to obtain it in advance had been present?

Later, in *U.S. v. Santana*, 49 L. Ed. 2d 300 (197), the Court had an opportunity to inch up on that question. In this case, federal officers had ample grounds to arrest the defendant for a felonious sale of drugs, but instead of obtaining a warrant, they made the arrest immediately without a warrant. The significant difference between this and the *Watson* case was that the officers first encountered the defendant as she stood at the threshold of her home. Before the officers could make the arrest, she had retreated inside, where they followed and arrested her.

The Court upheld the validity of this arrest, but again carefully avoided the more basic question of whether officers could generally enter a private home to make a felony arrest without a warrant. Instead, it considered only whether the arrest could be made when the officers first encountered the defendant in public view and then followed her into a private home. With this approach the Court was able to uphold the arrest, using fairly well-established principles from older cases.

The outcome in this case does hint, however, that when finally faced directly with the question of whether a home may be entered for an arrest without a warrant, even when the defendant has not been seen outside the house, the Court will hold that no warrant is necessary.

It remains possible, though, that the Court would uphold an entry for such an arrest only when the officers have an arrest warrant or, possibly, only a *search* warrant.

These two cases illustrate the Burger Court's general approach toward decisions of the Warren Court. Nothing in either case rejects any decision that the Warren Court had made. Although they are not reversals, the two cases appear to be conscious refusals to follow some of the directions suggested by the Warren Court. But even that conclusion may be inaccurate. It is far from clear that the Warren Court, faced with precisely the same questions, would have ruled differently; the practices that the Court declined to overrule are ones that had been widely established and about which there had been little evidence of substantial abuse.

Inventory of impounded vehicles

In a chain of decisions running over the past several years, the Court has dealt with the extent to which law enforcement officers may enter and inspect automobiles that they have impounded. These decisions have attracted little public attention but are of great practical importance.

In general, the Court has recognized that once a law enforcement agency has assumed control over a vehicle (usually because its driver has been placed under arrest), it is reasonable for the agency to take steps to prevent personal property from being stolen from the vehicle, to protect the agency against charges that its officers have improperly taken anything from the vehicles and to prevent dangerous materials in the car from falling into the wrong hands. But despite this series of decisions, the Court had left unanswered a number of important questions about the scope of the inventory of an impounded automobile.

In *South Dakota v. Opperman*, 49 L. Ed. 2d 1000 (1976) the Court dealt in part with the question. Officers in Vermillion, South Dakota, towed an illegally parked car to their impound lot, following standard procedures for determining when a car should be towed. The impound lot was surrounded by a fairly crude fence, but on occasion it had been entered and items had been stolen from the cars stored there. The towed automobile was locked, but officers who saw it at the lot could see a watch on the dashboard and other personal property in the back seat.

In accordance with routine procedures in such cases, officers entered the car and made an inventory of its contents. The procedure included opening the unlocked glove compartment, where they found a bag of marijuana. All of the car's contents, including the marijuana, were removed and taken to the police department.

The defendant was later charged with possession of marijuana and convicted. The case eventually went to the Supreme Court, presenting the questions of whether the procedures for inventorying impounded vehicles can include entering a vehicle that is locked and whether, once the vehicle has been entered, the contents of a closed glove compartment may properly be examined.

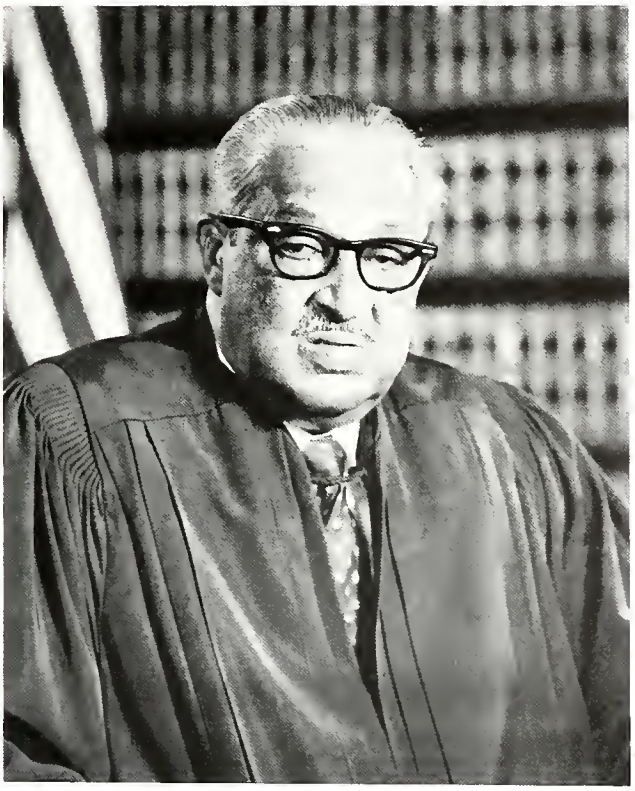
But the Court typically did not venture far beyond what it absolutely had to decide in order to render a decision. It can be said on the basis of this case that officers who have lawfully impounded an automobile may enter that automobile and inventory its contents, including the contents of a glove com-

partment: (1) if the impoundment occurred under authority of a proper law and under routine circumstances; (2) if there is some danger of theft from the impounded automobile; (3) if department-wide routine procedures call for the inventory of the contents of the car and those procedures are followed; and (4) if the glove compartment is unlocked.

Whether the outcome of the case would have differed had one of those factors been absent is not clear. And it is not clear whether the locked trunk of the automobile could properly have been entered to inventory its contents. (The police in this case had not tried to enter the trunk and had merely noted on their inventory form that the trunk was locked.)

These questions remain to be answered, but the implication of the case is that the procedure followed in it would be accepted in almost all circumstances, even without a showing of some danger that the vehicle would be broken into. On the other hand, it seems likely that the Court would not have upheld a forcible entry into either the glove compartment or the trunk of the automobile; justification of such an entry on the grounds of protecting its contents from theft would have been much more strained. But what the effect on this case would have been if no personal property had been visible inside the automobile is less certain. Resolution of that question must await another case.

Those who feel that any affirmation of the legality of police conduct is a rejection of the Warren Court tradition probably would lump this case with those "reversing" the trends of the Warren Court. On the other hand, none of the specific decisions of the Warren Court suggests that it would have held otherwise. In fact, in many ways, the Burger Court's extremely limited decision in this case (apparently continuing to insist upon the importance of following established, regular procedures, for example) suggests that it is echoing the themes first sounded by the Warren Court in cases dealing with the inventory of impounded vehicles.



Associate Justice Thurgood Marshall

Consent to search

While the Warren Court moved to impose strict standards to be met before a person could be regarded as having waived his right to remain silent in the face of police questioning, it had never addressed that question as applied to a waiver of the right to be free from unjustified search. Thus, the way was left open for the Burger Court to hold in *Schneckloth v. Bustamonte* (1970) that no specific warnings were required before a person could waive his right to be free from unreasonable search. Even in that case, however, the Court carefully avoided suggesting how it would have decided if the defendant had been under arrest, rather than free, when he consented to the search.

As a second issue in *U.S. v. Watson*, discussed above, the Court finally approached this question. In *Watson*, the defendant was under arrest when he consented to a search of his automobile. The Court declined to apply a more stringent standard to obtaining a consent from an arrested person than was required from a person not under arrest, holding merely that the same standards applied in *Watson* as applied in *Schneckloth*.

Perhaps about this case, more than many of the others decided by the Court this year, it may accurately be said that an important theme of the Warren Court has been rejected—that is, the need to make sure that a defendant understands his rights before he waives them, especially when he is in the custody of law enforcement. But this decision cannot be characterized as one that reverses any rule established by the Warren Court. Rather, the Warren Court had simply never spoken to this issue; it had had no opportunity to establish a rule, and thus the Burger Court was breaking ground, regardless of how it ruled.

Confessions

Probably the case that best symbolizes the Warren Court in the area of law enforcement procedure is *Miranda*. Rarely does the general public know the name of a court decision, but *Miranda* is known to many citizens who otherwise pay little attention to the Supreme Court and to almost anyone remotely connected with law enforcement, even those who would be hard pressed to name another U.S. Supreme Court case. *Miranda* represents the heights and the depths of the Warren Court, depending on the point of view about the Court's role. Therefore, any case that provides the opportunity for the Burger Court to deal with the *Miranda* decision is particularly significant. Two such cases arose this year.

Miranda had provided that a confession or admission was admissible in a criminal case only if the defendant had been specifically advised of his rights with respect to interrogation and had specifically either waived those rights or been first afforded those rights that he claimed. That much of the

Miranda rule is almost universally known. What is more frequently forgotten, however, is that the Miranda rule applies only to confessions or admissions that result from an "in-custody interrogation."

Inevitably, the question of when the interrogation is "in custody" has been much litigated since the original *Miranda* decision. In *Beckwith v. U.S.*, 48 L. Ed. 2d 1 (1976), the Burger Court considered this question further. In that case the defendant had been convicted of tax fraud, partly on the basis of admissions he had made while talking with Internal Revenue Service agents in his own home. The interview was admittedly nonthreatening, and none of those participating in the interview, including the defendant, thought that he was "in custody"—they all thought that the conversation was friendly and that he could have walked away at any time. Nevertheless, on appeal the defendant argued that the questioning in this case was the equivalent of being "in custody" when the agents had focused their attention on him as a suspect and were specifically seeking evidence of tax fraud against him.

The Court rejected this argument and emphasized that the *Miranda* rule would not apply unless the defendant being questioned had "been taken into custody or otherwise deprived of his action in any significant way," or at least unless there were some "special circumstances . . . 'where the behavior of law enforcement officials was such as to overbear petitioner's will to resist' . . . ."

Does that decision reject the spirit of the Warren Court? Possibly, but not certainly. It clearly does not reverse anything the Warren Court had staked itself out on; the Warren Court had never applied the *Miranda* rule to a situation in which the defendant was not "in custody."

The other case requiring an application of the *Miranda* rule was *Michigan v. Moseley*, 46 L. Ed. 2d 313 (1975). Under the *Miranda* rule, it is clear that once a defendant being questioned indicates that he is unwilling to answer questions or, if he has already answered some questions, that he is unwilling to answer any more, law enforcement officers are obliged to stop their questioning. The *Moseley* case raised a variation on this theme. Here, officers, after arresting the defendant for robbery, scrupulously followed the *Miranda* requirements; they advised the defendant of his rights and immediately stopped their questioning when he indicated that he no longer wished to answer questions. They then left him alone, but a couple of hours later another officer with questions about a different offense returned to the defendant, again went through the full *Miranda* procedure, and, when the defendant indicated a willingness to talk, asked him questions. This time, the defendant made damaging admissions that were later used in evidence against him.

Thus the question this case brought before the Court was whether questioning can ever be renewed once a defendant has taken advantage of the *Miranda* rights. To put it another way, is a defendant who has once claimed his *Miranda* rights immune from any probes to determine whether he might have changed his mind? The Court said that he is not; the second round of interrogation was acceptable and the admission was usable as evidence.

Characteristically, the Court seemed unwilling to let the cat completely out of the bag. It made some point of observing that the second-round questioning was done by a detective other than the one who had first tried to question the defendant and that his questions were about an offense different from the one the first questions were asked about. Therefore, it is not clear whether the evidence would have been admissible had it been the first detective returning to repeat the same questions he asked the first time around.

The Court did make clear, however, that the lapse of two hours was important in that it permitted a dissipation of any coercive effect of the first interrogation: "[T]his is not a case, therefore, where the police failed to honor a decision of the person in custody to cut off questioning either by refusing to discontinue the interrogation upon request or by persisting in repeated efforts to wear down his resistance and make him change his mind. In contrast to such practices, the police here immediately ceased the interrogation, resumed questioning only after the passage of a significant period of time and the provision of a fresh set of warnings, and restricted the second interrogation to a crime that had not been a subject of the earlier interrogation."

Again, this decision represents at most a rejection of the spirit of some of the Warren Court's decisions, but not a rejection of any rule that had been established.

Self-incrimination

"No person . . . shall be compelled in any criminal case to be a witness against himself." That command of the Fifth Amendment to the United States Constitution has produced some of the most important and interesting Supreme Court cases on law enforcement procedure, including the *Miranda* case discussed above. The Fifth Amendment does not forbid the use of self-incriminatory material; it merely prohibits the use of *"compelled"* self-incriminatory material. The case of *Andresen v. Maryland*, 49 L. Ed. 2d 627 (1976) focused attention on the question of compulsion.

In that case, officers with a valid search warrant entered the office of an attorney who was being investigated for land fraud. From his files they seized papers, described in the warrant, that proved to be damaging evidence against him in his subsequent trial for the fraud. The records were ones he himself had maintained, which led to his claim that they were improperly used against him at trial because their use constituted self-incrimination.

The Supreme Court rejected this claim and in doing so focused its attention on the word "compelled" in the Fifth Amendment. The Court emphasized that the defendant was in no way compelled to produce the self-incriminating material; the material was maintained voluntarily and the defendant had not been compelled to bring it forward, for it had been obtained in a search in which the officers themselves obtained the material. The Court did recognize, however, that had the same papers been sought by subpoena, thus compelling the defendant to bring them forward and "authenticate" the incriminating information, the procedure may well have violated the Fifth Amendment.

What if the material seized had been not business records but private letters or a diary? As it did so often this year, the Court carefully avoided saying anything that would indicate its judgment on this different question. However, it is difficult to understand, in the light of the Court's focus on the

word "compelled," what difference the nature of the material could have made.

In another case, *Fisher v. U.S.*, 48 L. Ed. 2d 39 (1976), the Court also directed its attention to the "compulsion" necessary to violate the constitutional prohibition against compelled self-incrimination. In this case, the defendant had turned over to his attorney work papers prepared by his accountant. It was those papers that were obtained from the attorney by an Internal Revenue Service summons. Among the important decisions made in this case was the Court's conclusion that the defendant could not claim that he had been compelled to incriminate himself, because the only compulsion in the case was directed against his attorney, not the defendant himself. Thus the Court again indicated, as it did in the *Andresen* case, its inclination to pay strict attention to the precise wording of the constitutional protection being claimed by the defendant.

Again, nothing in either of these cases rejected a previous decision by the Warren Court. On the other hand, it may well be argued that the Court showed itself less willing than the Warren Court to apply the Fifth Amendment generously.

Application of the exclusionary rule

An early landmark of the Warren Court in a criminal procedure was *Mapp v. Ohio*, 6, L. Ed. 2d 1081 (1961). That case established that evidence seized illegally by state or local officers could not be used as evidence in a criminal case in the state's courts. A recurrent theme of the Burger Court has been a distrust of that exclusionary rule. The Court has for years refused to extend the exclusionary rule to any situation in which its use had not previously been established. (It had, for example, approved the use of illegally seized evidence before a grand jury although the evidence could not be used in the trial itself.) It continued that trend this year and also denied applicaton of the exclusionary rule in a forum where its use has long been customary.

The Burger Court has consistently looked to the so-called deterrent purpose of the exclusionary rule to determine the extent to which the rule should be applied. That is, it has argued that the central reason for having an exclusionary rule is to remove the incentive for a police officer to make an illegal search; if he cannot use in evidence materials he has illegally seized, he will try to avoid illegal seizures. The Court has examined each case in which a defendant has sought to apply the exclusionary rule to determine whether its application in that *instance* would serve its deterrent purpose. Using that approach, it has found few cases in which any deterrent purpose is advanced by excluding evidence other than in the principal trial of the case.

This theme was echoed in *U.S. v. Janis*, 49 L. Ed. 2d 1046 (1976), in which the Court decided that even if evidence has been illegally seized by state officers, it still may be used in a federal civil proceeding. This result seems hardly surprising in light of the Court's handling of the issue in previous cases, but it does confirm that the Court will consider nothing other than the deterrent effect in applying the exclusionary rule. But this case, like the others we have looked at, does not represent an overturning of any rule established by the Warren Court.

On the other hand, the important case of *Stone v. Powell*, 49 L. Ed. 2d 1067 (1976), does seem to indicate a reversal of direction. Although in a technical sense this case overrules no previous decision, as a practical matter it puts the brakes on a widely accepted practice that had been established without any specific court decision approving it.

Habeas corpus proceedings is a process by which a person who has been convicted in state court may, in some circumstances, seek recourse in federal courts. A general ground for a defendant to seek such recourse is that he is being held "in custody in violation of the Constitution or laws of the United States." This has widely been read to mean that if evidence has been improperly admitted into evidence against him when it had been obtained in violation of the U.S. Constitution, the defendant is entitled to his release upon establishing that fact in habeas corpus proceedings in federal court. That assumption was destroyed in this case.

The Court said that "where the state has provided an opportunity for full and fair litigation of the Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial." It explained that this decision does not mean that a defendant may not claim in habeas corpus proceedings that he has been unconstitutionally searched, but it does mean that even if the federal court finds a Fourth Amendment violation, it need not apply the exclusionary rule.

The Court based its decision on its finding that no deterrent effect would be served by excluding evidence in habeas corpus proceedings. The practical effect seems to be that there will be far less opportunity or incentive for seeking to have the federal courts second-guess state courts' judgments on whether a search was legal.

It is important to reinforce the point that this decision in no way changes the rules the law enforcement officer must follow in making a search. It means only that there is one less opportunity for a defendant to seek to have evidence excluded from consideration. An illegal search is still likely to result in exclusion at trial of any evidence obtained. A law enforcement officer can hardly afford to be less careful in observing the rules of the law of search simply because it is less likely that the federal court will review the search during habeas corpus proceedings.

Also, it seems to be true that if the defendant has, in essence, waived his right to complain about an illegal search by, for example, failing to make a pretrial motion when that pretrial motion is required by North Carolina law, he will be regarded as having had an opportunity for a full and fair hearing in state courts and thus be precluded from seeking review of that question by habeas corpus proceedings in federal court.

Douglas R. Gill

Personnel

Wage and Hour Law not applicable to state and local governments

Background. In 1938 Congress, exercising its constitutional power to regulate commerce, enacted the Fair Labor Standards Act, which set minimum wages for most private employers and required them to pay employees time-and-a-half for hours worked over 40 a week. In 1966 FLSA coverage was extended to certain employees of state and local governments, namely, employees of state hospitals, institutions, and schools. That Congress had the constitutional authority to make that extension was upheld by the Supreme Court in 1968 in *Maryland v. Wirtz*.

In 1974 Congress further extended the federal minimum wage and maximum hour provisions to include most state and local government employees. The minimum wage provision did not generate great concern since most states have their own legislation requiring about the same wage, but the overtime provisions horrified local government officials. Cities and counties provide several services, such as police and fire protection, which must operate 24 hours a day, and this means work schedules that are difficult to reconcile with the FLSA. Although the 1974 amendments allowed workweeks greater than 40 hours for police and firemen, federal regulations requiring overtime wages rather than compensatory time off would necessitate substantially greater expenditures by local governments. In response, the National League of Cities, the National Governors' Conference, 19 states, and four local governments joined in a court challenge of the extension. They won in *National League of Cities v. Usery*, 49 L.Ed. 2d 245 (1976), decided by the Supreme Court last June 24. As part of that decision, they got *Maryland v. Wirtz* reversed.

The Court's decision. Counsel for the Secretary of Labor, Mr. Usery, argued that Congress has the authority to set wages and hours of state and local employees according to Article I, Section 8, of the Constitution, which empowers it "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." A five-member majority of the Court held, however, that the commerce clause power of Congress does not extend to regulating the "integral governmental functions" of the states. The employment of workers to provide governmental services is just such a governmental function, and each state is entitled to make its own decisions about how to carry out that function free from congressional interference. Congress may not judge for the states the wages and hours needed to recruit and hold state employees. The same rule applies to local governments, which are the creations of the states.

In reaching this decision, the majority, with Justice Rehnquist as spokesman, substantially boosted the states in their struggle to hold their own with Washington. In effect, the majority recognized that the federal system requires a constitutional doctrine of intergovernmental immunity. The source of this doctrine is the Tenth Amendment provision that the "powers not delegated to the United States by the Constitution . . . are reserved to the states . . . ." That language declares that Congress cannot exercise its granted powers (such as regulation of commerce) in a manner that would impair the state' integrity or their ability to function effectively in the federal system.

One characteristic of a state's integrity or sovereignty is its power to set wages and hours for those hired to carry out governmental functions. The question for the Court was whether the power to determine wages and hours is essential to the separate and independent existence of the state. In finding that is, Rehnquist pointed out some likely consequences of compliance with FLSA: Nashville would have to pay police and firemen $938,000 per year more in overtime; California has already reduced highway patrol training hours from 2,080 to 960 because training time must be compensated under FLSA; and the budget crunch caused by FLSA requirements has prompted Inglewood, California, to curtail its program to find employment for blacks and women. Almost all cities would have to radically restructure police and firemen's workweeks. These examples show that state and local governments would be severely restricted by the FLSA in how they provide governmental services. Nor would they be able to experiment with hiring untrained temporary workers and paying them less than the minimum wage, or giving summer employment to teenagers at less than the federal minimum. In the majority view, if Congress took away the states' authority to make those decisions, there would be little left of their separate and independent existence.

The Court did not understate the effect of its holding. It was explicit that *Maryland v. Wirtz* was overruled, leaving hospital, institutional, and school employees also outside the coverage of the FLSA.

Blackmun's opinion. Although he joined in Rehnquist's majority opinion, Justice Blackmun also issued a concurring opinion that may be critical in future cases. He interprets the

majority opinion as not creating an absolute barrier against congressional interference with the states' governmental operations, but assumes that the Court is adopting a balancing test, and that when the federal interest is demonstrably greater than that of the state, such as in environmental protection, Congress has the power to act even if it interferes with a state governmental function. Blackmun's concurring opinion may make him the swing vote in future decisions on federal-state power, which makes his balancing test all the more important.

The dissents. Justice Brennan's dissenting opinion argues strongly that this decision is being made in the wrong forum—that it is a political rather than a judicial decision. In his view the Tenth Amendment does not support the majority at all. The amendment only declares the existing relationship between federal and state governments; the meaning of the amendment is that Congress may not invade state sovereignty by exercising powers *not* delegated to it in the Constitution. Congress *has* been delegated power with regard to commerce. Restraints on congressional use of that power are to be found in the political, not the judicial, process. The states are fully capable of protecting themselves in that forum; indeed, Congress is composed of elected representatives from the states. By adopting the balancing test suggested by Blackmun, the Court would be taking over a function intended for Congress.

Both Brennan and Justice Stevens wonder why setting wages and hours is so different from other state functions that, unlike other conditions of employment (tax deduction, safety conditions, etc.), it may not be touched by the federal commerce power.

Reaction. State and local government officials around the country expressed delight at the Court's decision; officials of public employees' unions were dismayed. In addition to a substantial savings in money, governors, mayors, commissioners, and managers were pleased that the Court so strongly supported the independence of local governments. What concerned the union officials, in addition to the loss of wage and hour coverage, was the apparent death blow to pending federal legislation that would require states to collectively bargain with public employees' unions. If the commerce power is not sufficient to support federal legislation on wages and hours, then it is probably not sufficient to support legislation requiring bargaining as to those wages and hours. Comments by union officials after the decision indicate that the unions will reduce the lobbying of Congress for collective bargaining legislation and concentrate instead on boosting local union membership and lobbying state legislatures for mandatory collective bargaining. That action may be necessary for self-preservation, if there is any move to repeal state collective bargaining laws passed in order to retain local control when it seemed the Congress was about to act.

Questions. Left unanswered by *National League of Cities* is just which state and local government employees are now excluded from the FLSA. According to the decision, the wage and hour provisions do not apply if the employee's job is an "integral governmental function." The majority listed several such services, including fire prevention, police protection, sanitation, public health, and parks and recreation. The reversal of the *Wirtz* decision adds hospital, institutional, and educational services to the list, but what other activities are integral governmental functions?

By refusing to overrule an earlier case, the majority made it clear that a state's operation of a railroad is not an integral governmental function and the FLSA would cover that activity. But questions still remain about such activities as, for example, a book store on a state university campus, a university-operated motel, or the Ports Authority. Are these integral governmental functions not covered by the FLSA, or do they represent governmental intrusion into private enterprise that should be treated like private employment? More specific federal legislation or case law will be required to answer these questions. However, North Carolina need not be as concerned as other states since local governments here are engaged in few activities that are not traditionally governmental.

A more serious question raised by the decision concerns the effect it will have on other federal legislation regulating state employment practices. Title VII of the Civil Rights Act of 1964 prohibits state and local governments from discriminating in employment on the basis of race, sex, or religion. The Equal Pay Act of 1963 prohibits employers covered by FLSA from paying males and females different wages for the same work. And the Age Discrimination in Employment Act of 1967 makes it unlawful for governmental employers to discriminate against people between 40 and 65 years old. May Congress regulate state employment in these ways, or is *National League of Cities* a precedent for denying the applicability of these provisions to state and local government?

The answer to that question may turn on legal subtleties. Congress enacted the FLSA amendments under its power to regulate commerce. The Court did not decide whether Congress has authority over state employment practices by other specific delegations of power in the Constitution. The Fourteenth Amendment gives Congress the "power to enforce, by appropriate legislation," the provisions of that amendment, which include equal protection. This specific enforcement provision may carry more punch than the generally stated commerce power. It can be argued that all the federal acts mentioned above were intended to insure equal protection, which would make them valid if the limitation of the commerce clause does not apply to the equal protection clause. Or, perhaps under Justice Blackmun's balancing test, the federal interest in eliminating race, sex, and age discrimination in employment is greater than its interest in minimum wages and maximum hours, and outweighs the state interest.

A case decided just a few days after *National League of Cities* supports the Congress' power to deal with job discrimination through the equal protection clause. In *Fitzpatrick v. Bitzer*, 49 L.Ed. 2d 614 (1976), the Court upheld the provisions of Title VII that allow awards of backpay against discriminating state employers and collection of attorney's fees from states found to discriminate in employment. To reach that result, the Court implicitly recognized Congress' authority under the Fourteenth Amendment to deal with discrimination in state employment.

Congress could circumvent the *National League of Cities*

decision by making compliance with the FLSA's wage and hour provisions a condition of federal contracts and grants with the states. Congress would be attempting to accomplish indirectly through exercise of its "spending clause" power what it could not achieve directly through the commerce power. Whether the Court will accept that logic is uncertain. More likely, though, political realities will keep the justices from having to face this question. The *National League of Cities* decision is very popular with state and local government officials, who probably have the clout to block any legislative circumvention of the decision.

Other effects. The most unpredictable consequence of *National League of Cities* is its impact on federal-state relations in fields other than labor law. The majority opinion is broad and states principles that could substantially limit congressional powers that affect state actions. It would be dangerous to speculate where the decision will lead. Undoubtedly *National League of Cities* will be cited in many briefs before the Court in the next few years—the result we have to wait for is the number of times it will be relied upon by the justices themselves.

Michael Crowell

Reverse discrimination

In *McDonald v. Santa Fe Trail Transportation Co.,* 49 L.Ed. 2d 493 (1976), the Supreme Court held that Title VII of the Civil Rights Act of 1964,[1] the employment antidiscrimination section of that act, protects white persons as well as persons of minority races from employment discrimination. Although the Court does not explicitly say so, the clear implication of the holding is that all persons—whatever their race, sex, national origin, or religion, and not solely persons in the traditionally protected classes (blacks, women, etc.)—receive the same protection under Title VII. Thus, men as well as women who claim they have been discriminated against because of their sex are entitled to protection under Title VII. This holding is not revolutionary; the Equal Employment Opportunity Commission has rendered similar holdings in its decisions for several years.[2] The Supreme Court's agreement with those holdings, however, is important because it resolves the issue of the applicability of Title VII to majority classes in the highest court in the judicial system. Without this clear interpretation from the Court, lower courts could reach conflicting results when the issue appears in future litigation.

McDonald clearly presented the issue of reverse discrimination in its pure form; the employer made no claim that it was attempting to remedy past discrimination against minorities, which presents a more complicated issue. Three employees of the Santa Fe Transportation Co., two white and one black, were charged with stealing part of a shipment that the employer was transporting. The employer promptly discharged the two white employees but retained the black employee. The white employees sued the employer and their local union under Title VII and other civil rights laws,[3] alleging that the employer fired them and the union acquiesced in that firing because of their race. The Supreme Court agreed, holding that if the employees could prove that the offense they committed was used as a pretext to fire them for racial reasons, they should be reinstated. The Court did not hold that persons convicted of criminal offenses against an employer may not be discharged; it only held that the standards used to discharge any employee "must be applied alike to members of all races."

The legal principle that an employer may not use an employee's record of criminal offenses as a pretext for discharging him for racial reasons had been established earlier in *McDonnell Douglas Corp. v. Green,* 411 U.S. 791 (1973). In that case the employer laid off a black civil rights activist as part of a general cut-back. The former employee, Green, then led public demonstrations protesting the employer's hiring and discharge practices. Among the demonstrations in which Green participated was a "stall-in" designed to block vehicular access to the employer's plant. As a result of his participation in the stall-in, Green was arrested. He pleaded guilty to a charge of obstructing traffic. Several months later the employer began hiring again, but refused to rehire Green allegedly because of his criminal activity. Green then sued under Title VII.

In *McDonnell Douglas* the Court held in a unanimous opinion that the employer could refuse to hire for the reason it gave, but the former employee had the right to prove that his record of criminal offenses was used as a pretext to cover racial motives. In a passage that was quoted in *McDonald*, the Court stated:

> Especially relevant to such a showing (of pretext) would be evidence that white employees involved in acts against petitioner (employer) of comparable seriousness to the "stall-in" were nevertheless retained or rehired. Petitioner may justifiably refuse to rehire one who was engaged in unlawful, disruptive acts against it, but only if this criterion is applied alike to members of all races.

Thus, once the Court established that Title VII protected whites as well as blacks, the case was an easy one. Although the employer in *McDonald* tried to distinguish *McDonnell Douglas*, the Court held that the two fact situations were so similar that the holding in *McDonnell Douglas* applied to *McDonald*. Persons outside the traditionally protected classes—individual whites or males—are now clearly entitled

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1. § U.S.C. 2000(e) et seq. The statute prohibits discrimination in employment by employers, labor unions, apprentice training programs, or employment agencies against employees, union members, or applicants on the basis of race, color, religion, sex, or national origin. 42 U.S.C. 2000(e) (2).

2. The majority opinion in *McDonald* cites several opinions. See _____U.S._____n. 7, 96 S. Ct. 2578 n. 7.

3. In addition to the holding under Title VII, the Court found that 42 U.S.C. § 1981, applied to whites as well as blacks. The statute provides that "[a]ll persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts as is enjoyed by white citizens . . . ." That holding is potentially as important as the Title VII holding in *McDonald*; it is not discussed in this article, however, because of the impact of the Court's construction of § 1981 will be in the private sector. Other statutes that prohibit similar discrimination by governments have applied to whites as well as blacks for many years.

to a remedy under Title VII if they can prove discrimination against them based on race or sex.

The holding of *McDonald* is obviously important; however, the Court did not have to decide the really tough issue—reverse discrimination in remedial situations. Lower courts are beginning to deal with this issue, and it will have to be resolved eventually by the Supreme Court.

Perhaps the first case reaching this point is *McAleer v. American Telephone and Telegraph Co.*[4] McAleer, a male employee of AT&T, brought a suit in federal district court in Washington, D.C., before Judge Gesell alleging that he was denied a promotion because of his sex. Proving that fact was a relatively easy matter because AT&T had entered into a collective bargaining agreement that would have insured McAleer's promotion because of his seniority. After that collective bargaining agreement was signed, however, AT&T, along with several unions representing its employees, entered into a consent decree with several government agencies enforcing the employment antidiscrimination laws.[5] The decree, negotiated under the supervision of Judge Higgenbotham in Philadelphia federal district court, was designed to remedy what the agencies contended was discriminatory treatment of women and minorities in hiring and promotions. To remedy the past discrimination, AT&T agreed to use certain goals and timetables for promotion of women and, if necessary, to disregard seniority to insure that the goals were met.

That AT&T passed over McAleer for promotion because of the seniority override was not disputed. AT&T argued, however, that it should not be found liable for abiding by the terms of the consent agreement. In effect AT&T was arguing that a member of a majority class may be disadvantaged if it is found necessary by a court to remedy previous employment discrimination directed against a minority class. Judge Higgenbotham agreed with this argument in an opinion that dealt with numerous objections to the seniority override raised by the unions. His basic argument is as follows: Title VII cases frequently involve subtle system-wide discrimination. In a company as large as AT&T, locating the individual victims of discrimination would be a very difficult job; to insist on locating them would either seriously reduce the effectiveness of the remedy or make it impossible. Either of those results would frustrate the congressional intent of Title VII to eliminate barriers to equal employment opportunity and, because the victims of discrimination cannot be identified, would not promote the alternative intent to restore the victims to the economic position they would have been in had they not been discriminated against. Thus, class remedies are necessary to insure equal opportunities for members of the previously disadvantaged class, even if some of the persons who receive benefits are not victims of discrimination and some of the members of the majority class are personally innocent. In addition, Judge Higgenbotham noted that the whites or males may not be entirely innocent:

> . . . [A]bsent the system-wide discrimination complained of here, more women and minorities would have achieved on their own the jobs to which the seniority override now gives them access and many of the employees represented by the [union] may well have been at least modest beneficiaries of the discrimination the Consent Decree . . . seeks to remedy.

Following this basic argument Judge Higgenbotham found that the consent decree did not constitute invalid reverse discrimination.

In *McAleer* Judge Gesell faced a sightly different issue. He had to decide not whether the overall remedial program was proper, but whether McAleer had a remedy, and if so, what kind of remedy. He found that AT&T's refusal to promote McAleer, even though required by the consent decree, violated McAleer's Title VII right to be free from discrimination based on his sex. The consent decree was no defense for AT&T because it was necessary only because AT&T had previously discriminated. Accordingly, he ordered AT&T to pay damages, citing as authority a 1976 U.S. Supreme Court decision, *Franks v. Bowman Transportation Co.*, 47 L.Ed. 2d 444 (1976).

In *Franks*, the Court held that, in constructing a remedy for a violation of Title VII, a court should grant seniority to presently qualified applicants who were discriminated against retroactive to the date they first applied for a position. Furthermore, a court should refuse to grant such seniority only if the refusal will not, if applied generally, frustrate the purpose of Title VII—to compensate the victim of unlawful employment discrimination for injuries suffered and to insure equality of employment opportunity—and then only if the judge gives reasons for his action.[6]

One of the arguments made in *Franks* for the position that retroactive seniority should not always be presumed a valid remedy was that seniority rights of the workers already hired (incumbents) are unreasonably diluted by the remedy. The majority of the Court rejected this argument, stating that:

> . . .[D]enial of seniority relief to identifiable victims of racial discrimination on the sole ground that such relief diminishes the expectations of other, arguably innocent, employees would if applied generally frustrate the central, make whole objective of Title VII . . . there is nothing in the language of Title VII, or in its legislative history to show that Congress intended generally to bar this form of relief to the victims of illegal discrimination . . . . If relief under Title VII can be denied merely because the majority group of employees, who have not suffered discrimination, will be unhappy about it, there will be little hope of correcting the wrongs to which the Act is directed.

Judge Gesell, in *McAleer*, reasoned that *Franks* validated the granting of promotional benefits to women as part of a remedy for past discrimination.[7] He noted that promotions,

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4. _____F. Supp._____, 12 EPD ¶10, 994 (D.D.C. 1976).

5. For the most recent opinion in this case, see EEOC v. American Tel. & Tel. Co., _____F. Supp._____, 12 EPD ¶11, 160 (E.D. Pa. 1976).

6. Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975), held that a judge should also grant backpay in similar circumstances unless he finds that his failure to do so, if applied generally, would not frustrate the purposes of Title VII.

7. One difference between the *Franks* and the *AT&T* cases is that in *Franks* a judge had specifically found that the employer had discriminated. In *AT&T*, no similar judicial finding was made, and *AT&T* specified in the decree that it was not admitting it had dis-

like seniority, are scarce benefits, to be granted if necessary to victims of past discrimination instead of to arguably innocent incumbent employees. Thus, Judge Gesell refused to order AT&T to promote McAleer.

Gesell used *Franks*, however, also to justify an award of damages to McAleer:

> ...Apparently common to the various opinions in *Franks* was a recognition of the need to share among the respective parties the burden of eradicating past discrimination and achieving equality of employment opportunities. In particular, it was agreed that courts should attempt to protect innocent employees by placing this burden on the wrong-doing employer whenever possible. This court, agreeing with these sentiments, sees no reason why in equitably distributing the burden among the concerned parties the onus should be shifted from the employer responsible for the discrimination to the blameless third party employee any more than is, as a practical matter, unavoidable ....

Following this reasoning, Judge Gesell held that AT&T was liable under Title VII for damages to McAleer for its failure to promote him.

This decision presupposes that whites and males are protected under Title VII, but it goes beyond the factual context of *McDonald* to apply the principle to situations in which whites are discriminated against as a result of a remedy to victims of previous discrimination. That is the question not reached in *McDonald*, and that is probably also one of the next important questions the Supreme Court must answer about Title VII. If *McAleer* survives,[8] it will mean that remedies for Title VII will become even more expensive for the employer than *Franks* contemplates. Not only must a remedy include back pay and seniority (with all its implications for vacation, salary, pension rights, etc.), but the remedy must also be structured so as to disadvantage the incumbent workers as little as possible. In addition, the incumbents may have to be compensated for the disadvantages they do suffer.

One final aspect of the *Franks* and *McAleer* cases should be noted. Both cases involved unions, and the employment relationships were governed by collective bargaining agreements. There is no collective bargaining in public employment in North Carolina.[9] Thus, no labor union can contract with a governmental unit to provide for contractual seniority rights for employees. This legal obstacle to collective bargaining suggests that these cases are likely to be applied directly only in situations in which governmental employers use seniority in their personnel ordinances or regulations. Some governmental units include seniority as one factor to be considered in making promotion or layoff decisions and some departments, in fact, rely heavily, although not exclusively, on it for these purposes. Others use seniority to determine the amount of benefits an employee receives (vacation, salary, pension rights, etc.). Thus, local units may have to grant seniority if it has any importance in their personnel system and they are found to discriminate.

If seniority appears to be an appropriate remedy, the *Franks* case also suggests several defenses an employer might use to convince a judge not to grant it in particular cases. First, seniority may be granted only to the date that Title VII applied to local governments; presumably if the applicant was discriminated against before that date, he has no remedy under Title VII. Title VII became applicable to local and state governments on March 24, 1972. Second, if the employer can prove the applicant was not at the time of application, or is not presently qualified for the position the grant of seniority would give him, the employer does not have to grant seniority. The burden of proof is on the employer. Finally, if the employer can prove that the employee, had he been hired when he applied, would not have progressed to the point at which the grant of seniority would place him, seniority can be denied. Again the burden rests on the employer. Meeting this burden will be very difficult in most cases because the employer must prove a hypothetical fact—that the employee would not have progressed had he been hired.

In spite of the fact that the specific holdings involve collective bargaining agreements, and thus may not be easily applied to North Carolina governmental employers, the cases suggest a principle that applies to governmental employers here—that any victims of discrimination, including those victimized by a remedy designed to relieve others from discrimination, are entitled to be made whole economically. The chief difference between a North Carolina government employee and an employee subject to a collective bargaining agreement is that the North Carolina employee cannot prove injury as easily as, for example, McAleer could. The collective bargaining agreement in that case supported McAleer's contention that he would have been automatically promoted. Without such agreements, subjective evaluations by employers or decisions based on other nonquantifiable criteria would have to be refuted before the reverse discrimination could be proved. Thus, the principle provides protection for North Carolina governmental employees, but meeting the evidentiary burden is more difficult for them.

James C. Drennan

Qualifications for employment

Employee residency requirements

A matter of increasing concern to local governments is the constitutional validity of residency requirements for their employees. Can a city, county, or other government employee be required, as a condition of his employment, to

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criminated. Judge Higgenbotham considered the question of whether a consent decree grants the same remedial powers as a judicial finding of discrimination and held that it does. [See EEOC v. American Tel. & Tel. Co., _____F. Supp. _____, _____ 12 FPD ¶11, 160 at pp. 5327-29 (E.D. Pa. 1976).]

8. The decision could be reversed on procedural grounds. Judge Gesell issued an order affecting a party to a related suit in Pennsylvania. In addition, McAleer was presumably represented by a union that participated in the consent decree. Both of these facts place the case in an unusual procedural posture. For these reasons (or others) it could be modified on appeal without ever reaching the merits of the argument.

9. N.C. Gen. Stat. §95-97, 100. A federal court has held that this state law prohibiting unionization of state and local government employees does not apply to the State Ports Authority, but that is the only organization exempted from the prohibition.

reside within the corporate or geographical limits of the governmental unit for which he works?

State courts and the lower federal courts have been badly divided on this issue. In *Donnelly v. City of Manchester*[1] a New Hampshire schoolteacher successfully challenged a city ordinance requiring municipal employees to be (or become) city residents unless granted a special permit. The New Hampshire Supreme Court, finding the ordinance invalid, stated:

> The right of every citizen to live where he chooses and to travel freely not only within the State but across its borders is a fundamental right which is guaranteed both by our own and the Federal Constitution.

A federal district court reached a similar conclusion in *Hanson v. United School District No. 500, Wyandotte County, Kansas*.[2] At issue in that case was a regulation requiring school employees to live within the county in which the school district was located. The plaintiffs were teachers residing outside Wyandotte County. The court, finding that the regulation violated the Fourteenth Amendment's equal protection guarantee, noted:

> In effect, the school board's regulation requires the plaintiffs to choose between their rights to live and to work where they desire. They may either live outside Wyandotte County or they may teach in the school district within the county. They may not, however, do both.

A second and apparently more numerous line of cases tend to uphold local government residency requirements. Typical of these decisions is *Wright v. City of Jackson, Mississippi*,[3] in which the city adopted an ordinance requiring all municipal employees to maintain their domicile and principal place of residence within the corporate limits of Jackson. The plaintiff employees maintained that the city had to show a substantial and compelling reason for imposing residency requirements that interfere with the fundamental constitutional right to travel. Upholding the city ordinance, the Court of Appeals for the Fifth Circuit found that no fundamental constitutional right to travel was infringed by the ordinance; thus the city was not required to justify the ordinance under the compelling-interest standard.

According to a third line of reasoning, the constitutionality of residency requirements imposed by local governments depends on the type of public employee involved. In *Nichols v. Charlotte*,[4] a fingerprint technician employed by the Charlotte Police Department brought suit to prevent enforcement of an ordinance requiring all city employees to be (or become) residents of Mecklenburg County. The plaintiff, who was a resident of York County, South Carolina, alleged that her right to interstate and intrastate travel was infringed by the Charlotte ordinance. The U.S. District Court for the Western District of North Carolina noted that federal cases have tended to uphold residency requirements for firemen and policemen because of the necessity for a quick response in the event of an emergency. However, the court found that residency in Mecklenburg County as a requirement for employment in the Records Bureau of the Police Department was both arbitrary and unnecessary, thus offending the equal protection clause of the Fourteenth Amendment to the U.S. Constitution.

The United States Supreme Court, in a per curiam opinion of March 22, 1976, came down firmly on the side of those jurisdictions that have upheld the right of a government to impose residency requirements on its employees. In *McCarthy v. Philadelphia Civil Service Commission*, 47 L. Ed. 2d 366 (1976), the Court considered the dismissal of a sixteen-year veteran of the Philadelphia Fire Department, who was terminated when he moved his permanent residence to New Jersey in violation of a municipal regulation requiring city employees to be residents of Philadelphia. Finding for Philadelphia, the Supreme Court stated:

> In this case, appellant claims a constitutional right to be employed by the City of Philadelphia while he is living elsewhere. There is no support in our cases for such claims.

The Supreme Court has thus affirmed that a city, county, or other governmental employer has the *choice* of whether or not to impose residency requirements on its employees. None of the cases cited above supports the proposition that every public employee must reside within the boundaries of the governmental unit by which he is employed.

Ben F. Loeb, Jr.

Grooming of governmental employees

The case of *Kelley v. Johnson*, 47 L.Ed. 2d 708 (1976), deals with the power of counties to regulate the appearance and hairstyles of their employees. *Kelley* upheld the right of a county to set grooming standards for hair length and other aspects of personal appearance (hair, sideburns, mustaches, beards, and wigs), but only in a limited context. This case does not give counties or other units of state and local government unlimited authority to regulate the appearance of employees.

In *Kelley*, the president of the Suffolk County New York Patrolmen's Benevolent Association sued the Suffolk County Police Commissioner seeking a declaration that the commissioner's order on hair grooming standards was unconstitutional and enjoining its enforcement. The police commissioner's order required that male personnel keep their hair neat, clean, and trimmed so that it would not touch the ears or collar, specified the shape and styling of sideburns and mustaches, and prohibited beards, goatees, and wigs except under restricted circumstances.[1]

The *Kelley* decision really represents only limited authority for counties and other governmental units to regulate the appearance of employees. It covers the ordinary situation in

1. 274 A. 2d 789 (1971).
2. 364 F. Supp. 330 (1973).
3. 506 F. 2d 900 (1975).
4. ____ F. Supp. ____ (1975).

1. The regulations were modified in the course of the litigation, but the modifications do not affect the case.

which an employee's objection to a standard is based on taste alone. In the course of litigation over the grooming order, the issues before the district court of appeals and the Supreme Court changed radically. The policemen's constitutional attack on the grooming regulations lost substance, and by the time it reached the Supreme Court no longer balanced any of the policemen's First Amendment rights or the right of privacy against the county's interest. As will be seen, these issues remain unanswered, and the Kelley case is probably readily distinguishable from the more difficult cases of conscience over grooming regulations that are likely to arise in the future.

Kelley initially sued in federal district court, on his own behalf as well as for the policemen's association. He contended that the order violated the policemen's rights of free expression under the First Amendment and guarantees of due process and equal protection under the Fourteenth Amendment, since it required them to adhere to a standard different from prevailing community standards. The district court dismissed this complaint and the policemen appealed.

The court of appeals held the dismissal improper. It found the "choice of personal appearance [to be] an ingredient of an individual's personal liberty" protected by the Fourteenth Amendment. The case was returned to district court so that the police department could show a relationship between the grooming regulations and the legitimate goals it was seeking to achieve by its regulations. The court of appeals also held that the police department had to demonstrate to the district court "a genuine public need" for the grooming regulations.

The district court then took additional testimony on whether there was "a genuine public need" for the regulations. The testimony identified discipline, *esprit de corps*, and uniformity as the purposes of the rules. After concluding that these goals were not adequate to show "a genuine public need," the district court enjoined enforcement of the regulation, and the court of appeals affirmed the injunction. The Supreme Court agreed to hear the case to decide whether the police department had to base its grooming regulations on "a genuine public need."

The Supreme Court held that police grooming regulations, like other ordinary regulations instituted by state and local governments, are entitled to be presumed valid and are enforceable until it can be shown that there is no rational connection between the regulations and their purposes. The police department had a legitimate interest in promoting discipline, *esprit de corps*, and uniformity among police officers, and the testimony heard by the district court showed that the grooming regulations were rationally related to these goals.[2] Therefore, the regulations were upheld and the court of appeals' judgment reversed.

It is important to recognize that this decision balanced only an ordinary interest, the "choice of personal appearances," against the interest of the county police department in achieving discipline, *esprit de corps*, and uniformity. *Kelley* is distinguished by the Supreme Court from earlier cases involving interests such as those protected by the Fifth Amendment[3] (e.g., protection against self-incrimination, double jeopardy, etc.). These interests, like speech, press, and religious liberty, require courts to strike a different balance.[4]

A court's decision would probably be different, for instance, in cases in which a policeman (or other governmental employee) violated dress regulations by wearing an armband or other symbol of protest[5] or by having a different hair or beard style for religious reasons.[6] An employee's refusal to salute the flag because of religious convictions is another example.[7] Employees may object to reasonable appearance regulations, but if their objections are to prevail, they must be based on more than just personal taste. For unless protected rights of expression, religion, or race are involved, governmental regulations will be upheld.[8]

Kelley holds that ordinarily county policemen and other state and local employees may be regulated in their appearance and hairstyles so long as the regulations are reasonably related to a legitimate interest of the governing unit. In so doing, the government may require a standard of its employees that it could not require of the general public.

It should be noted that the Supreme Court did not disturb a court of appeals finding that regulating the appearance of policemen could not be justified by the "para-military" character of uniformed civilian services. According to the *Kelley* decision, police regulations are not entitled to special weight; they are like other ordinary regulations of government. Thus, dress regulations of the Armed Services would not automatically be lawful for police departments. Police regulations must be independently defined and should serve reasonable departmental objectives.

L. Lynn Hogue

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2. The dissenting opinion by Justice Marshall, which is joined by Justice Brennan, examines the argument that the regulations are reasonable considering the goals of uniformity and *esprit de corps* and concludes that there is no rational relationship between the rules and the reasons for them. Marshall notes that longer hair does not make a policeman any less identifiable as a policeman. Furthermore, the fact that the police benevolent association sued to enjoin the regulation indicates that it has diminished, rather than fostered, *esprit de corps*. Marshall characterizes the right of "choice [in] personal appearance" not as an ordinary interest, but rather as a part of the constitutionally protected right of privacy. According to such a view, the police department would not be permitted to regulate appearance without *compelling* (rather than merely *any*) reasons for the regulation. The majority opinion does not examine the right of privacy issue; there is no discussion of when personal choice in hairstyle, appearance, and the like would fall within an employee's right of privacy. The views of Marshall and Brennan on the right of privacy are not generally shared by the other justices. [See Griswald v. Connecticut, 381 U.S. 479 (1965), Eisenstadt v. Baird, 405 U.S. 438 (1972), and Roe v. Wade, 410 U.S. 113 (1973).]

3. Garrity v. New Jersey, 385 U.S. 493 (1976), cited in Kelley at 716.

4. Cf. Cases upholding prohibitions of partisan political activity cited in the majority opinion; U.S. Civil Service Commission v. Letter Carriers, 413 U.S. 548 (1973) (Hatch Act); and Broadrick v. Oklahoma, 413 U.S. 601 (1973) (state "Hatch Act"), cited in Kelley, *supra*, at 714.

5. Tinker v. Des Moines School District, 393 U.S. 503 (1969).

6. The First Amendment issues in the original suit were not before the Supreme Court, 718 n. 2 (Marshall, J., dissenting); see also Powell, J., concurring, 717.

7. West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943).

8. Even regulations affecting such areas as expression, religion, or race could be upheld if, when subjected to strict scrutiny by the courts, they meet a compelling governmental interest.

Employment testing

Public officials have three new guides to help them through the briarpatch of employment testing as a result of the U.S. Supreme Court's decision in *Washington v. Davis*, 48 L.Ed. 2d 597 (1976). Since each guide is new and possibly at variance with previous decisions, officials may be somewhat confused and uncertain about the application of the decision. The decision provides that (1) an intent to discriminate is necessary to a finding of discrimination under the equal protection component of the due process clause of the Fifth Amendment, (2) public employee tests now may be validated by a finding of positive correlation between test scores and success in job-related training programs, and (3) success in an affirmative action program has legal significance.

Washington v. Davis was initiated by two Negro applicants who were rejected by the District of Columbia police department because they failed a verbal skills test required of all applicants. They brought suit in 1970 alleging that the recruiting procedures—including the U.S. Civil Service Commission Test 21, which was designed to test verbal ability, vocabulary, reading, and comprehension—was racially discriminatory and violated the due process clause of the Fifth Amendment and Section 1981, Chapter 42 of the U.S. Code. The case was not brought under Title VII of the Equal Employment Opportunity Act since the provisions of that act were not extended to federal, state, and local employees until 1972—two years after the case originated.

The plaintiffs challenged only the test on the grounds that (1) the percentage of blacks on the force was disproportionate to the percentage of blacks in the metropolitan population, (2) a higher percentage of blacks failed the test than whites, and (3) the test had not been validated as predictive of job performance ability.

In the following year, the U.S. Supreme Court decided *Griggs v. Duke Power*,[1] a private-sector case interpreting Title VII of the Equal Employment Opportunity Act and the EEOC guidelines on employment testing procedures. In *Griggs* the Court approved the EEOC guidelines and held: (1) employment selection devices, although neutral on their face, are unlawful if they operate to perpetuate the status quo or the effect of past discrimination; (2) it need not be proved that the defendant intended to discriminate; (3) statistics alone may establish a prima facie case of discrimination; and (4) if an adverse racial impact is established, the burden is on the governmental unit to show that each requirement for employment is specifically related to job performance.

In March 1972, the Employment Opportunity Act of 1972 was enacted. This act extended the Civil Rights Act of 1964 to all federal, state, and local employees. In July 1972, the federal district court decided *Davis v. Washington*. The district court followed the *Griggs* decision in finding that the statistical evidence was sufficient to shift the burden of proving the job-related validity of the test to the defendant police department. But the district court varied from *Griggs* in ruling that Test 21 was a valid job-related screening procedure for police applicants for the following reasons: (1) 44 per cent of new police recruits were black, a figure proportionate to the blacks on the total force and equal to the number of 20- to 29-year-old blacks in the recruiting area; (2) the police department had sought to recruit blacks, many of whom passed the test but failed to report for duty; and (3) the test was a useful indicator of training school performance and was not designed to, and did not, discriminate against otherwise qualified blacks.

Associate Justice Lewis R. Powell

The plaintiffs appealed. The court of appeals reversed and followed the reasoning in the *Griggs* decision, which held that Title VII of the Civil Rights Act of 1964, as amended, prohibits the use of tests that exclude members of minority groups, unless the employer demonstrates that the procedures are substantially related to job performance. The appeals court stated that the lack of discriminatory intent in administering the test was irrelevant. It held that the critical fact was that four times as many blacks as whites failed the test and that such a disproportionate impact sufficed to establish a constitutional violation, absent any proof that the test adequately measured job performance. The District of Columbia appealed the decision.

In 1975 the Supreme Court decided a second employment testing case, *Albemarle Paper Co. v. Moody*.[2] In that case the Court found that the absence of bad faith is not a sufficient reason for the district court to deny back pay to employees who have suffered discrimination. The Court also reaffirmed *Griggs* and the EEOC guidelines in requiring tests to be professionally validated and shown to be predictive of

1. 401 U.S. 424 (1971).

2. 422 U.S. 405.

important elements of work behavior relevant to the job for which the applicant is tested.

Of the scores of employment testing cases brought in federal courts since Title VII of the Civil Rights Act of 1964 was passed, *Davis v. Washington* is the first public employment testing case to be decided by the Supreme Court and the third major testing case since 1964. Justice White wrote the opinion reversing the court of appeals and upholding the district court decision. He was joined by Chief Justice Burger, and Justices Blackmun, Powell, Rehnquist, and Stevens and by Justice Stewart, who joined in part.

The *Davis* decision is significant in several respects. First, the Court distinguished between constitutional cases brought under the Fifth and Fourteenth amendments and Title VII litigation. The Court held that the court of appeals erred when it applied Title VII standards to a constitutional issue. The Supreme Court held, for example, that a disproportionate racial impact was sufficient to establish discrimination in *Griggs* but insufficient to establish discrimination under the due process clause of the Fifth Amendment. To establish discrimination under the latter, racially discriminatory intent must be shown.

Second, the Court agreed with the district court "that a positive relationship between the test and training course performance was sufficient to validate . . . wholly aside from its possible relationship to actual performance as a police officer." In emphasis, the Court added, "Nor is the conclusion foreclosed by either *Griggs* or *Albemarle Paper Co. v. Moody*, and it seems to us the much more sensible construction of the job relatedness requirement." It should be noted that the dissenting opinion saw the majority opinion as inconsistent with Title VII and the *Griggs* and *Albemarle* decisions.

Third, despite the adverse impact of Test 21, the Court approved of the police department's efforts to upgrade the communications skills of officers:

> It is untenable that the Constitution prevents the government from seeking modestly to upgrade the communicative abilities of its employees rather than to be satisfied with some lower level of competence, particularly where the job requires special abilities to communicate orally and in writing.

Fourth, the Court held that the police department's active efforts to recruit black officers, the changing racial composition of the recruit classes and of the force in general, and the relationship of the test to the training program negated any inference that the department discriminated on the basis of race or that "a police officer qualifies on the color of his skin rather than ability."

Although the question of whether the test actually violated Title VII guidelines was not before the Court, all of the majority except Justice Stevens were willing to rule that the test did not violate regulations promulgated by the U.S. Civil Service Commission requiring merit selection and the use of valid testing procedures.

Justice Brennan, joined in a dissenting opinion by Justice Marshall, objected to the implication that Test 21 met the requirements of Civil Service rules similar to Title VII guidelines, since neither the rules nor the regulations were before the Court in this case. He followed the court of appeals' reasoning that Test 21 had not been differentially validated for blacks and that a test validated with success in completing the police training program did not meet the job-related requirements of *Griggs* and *Albemarle Paper Co.* The dissenting opinion would have affirmed the court of appeals' judgment.

What are the implications of the *Davis v. Washington* decision? The long-run implications will depend on whether this was an accident of timing or whether the Supreme Court holds to this new "more sensible construction" when the Constitution is not involved and the next Title VII case is decided. The Supreme Court may have softened the *Griggs* and *Albemarle Paper Co.* decisions as to the job-relatedness of tests. If it did, the issue of job-relatedness may not be the purely scientific question that psychologists and EEOC guidelines have suggested.

The Court may have acknowledged that the federal government and certainly state and local governments do not have the time, money, and technical personnel to validate each step in the selection and promotion process, as EEOC guidelines now require. By holding that if the entire selection process does not discriminate, each part is not subject to challenge, the Supreme Court may be directing employers to get on with the job of building a competent, representative work force through actively recruiting and training minorities who have been the victims of past discrimination.

The Supreme Court apparently has said, "By their works we shall judge them." For the present, the way through the briarpatch of employment testing may be by showing results in hiring minorities rather than proving mastery of scientific testing technique and procedure.

Donald B. Hayman

Union dues checkoff

Local 660 of the International Association of Fire Fighters represents 351 of the 543 Charlotte city firemen. Since 1969 the union and many of the firemen have repeatedly requested that the city withold union dues from the paychecks of those firemen who agreed to a checkoff. Charlotte refused each request, and in 1974 the union and certain individual firemen filed suit, alleging that these refusals violated the equal protection clause of the Fourteenth Amendment to the United States Constitution.

The origin of this controversy was a 1959 act of the North Carolina General Assembly that: (1) prohibited union membership by public employees (G.S. 95-97); and (2) provided that any collective bargaining agreement between a governmental unit and its employees was against public policy and therefore void (G.S. 95-98). The constitutionality of this act was challenged in the United States District Court for the Western District of North Carolina. A three-judge panel found the prohibition against union membership to be unconstitutional, but upheld provisions voiding collective bargaining agreements between governmental units and labor

unions.[1] Following this decision, the North Carolina Attorney General ruled that a checkoff agreement was a segment or function of collective bargaining, and therefore a city had no authority to "deduct union dues from the wages of its employees for the benefit of a local labor union . . . composed of its employees."[2]

The Attorney General's interpretation was eventually challenged by the Charlotte Firemen's Union and several individual firemen in *Local 660, International Association of Firefighters v. City of Charlotte*, 48 L. Ed. 2d 636 (1976). This suit was filed when the firemen found that they could not obtain a group life insurance plan unless they had a dues checkoff arrangement with the city. The plaintiffs argued that sums were withheld from the paychecks of various city employees for a number of items including medical insurance, U.S. Savings Bonds, Firemen's Benefit Fund, Credit Union, and a deferred compensation program, and there was no reason why union dues could not be withheld in a like manner. The federal district court dismissed the cause with respect to the union, but ruled in favor of the individual firemen. The city appealed and the court of appeals, affirming the lower court decision, stated:

> Defendants may hereafter adopt reasonable, objective standards for determining which requests for witholding will be granted and which denied. If, on the basis of a rational classification made under such standards, defendants determine that such withholding requests as are involved in this case should be denied, the defendants may move to reopen the case in the district court.

The United States Supreme Court granted certiorari to consider whether the city's refusal to withhold union dues violated the Constitution's equal protection clause. The Court observed at the outset that the city's practice only had to meet a relaxed standard of "reasonableness" to survive constitutional scrutiny.

Charlotte presented three justifications for refusing the dues checkoff request:

(1) North Carolina law prohibits collective bargaining contracts, and a dues checkoff arrangement would in effect be such a contract;

(2) The United States Congress might in the near future mandate collective bargaining for state and local governments, and dues checkoff would be an appropriate matter for negotiation at that time;

(3) The city's practice of withholding only for purposes that could theoretically benefit all city or departmental employees is a legitimate method of avoiding the burden of withholding money for just any employee for just any purpose.

The Court declined to consider Charlotte's first two propositions but found that the third was legally sufficient. The lower court decision was reversed.

Charlotte prevailed apparently because of its long-standing practice of withholding only for taxes, retirement programs, savings programs, or charitable contributions—programs in which all city employees, or all employees of a given department, could at least theoretically participate. The district court and the court of appeals did not find that this classification provided a reasonable basis for rejecting the dues checkoff request. The Supreme Court disagreed, holding that the distinction drawn by Charlotte was not so arbitrary or devoid of reason as to violate the equal protection clause of the Fourteenth Amendment to the United States Constitution.

Ben F. Loeb, Jr.

1. Atkins v. City of Charlotte, 296 F. Supp. 1068 (1969).
2. 40 N.C.A.G. Rep. 591 (1969).

Retirement and age discrimination

Robert Murgia was an officer in the Uniformed Branch of the Massachusetts State Police. Under Massachusetts law he was forced to retire at age 50, despite his excellent health. Murgia, seeking to enjoin enforcement of the retirement, took his case to federal court, claiming he was denied equal protection in violation of the Fourteenth Amendment. A three-judge court granted relief, but the Supreme Court reversed in a per curiam decision, *Massachusetts Board of Retirement v. Murgia*, 49 L.Ed. 2d 520 (1976). The Court did not find the mandatory retirement scheme to be a denial of equal protection because it is rationally related to the legitimate state interest in keeping only physically fit officers on its police force. At the heart of the decision, the justices determined that the Court does not have to provide the same kind of special protection for the elderly that it has given to racial minorities.

Standard of review. The key to the Court's decision was the standard by which Murgia's claim was judged. In equal protection cases, the Court gives "strict scrutiny" to a state's classification scheme if the discrimination concerns exercise of a fundamental right or if it operates to the peculiar disadvantage of a "suspect class" which needs particular protection. If neither of these is true, the Court only determines whether the classification scheme has a rational connection with a legitimate state interest. In simpler terms, the Court's standards for reviewing equal protection claims mean that if the state is going to treat people differently with respect to voting, jury duty, or other fundamentally important activities, the state has a heavy burden to justify its differentiation—likewise, if the basis for treating people differently, in whatever activity, is their race or national origin. Otherwise, the state must only show a "rational basis" for the classification.

In Murgia's case the Court decided that it should only determine whether there was a rational basis for mandatory retirement at 50. Strict scrutiny was not required since the interest at stake, governmental employment, is not a fundamental right, and because age is not a suspect class. The majority recognized that, though life is often difficult for the elderly, they are not really a class that has been "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." The Court's failure to provide extra protection for the elderly was the greatest disappointment in the decision for those concerned with society's neglect of the aged.

Rational basis for retirement. Once the Court decided not to use strict scrutiny, there was little to do but uphold the mandatory retirement. Evidence showed that physical fitness is particularly important to the performance of a police officer's job, and that physical ability generally deteriorates with age. Although if they had been in the legislature the members of the Court may not have voted for the cut-off age of 50, they could not say that the regulation was completely irrational. (The Massachusetts legislature had carefully considered the question and may have been persuaded that after age 50 an increasing number of physical disabilities do not show up in a routine physical examination.) The Court could not say that so many officers over age 50 would actually be physically fit that using a cut-off age of 50 is wholly unrelated to the legislature's objective.

Marshall's dissent. The only dissent came from Justice Marshall. (Stevens did not participate in the decision.) He used the occasion to renew his objection to the Court's way of deciding equal protection cases. He does not believe the difference between cases that deserve "strict scrutiny" and those that need only "rational basis" review is as clear as the majority thinks. Although precedent supports the decision that governmental employment is not a fundamental right, this is a decision that deserves careful review (though short of strict scrutiny). Although the elderly as a class may not need the same protection as racial minorities, losing one's job at age 50 can be devastating. Trying to find a new job at this age can be economically, physically, and emotionally damaging. A more sophisticated review of equal protection claims—rather than the simple rational basis-strict scrutiny distinction—might result in protection against mandatory retirement.

Marshall also argues that even if the rational basis test is used, the facts support Murgia's claim. Although physical fitness is important to the police officer's job, no evidence shows that a person automatically becomes unfit at age 50. In fact, police officers in Massachusetts must pass physical examinations every year past age 40 or they will be dismissed. Thus, most officers of age 50 are quite fit for the job. According to Marshall, mandatory retirement at that age is not closely tailored to the state's legitimate need to keep only fit officers on the force—it forces the retirement of too many people who are still fit for the job. The over-inclusiveness of the Massachusetts statute is demonstrated by the availability of a reasonable alternative, which would be to continue giving physical examinations after 50 and retiring those who cannot pass. (He cites evidence that physical examinations do not lose the capacity to predict a person's fitness until he is at least 60.)

Other mandatory retirements. Marshall seems justified in his observation that the *Murgia* decision does not imply that all mandatory retirement laws are constitutional. In this case, the state had a clear interest in having employees in excellent physical condition. For most other jobs, the state has no such interest. Instead, it would have to show that mental ability or manual dexterity, or whatever faculty is required for a job, deteriorates with age. Marshall obviously does not think such evidence can be produced unless the retirement age is considerably higher than the 50 used by Massachusetts for its state police.

Michael Crowell

Dismissal

Political firings

Political firings, although infrequent in North Carolina, have occurred periodically in state and local government for many years. Candidates for governor, county commissioner, sheriff, register of deeds, and mayor have campaigned on platforms promising to open the doors and sweep the incumbents out. After winning election most candidates have had second thoughts and have quickly recognized the need for continuity and administrative experience. But some officials have echoed Andrew Jackson's "to the victor belongs the spoils" and fired public officials both high and low.

Successful candidates who have promised to fire incumbents and hire their political friends may find that the U.S. Supreme Court has changed the rules of the game. In *Elrod v. Burns*, 49 L. Ed. 2d 547 (1976), the Court in a 5 to 3 decision ruled that the newly elected Democrat sheriff of Cook County, Illinois, violated the First and Fourteenth amendment rights of five non-civil service employees. A bailiff, a security guard, a process server, a chief deputy, and a fifth employee were discharged or threatened with discharge because they neither supported nor were members of the Democrat Party and they failed to obtain the sponsorship of one of its leaders.

The case arose in December, 1970, when Elrod, a Democrat, replaced a Republican sheriff and dismissed or threatened to dismiss several Republican employees of his predecessor. The employees brought suit in federal district court, but the complaint was dismissed. The court of appeals reversed and remanded the case with instructions to grant the employees injunctive relief. The case was then accepted by the Supreme Court on certiorari.

Five of the eight justices participating agreed on one thing and one thing only. They agreed that a nonpolicy-making, nonconfidential government employee cannot be discharged on the sole grounds of his political beliefs from a job that he is satisfactorily performing.

Justice Brennan, joined by two justices, wrote the opinion of the Court. Two other justices concurred in the decision but wrote a separate opinion, and three justices dissented. Justice Brennan found that the practice of patronage placed a restraint on (1) an employee's freedom of belief, (2) his freedom of association, and (3) the free functioning of the electoral process. He stated that an employee required to pledge allegiance, work for, or contribute to another party in order to keep his job, suffers coercion. The same employee who maintains his party affiliation or works for or contributes to his party at the risk of losing his job has his freedom of association limited. Further, Justice Brennan found that the free functioning of the electoral process is interfered with if an employer has the power to command political

support from employees and applicants and the power to deter such support from competing political interests. These freedoms are protected by the First and Fourteenth amendments.

Sheriff Elrod and Cook County put forth three arguments. First, patronage was justified because employees of an opposing party will not be motivated to work effectively and may subvert the administration's efforts to govern effectively. Second, patronage is needed to foster political loyalty of employees to the end that policies sanctioned by the electorate are carried out. Third, partisan politics is central to the democratic process.

Justice Brennan rejected all three arguments. To the first point, he doubted that mere difference of political persuasion motivates poor performance. He suggested that to discharge employees for cause such as insubordination or poor job performance when those bases in fact exist is a superior method for insuring government effectiveness to political dismissal.

To the second point, Justice Brennan doubted that nonpolicy-making individuals will thwart party goals as long as policy-making employees are subject to the sheriff's direction and dismissal. Justice Brennan admitted that it is difficult to draw a clear line between policy-making and nonpolicy-making positions. As a guide, he suggested that policy-making employees are those who act as advisers, who formulate plans for implementing broad goals, or who have ill-defined responsibilities.

To the third point, Justice Brennan doubted that eliminating patronage practices or patronage dismissals will end party politics. He suggested that the gain to representative government, if any, would be insufficient to justify its sacrifice of First Amendment rights.

Associate Justice William H. Rehnquist

Justice Brennan acknowledged that the First Amendment protections are not absolute and restraints are permitted for appropriate reasons. But a significant impairment of First Amendment rights must survive exacting scrutiny: (1) The interest advanced must be paramount; (2) the interest must be governmental rather than partisan; and (3) the benefit gained must outweigh the loss of constitutionally protected rights. Justice Brennan held that the dismissals did not meet these requirements. He noted that a person has no right to a government benefit, such as public employment, and the government can deny the benefit for any number of reasons, but the government may not deny the benefit to an employee for exercising his First Amendment rights. The freedom of belief and association that the county may not restrict directly may not be restricted indirectly.

Chief Justice Burger dissented, saying that the discharge of the sheriff's employees was not open to judicial scrutiny. He stated that the Illinois legislature had acted within its authority to permit half of the sheriff's staff to be tenured, career personnel subject to civil service and the balance to be appointed by sheriff.

In a second dissenting opinion, Justice Powell, joined by Chief Justice Burger and Justice Rehnquist, found that (1) patronage broadened the base of political participation and strengthened political parties; (2) employees who had benefited from their political beliefs and activities may not challenge the system when it becomes their turn to be replaced; (3) state or local government may condition employment on political affiliation and on the political fortunes of the hiring incumbent; and (4) patronage hiring practices serve sufficiently important interests, including some interests sought to be advanced by the First Amendment, to justify a tolerable intrusion on the First Amendment interests of employees or potential employees.

What will be the effect of *Elrod v. Burns* on the firing practices of North Carolina elected officials? Four results are predictable. (1) Elected officials are now on notice that the federal courts are open to political dismissal cases. (2) Discharged employees and their attorneys are reminded that the courts are receptive to political dismissal cases involving violations of the First and Fourteenth amendments. (3) More employee dismissal cases will be brought in federal courts. (4) Employers must document the dismissal of employees for failure in performance of duties or failure in personal conduct in greater detail if the firings are to stand judicial scrutiny.

The North Carolina General Assembly has enacted two general statutes regulating political activity. Since 1931, North Carolina election laws (G.S. 163-274) have provided that it is a misdemeanor

> (6) For any person, directly or indirectly, to discharge or threaten to discharge from employment, or otherwise intimidate or oppose any legally qualified voter on account of any vote such voter may cast or consider or intend to cast, or not to cast, or which he may have failed to cast;
>
> . . . .

> (9) For any person to give or promise, in return for political support or influence, any political appointment or support for political office;
>
> . . . .

Many North Carolina elected public officials and employees have been ignorant of this statute. Certainly the sheriff of Mecklenburg County was in 1974. In 1975 he was convicted of violating it, and discharged employees were re-employed with back pay.

Since 1967, G.S. 126-13 has provided that no state employee subject to the Personnel Act or temporary state employee shall:

> (1) Take an active part in managing a campaign, or campaign for political office or otherwise engage in political activity while on duty or within any period of time during which he is expected to perform services for which he receives compensation from the State;
>
> (2) Otherwise use the authority of his position, or utilize State funds, supplies or vehicles to secure support for or oppose any candidate, party, or issue in a partisan election involving candidates for office or party nomination, or affect the results thereof.

G.S. 126-14 provides:

> No State employee or official shall use any promise of personal preferential treatment or threat of loss to encourage or coerce any State employee subject to the Personnel Act or temporary State employees to support or contribute to any political issue, candidate, or party.

Failure to comply with either of these provisions is grounds for disciplinary action. For deliberate or repeated violation, this action may include dismissal or removal from office.

North Carolina has had one recent political dismissal that was decided in federal court on a First Amendment right question. In 1975 the Fourth Circuit Court of Appeals in *O'Neal v. Gresham*[1] decided a case involving a temporary employee of the Durham County register of deeds. The court held that the plaintiff's constitutional right to be free from coercion or intimidation in exercising her right to vote was violated when she was discharged by the register of deeds for refusing to disclose whom she had voted for in a recent election. The case was remanded to the federal district court for a finding of fact as to whether the employee had been offered employment in the tax office, whether there was a valid reason for the plaintiff's refusing such offer, if made; and whether she had made a reasonable effort to mitigate her damages by seeking other employment. The plaintiff was denied attorneys' fees.

Only time will tell the full impact of *Elrod v. Burns*. Will the newly protected employees subvert the administrative efforts of elected officials or will efficiency and program effectiveness be enhanced? Will party politics suffer or will career service and professionalism be enhanced? Will supervisors find that *Elrod v. Burns* has more than offset *Bishop v. Wood* (see discussion of following case) and result in making it more difficult to dismiss the unsatisfactory employee who may obtain judicial review on racial, sexual, religious, age, and now political discrimination charges? Even though the rules of the game may not have been changed, some state and local officials and employees may find that the greater publicity will require a new score card.

Donald B. Hayman

1. 519 F. 2d 803.

Dismissal of public employees without a hearing

In *Bishop v. Wood*, 48 L. Ed. 2d 684 (1976), the United States Supreme Court upheld a city's right to fire a policeman who serves at the will and pleasure of the city without a hearing. This right exists even when the reasons for the discharge prove false. In the 5-4 decision, the Court made it clear that federal courts are not "the appropriate forum in which to review the multitude of [nontenure] personnel decisions that are made daily by public agencies." The Court went on to say that

> [We] must accept the harsh fact that numerous individual mistakes are inevitably made in the day-to-day administration of our affairs. The United States Constitution cannot feasibly be construed to require federal judicial review for each error. In the absence of any claim that the public employer was motivated by a desire to curtail or to penalize the exercise of an employee's constitutionally protected rights, we must presume that official action was regular and, if erroneous, can best be corrected in other ways. The Due Process Clause of the Fourteenth Amendment is not a guarantee against incorrect or ill-advised personnel decisions.

The facts in this case are as follows: Bishop, a policeman for the city of Marion, North Carolina, was fired by the city manager on the police chief's recommendation without a hearing to determine whether the cause justified his discharge. When he was fired, Bishop was a "permanent employee" under the city's personnel ordinance; he had completed six months as a probationary policeman and almost 2½ years as a "permanent employee." The city's ordinance provides that a permanent employee may be discharged for specified reasons and that if he requests it, he shall be given written notice that sets forth these reasons and the effective date of the discharge.[1]

Bishop sued the city in federal district court, alleging that he had tenure in his position and therefore the city must prove at a hearing one of the reasons for discharge listed in the ordinance, e.g., negligence, inefficiency, or unfitness to perform his job. In order to prevail, Bishop had to prove that

1. The ordinance provided: "A permanent employee whose work is not satisfactory over a period of time shall be notified in what way his work is deficient and what he must do if his work is to be satisfactory. If a permanent employee fails to perform work up to the standard of the classification held, or continues to be negligent, inefficient, or unfit to perform his duties, he may be dismissed by the City Manager. Any discharged employee shall be given written notice of his discharge setting forth the effective date and reasons for his discharge if he shall request such a notice."

he had either a constitutionally protected property right or a liberty right. He failed to satisfy the Court that he had either.

Bishop's "property right" argument was based on the city ordinance's provision that a permanent employee may be discharged for failure to perform work up to the standard of his classification or for negligence, inefficiency, or unfitness to perform his duties. Bishop contended that the ordinance should be interpreted to prohibit discharge for any other reason and therefore to confer tenure on all employees who complete the probationary period. He also maintained that he had de facto tenure because his "permanent" classification and length of service (33 months) gave him sufficient expectation of continued employment.[2]

The Court rejected both of these property right arguments. It noted that the North Carolina Supreme Court in *Still v. Lance*[3] had held that an enforceable expectation of continued public employment can exist in North Carolina only if the employer, by statute or contract, has actually granted some form of guarantee. Although the Marion ordinance can be read as conferring such a guarantee, the Court accepted the trial court's interpretation that it did not. The district court had found and the court of appeals affirmed, en banc in an equally divided vote, that the ordinance had merely listed representative reasons for discharge and provided certain specified procedures as conditions for an employee's removal. Thus Bishop held his position as a policeman at the "will and pleasure of the city"; he had no protected property right in the job that prohibited the city from firing him without proving cause.

As for Bishop's second claim—that he was denied a protected liberty right—the Court held that the "good name, reputation, honor, or integrity" of a discharged employee is not impaired if the reasons were communicated orally in private and later, by Bishop's request, in writing. Citing *Board of Regents v. Roth*,[4] the Court held that the discharge of an employee who serves at the pleasure of his employer (or nonrenewal of an employee serving a specified term) does not foreclose future employment opportunities to such an extent that the employee is deprived of a protected liberty. The discharge or nonrenewal will probably make the employee less attractive to other employers, who may contact the former employer about the discharge. However, as long as the employer does not make the reasons for the discharge public, whether or not the reasons are wrong, the Court holds that no liberty interest has been denied.

The danger with this decision is that it almost certainly will be read too broadly and could result in awards of backpay to governmental employees who were fired in an unconstitutional manner. A slight variation in the wording of the ordinance would have created a clear tenure right in Bishop's job and a different result in the case.[5] Even with this ordinance,

Associate Justice John P. Stevens

four of the five justices thought the language permitted dismissal only "for cause." The majority opinion acknowledged that the ordinance "may fairly be read as conferring such a guarantee." The majority, however, were willing to defer to the district court judge who interpreted the ordinance to provide only a representative list of reasons why an employee may be dismissed and not to prevent an employee's discharge for other reasons or for no reason.

The records of several other federal district court judges in North Carolina strongly suggest that they would have interpreted the Marion ordinance to find that Bishop could be fired only for cause proved by the city. Governmental employers are therefore well advised to insure that their personnel ordinances make it clear which employees serve at the "will and pleasure" of the employer and which do not. If an employee is labeled "permanent," the nature of the permanence should be clear. For example, if the permanence is for a specified term (term tenure), the employee must understand the nature of his protection for that term. The reasons and procedures for discharge during that term and the reappointment procedures should be clearly set out in the personnel ordinance and/or the employment contract. If "permanence" means until retirement (permanent tenure), as Bishop and four justices thought, the employee's right not to be discharged until retirement except for proven cause should be explicit in the unit's employment document.

Robert E. Phay

2. *See* Perry v. Sindermann, 408 U.S. 593 (1972), in which the Supreme Court ruled that the expectation of continued employment based on the college regulations created de facto tenure, which was a protected property right that could not be denied without proper reasons and a hearing.

3. 275 N.C. 254, 182 S.E.2d 403 (1971).

4. 408 U.S. 564 (1972).

5. *See* Arnett v. Kennedy, 416 U.S. 134 (1974), in which the Court concluded that federal regulations permitted nonprobationary employees to be removed only for cause and thus such employees had a property interest that was entitled to the protections of constitutional due process.

Property Taxation

In a case decided on January 14, 1976, the United States Supreme Court broadened the authority of North Carolina cities and counties to tax imported property. In *Michelin Tire Corporation v. Wages*, 46 L.Ed.2d 495(1976),[1] the Court overruled *Low v. Austin*[2] and held that state and local governments may levy nondiscriminatory ad valorem property taxes on imported property, even though the property remains in the containers in which it was imported.

In discussing *Michelin Tire* and its effects on property taxation in North Carolina, it will be helpful to review briefly the state of the law at the time the case was decided. Article I, section 10(2), of the United States Constitution prohibits states from "laying any imposts or duties" on imported property. In *Brown v. Maryland*,[3] which dealt with a license tax on the importation and sale of property, the Supreme Court held that such a license tax was in substance a tax on the property itself and that imported property could not be taxed until it had lost its status as an import by being commingled with the common property of the state. One of the evidentiary tests promulgated by the Court for determining the extent of immunity from taxation was that the property could not be taxed so long as it remained in the "original package" in which it had been imported. In *Low v. Austin* the Court expanded the holding of *Brown v. Maryland* and ruled that a local government could not levy a nondiscriminatory property tax on imported property still in the original package of importation, even though the property was available for sale—the purpose for which it had been imported. Once imported property was sold, it became taxable even though still in the original package.[4]

The property taxed in *Michelin Tire Corporation v. Wages* consisted of tires stored in Michelin's warehouse in Gwinnett County, Georgia. About 25 per cent of the tires had been imported over land from Nova Scotia in trailers; the remainder had been imported from France in sea vans. All of the tires were shipped in bulk. When the tires arrived at the warehouse, they were removed from the vans and trailers, sorted by size and style, and stacked on pallets; they were then ready for sale and distribution to Michelin's dealers in the Southeast. The county levied its ad valorem property tax on the tires in the warehouse on tax day (January 1). The Georgia Supreme Court held that the tires were taxable on the ground that they had been commingled with other tires imported for purposes of sale and were available for sale, and had therefore lost their status as imports.[5]

The Supreme Court held that the tires were indeed taxable, but it reached over the precise issue presented (whether the sorting and commingling of the tires made them taxable) and used the case as a vehicle to overrule *Low v. Austin* and thereby broaden the power of state and local governments to subject imported property to a property tax. The Court stated that *Low v. Austin* had erroneously interpreted *Brown v. Maryland* and had expanded the scope of immunity from taxation beyond what the Framers of Article I, section 10(2) had intended. The Court emphasized in its opinion that for imported property to be taxable under the new rule, the journey of importation must have ended and the tax levied on the property must be a nondiscriminatory ad valorem property tax; that is, the tax must not in any way discriminate against imported property or single such property out for taxation to the exclusion of domestic property.

The North Carolina ad valorem property tax is nondiscriminatory; it is a general tax on all nonexempt and nonclassified property having a tax situs in the state, and it does not impose a special tax on imported property. North Carolina does, however, exclude certain imported property from the tax base. G.S. 105-275(2) excludes from the tax base, for the first twelve months of storage, property that has been imported through a North Carolina seaport terminal and is stored at that terminal. To determine the taxability of imported property, a North Carolina tax supervisor must first ask whether the importation journey has ended. If the property is stored in a North Carolina seaport terminal, the tax supervisor must also ask: (1) Was the property imported through that terminal; and (2) if so, has it been stored there for more than 12 months as of the listing date.

No amendment to the Machinery Act is necessary to render taxable imported property that is not classified by G.S. 105-275(2). This is already accomplished by G.S. 105-274, which subjects to taxation all property that is not exempted or excluded.

William A. Campbell

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1. For a more detailed discussion of this case, see Property Tax Bulletin No. 45 (Institute of Government, 1976).
2. 80 U.S. (12 Wall.) 29 (1872).
3. 25 U.S. (12 Wheat.) 419 (1827).
4. See, *Waring v. The Mayor*, 75 U.S. (8 Wall.) 110 (1868).
5. 233 Ga. 712, 214 S.E.2d 349 (1975).

Schools

The United States Supreme Court decided numerous cases during its 1975-76 term that are of interest to public school officials. Three of these are discussed below: *Roemer v. Board of Public Works*, 49 L.Ed.2d 179 (1976); *Runyon v. McCrary*, 49 L.Ed.2d 415 (1976); and *Pasadena City Board of Education v. Spangler*, 49 L.Ed.2d 599 (1976).

Several other decisions that have implications for public school officials and employers are discussed in other articles in this issue. As a result of the Court's ruling that Congress may not apply the Fair Labor Standards Act to state and local governments (*National League of Cities v. Usery*, p. 36), teacher unionization seems further away in North Carolina now than at any time in the past several years. The movement toward public employee unionization received a further blow from *City of Charlotte v. Firefighters Local 660* (p. 44), which held that the city's refusal to withhold union dues from pay checks does not deny equal protection to union members. *Washington v. Davis* (p. 43) upheld an employment test used by the District of Columbia police department. The Court's finding that the test does not violate due process or Title VII of the 1964 Civil Rights Act, even though it disproportionately eliminates minorities, sheds new light on the criteria that state and local governments may use in teacher certification and other employment. Another case, involving the dismissal of a Charlotte policeman *Bishop v. Wood*, p. 48), appears to mark the Court's partial retreat from supervising governmental dismissal practices. Finally, the Court upheld Philadelphia's requirement that public employees reside within the city limits (*McCarthy v. Philadelphia Civil Service*, p. 41); this decision could lead to residency requirements for public school employees. Indeed, within weeks after the decision, a number of major cities—including New York, Detroit, and Chicago—had begun to study such regulations.

Two other actions of the Court should be noted. First, after hearing arguments in the case of *Drew Municipal Separate School District v. Andrews*, the Court declined to decide the matter. This withdrawal of the earlier grant of certiorari leaves standing the Fifth Circuit decision that held unconstitutional a Mississippi school district's refusal to employ unwed mothers.[1] Second, the Court agreed to review a major corporal punishment decision during the 1976-77 term. This case, *Ingraham v. Wright*, concerns serious injuries inflicted on students in a junior high school in Dade County, Florida. Initially, at the court of appeals level, the corporal punishment was held to be cruel and unusual punishment in violation of the Eighth Amendment.[2] However, the Fifth Circuit, en banc, reversed that decision, holding that the Eighth Amendment applies only to criminal penalties and that the injured students must look to traditional criminal and tort law remedies for compensation. The Supreme Court's opinion in the case can be expected to have a major impact on school discipline.

Private schools

The Supreme Court has ruled on two major issues concerning private schools. In the first case, *Roemer v. Board of Public Works*, the Court upheld a Maryland plan of financial assistance to private institutions of higher education. The 5-4 decision, with two majority and three dissenting opinions, was based on the following facts. Since 1971 Maryland has provided by statute for annual grants to all private institutions of higher education. The grants are noncategorical, except that they may not be used for religious programs. The current formula allows the institution an amount per full-time student equal to 15 per cent of the state's per pupil appropriation for public higher education. Students enrolled in seminaries or theological degree programs are excluded from the formula, and institutions that award primarily these degrees are ineligible. Approximately a third of the schools that receive grants have a religious affiliation. Funding is administered by the Maryland Council for Higher Education, which determines institutional eligibility and audits the use of funds. The plaintiffs in the case, who are Maryland residents and taxpayers, brought suit against the responsible state officials and five institutions (four of which are Roman Catholic), challenging the program as an establishment of religion prohibited by the First Amendment.

The first court to hear the case, a three-judge federal district court, upheld the statute by a split decision.[3] The Supreme Court reached the same conclusion, but with considerable difficulty. Only three of the five-member majority agreed on their reasons for affirming the district court's judgment. That plurality (Justice Blackmun wrote the opinion, joined by Chief Justice Burger and Justice Powell) supported the Maryland statute, after applying to the Maryland facts the three-part test of *Lemon v. Kurtzman*.[4] *Lemon* held that state aid to religious institutions is permissible when: (1)

1. 507 F.2d 611 (1974).

2. 498 F.2d 248 (1974).
3. 387 F. Supp. 1282 (1974).
4. 403 U.S. 602 (1971).

the statute in question has a secular purpose; (2) its primary effect is secular; and (3) the result does not "excessively entangle" the state with religious institutions. (The district court in *Roemer* found that Maryland's plan met all three criteria; the plaintiffs appealed the court's finding on the last two points.)

The Supreme Court found that the primary effect of the statute is not to advance religion. The Court relied first on the lower court's findings that the institutions themselves are not "pervasively sectarian." Religious services are optional for students (though religion courses are mandatory), the institutions are largely independent of the Roman Catholic Church with which they are affiliated, students and faculty are not selected on the basis of religion, and subjects other than theology are taught in accordance with the standards of academic freedom. The Court also concluded that Maryland has adequately insured that funds are not expended directly on religious activities. Citing *Hunt v. McNair*,[5] it noted that "... in aiding a religious institution to perform a secular task, the State frees the institution's resources to be put to sectarian ends. If this were impermissible, however, a church could not be protected by the police and fire departments, or have its public sidewalk kept in repair. The Court never has held that religious activities must be discriminated against in this way."

The Court found it more difficult to say that there is no "excessive entanglement," precisely because the Maryland statute takes numerous steps to supervise the institutions' use of state funds. However, despite the fact that annual funding and auditing require an ongoing relationship between the schools and the state, the Court concluded that the state's involvement is not excessive because the schools are substantially autonomous institutions performing "basically secular educational functions." The aid program allows "what is crucial to a nonentangling aid program: the ability of the State to identify and subsidize separate secular functions carried out at the school, without on-the-site inspections being necessary to prevent diversion of the funds to sectarian purposes."

Discussing the relationship between this decision and earlier holdings on state aid to religious schools, the Court said, "Our holdings are better reconciled in terms of the character of the aided institutions ..." The Maryland plan differs from those struck down in *Lemon v. Kurtzman, Committee for Public Education and Religious Liberty v. Nyquist*,[6] and *Levitt v. Committee for Public Education*,[7] in several ways. The Court's opinion attached most significance to the following points: (1) the aid is to higher education rather than to schooling given at "an impressionable age;" (2) the colleges are not supervised by a church as parochial elementary and secondary schools are; and (3) more than two-thirds of the institutions aided are not affiliated with a religious organization. This fact should minimize the political divisiveness of the program.

Justices White and Rehnquist, the two other members of the majority, stated their opinion, as they had earlier in the *Lemon* case, that the third requirement of "no excessive entanglement" is unnecessary. They agreed that Maryland's and other states' aid programs have a secular purpose, and the primary effect is not to further religion. Justice White concluded, "That is enough in my view to sustain the aid programs against constitutional challenge ...."

There were three separate dissents. Justices Brennan and Marshall would enjoin further use of the Maryland act and require the institutions to repay all funds granted to them under it. Quoting from his opinion in *Lemon*, Justice Brennan concluded that direct aid to sectarian institutions is unconstitutional even though they provide secular education, because "the secular education is provided within the environment of religion; the institution is dedicated to two goals, secular education *and* religious instruction. When aid flows directly to the institution,both functions benefit."

Justice Stevens' dissent, while agreeing with Justice Brennan, particularly emphasized the ill effects of "entanglement" on the religious schools themselves. He foresaw a temptation "to compromise their religious mission without wholly abandoning it."

Justice Stewart disagreed with the finding that the defendant institutions are basically secular. His opinion noted that, unlike the institutions assisted in *Tilton v. Richardson*,[8] in which state aid was upheld, these colleges require theology courses that may indoctrinate. Every theology faculty member in two of the institutions is a Roman Catholic cleric and, according to the district court, "The primary concern of these departments ... is Christianity."

The *Roemer* decision is unquestionably important for higher education in North Carolina, which is one of ten states presently funding higher education at private institutions. A spokesman for the Association of American Colleges says he is "confident that more states will follow this route now that its constitutionality is established."[9] In fact, immediately after the *Roemer* decision, a federal district court in Missouri upheld that state's higher education tuition grant program, even though it contains no restriction against using the funds for religious purposes. If the North Carolina General Assembly is inclined to continue or expand this method of meeting the state's higher education needs, it may do so with greater confidence in the legality of the system.

The effect of the decision at the elementary and secondary levels is less certain. Few of North Carolina's students at those levels are privately educated (less than 5 per cent), and apparently there is no strong desire at this time to supply the private schools with public funds. The desire may develop, of course. Recent national statistics show that, excluding the children who attend parochial schools (of which North Carolina has very few), private school enrollment has increased 49 per cent in the past ten years.[10] If enrollment growth continues, pressure to underwrite private schools or their students may increase. *Roemer* does not necessarily indicate that state aid to private elementary and secondary schools is constitutional, however. The Supreme Court has been markedly less sympathetic to aid programs for the lower grade levels and has approved them only twice.[11] In

5. 413 U.S. 734 (1973).
6. 413 U.S. 756 (1973).
7. 413 U.S. 472 (1973).
8. 403 U.S. 672 (1971).
9. 4 School Law News 3 (June 25, 1976).
10. 19 Education U.S.A., 18 (September 20, 1976).
11. Everson v. Board of Education, 330 U.S. 1 (1947); and Board of Education v. Allen, 392 U.S. 236 (1968).

differentiating the *Roemer* facts from the several instances of state aid struck down in recent years, the plurality opinion of the Court noted again that aid to higher educaton is less likely to run afoul of the First Amendment than aid to institutions that educate children of "impressionable age."

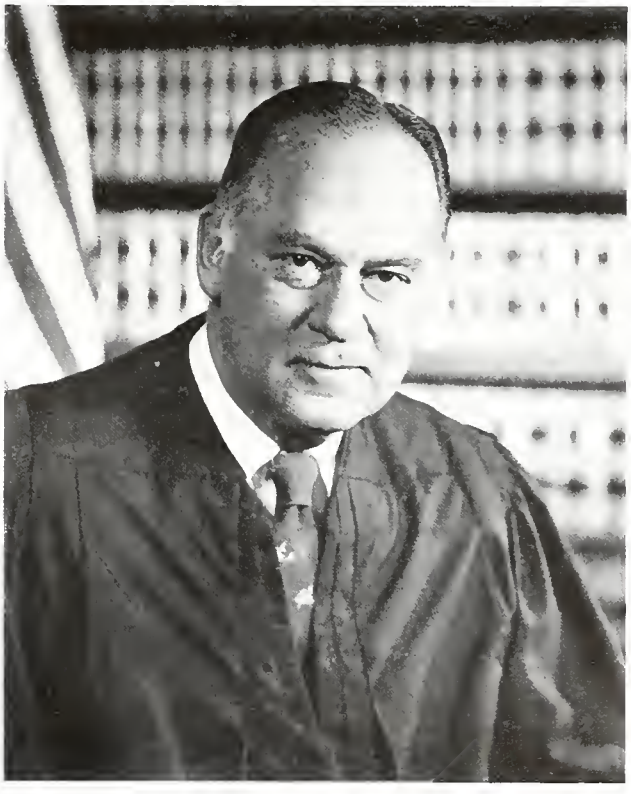
The second private school issue addressed by the Court this term is racial discrimination in admissions. The plaintiffs in *Runyon v. McCrary* were Virginia parents who had attempted to enroll their children in private, profit-making nonsectarian schools and day camps. The defendants, school operators who advertised for students in the "yellow pages" and through flyers mailed to "resident," rejected the children solely on the basis of race. The question presented to the Supreme Court was whether § 1981 of the United States Code prevents private schools from denying admission on the basis of race. Both the federal district court in which suit was brought and the Fourth Circuit Court of Appeals held that it did. Section 1981, which derives from Section I of the Civil Rights Act of 1866, reads in part: "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens . . . ."

When it was passed and for 100 years thereafter, the act was widely believed to do no more than protect the legal capacity of blacks, overriding state legislaion that reduced blacks to the status of married women and minors, incapable of functioning as independent legal entities. In 1968, however, the Supreme Court held in *Jones v. Mayer*[12] that the act "reaches purely private acts of racial discrimination." *Jones* involved housing discrimination against blacks. The premise of the decision was that a black does not enjoy the same right to purchase property (guaranteed by § 1982, which also derives from the 1866 Civil Rights Act) as a white citizen has if a seller or lessor may refuse to deal with him solely because of his race. *Runyon* extends that premise to find that a black is deprived of his § 1981 right to contract as freely as whites when a private school refuses him admission on the basis of race. The opinion goes on to defend the constitutionality of § 1981, as so applied, against the defendants' arguments that such a reading violates parental rights, an individual's freedom of association, and his right of privacy. Justice Stewart states, "The Court has repeatedly stressed that while parents have a constitutional right to send their children to private schools and a constitutional right to select private schools that offer specialized instruction [including, he implies, the advocacy of racial segregation], they have no constitutional right to provide their children with private school education unfettered by reasonable government regulation." Concurring opinions by Justices Powell and Stevens regret the Court's reinterpretation and extension of the 1866 Civil Rights Act, beginning with *Jones*, as does the dissenting opinion by Justices White and Rehnquist.

Runyon v. McCrary is an interesting case, but will probably not have a significant impact on education. For one thing, the majority opinion attempts to narrow the holding, noting that the case does "not present any question of the right of a private social organization to limit its membership on racial grounds . . . any question of the right of a private school to limit its student body to boys, to girls, or to adherents of a particular religious faith . . .[nor even any question of] the application of § 1981 to private sectarian schools that practice *racial* exclusion on religious grounds." The Court states that its holding merely "prohibits private, commercially operated, nonsectarian schools from denying admission to prospective students because they are Negroes" (though nothing, in the majority opinion at least, suggests that the result would have differed if defendants had been nonprofit or sectarian). Also, it is clear that the decision has no effect on a private school's right to exclude on nonracial grounds, presumably no matter how exacting or arbitrary the criteria. Finally, as a practical matter, the number of black students who will choose to enter private, formerly segregated schools after *Runyon* can be assumed to be small indeed.

Public school desegregation

A case that *is* of immediate and significant interest to public school administrators, particularly those operating under desegregation orders, is *Pasadena City Board of Education v. Spangler*. As a result of litigation begun in 1968 to desegregate the schools of Pasadena, California, the federal district court approved a desegregation order for the 1970 school year that included a requirement that there be "no majority of any minority in any Pasadena school." The order placed no time limit on the requirement, and later stages of the litigation revealed that the judge and the parties had



Associate Justice Potter Stewart

12. 392 U.S. 409.

different understandings of the limitations of the requirement at the time it was imposed. (Both parties appear to have understood the order to require one-time reassignment of students). The requirement was met by widespread reassignment. Only one year after the plan was put into effect, however, changing demographic patterns caused one school to contain a majority of students of minority races. By the beginning of the third year (1972), there were four schools with more than 50 per cent black student bodies. By 1974, when the defendant school officials petitioned the district court to modify the terms of the Pasadena order, there were five. The district court refused to dissolve its injunctive order or suspend judicial supervision of the Pasadena schools because of the violation of the "no minority" portion of the 1970 order. The district court judge stated that the order "meant to me that at least during my lifetime there would be no majority of any minority in any school in Pasadena." A divided panel of the Ninth Circuit Court of Appeals affirmed that judgment, but all three circuit court judges expressed reservations concerning the district court's lifetime commitment to the "no majority" rule.

The Supreme Court, in an opinion written by Justice Rehnquist, reversed the judgment. The Court held that the district court had exceeded its remedial authority by requiring annual reassignment of students to comply with the original order. The majority noted that "[T]he District Court apparently believed that it had authority to impose this requirement even though subsequent changes to the racial mix in the Pasadena schools might be caused by factors for which the defendants could not be considered responsible. Whatever may have been the basis for such a belief in 1970, in *Swann*,[13] the Court cautioned that 'it must be recognized that there are limits' beyond which a court may not go in seeking to dismantle a dual school system . . . .These limits are in part tied to the necessity of establishing that school authorities have in some manner caused unconstitutional segregation for 'absent a constitutional violation there would be no basis for judicially ordering assignment of students on a racial basis.' " All parties agreed that the Pasadena plan for racial assignment of students was fully implemented in 1970 and that the subsequent resegregation of the schools was not caused by school officials. "That being the case," the Court said, "the District Court was not entitled to require the School District to rearrange its attendance zones each year so as to ensure that the racial mix desired by the court was maintained in perpetuity." Accordingly, the Court remanded the case to the court of appeals for proceedings to determine whether the district court's jurisdiction over the school system should be ended.

Justices Marshall and Brennan dissented because of their belief that the plan as a whole had never been fully implemented. This being the case, the district court judge "could rightly determine that the 'dangers' which induced the original determination of constitutional infringements in Pasadena have not diminished sufficiently to require modification or dissolution of the original Order." The majority of six, however, (Justice Stevens took no part) used the Pasadena case as an opportunity to reiterate a theme of the *Swann* case; that is, that school districts, once desegregated in good faith, will not be held strictly liable for circumstances beyond their control that resegregate student populations.

13. Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971).

Anne M. Dellinger

Social Services

Rights of Illegitimates

The Social Security Act of 1935 initiated a program of social insurance known as Old Age and Survivors Disability Insurance (OASDI), which includes benefits to spouses and children of deceased workers who were employed in covered employment. A portion of the cost of this insurance is deducted from the employee's wages. The Social Security Act as amended provides coverage for children 18 years of age (or less than 22 for a full-time student) who are *dependent* on the deceased insured parent when the parent dies. The federal statute presumes the dependency of any legitimate child and of certain illegitimate children who fall into specified categories:

(1) a child who inherits from the parent under the applicable state intestacy laws;
(2) a child who is living with the parent at the time of the parent's death;
(3) a child who is born of a marriage that was technically defective;
(4) a child whose paternity is acknowledged in writing by the father;
(5) a child for whom a court determines paternity or orders child support.

Two recent companion decisions of the U.S. Supreme Court upheld the above legislative classifications as constitutional in cases that deny survivors' benefits to illegitimate children. The thrust of these two decisions is to make "dependency" as defined by the federal statute more significant than paternity. Both decisions deny survivors' benefits to children in cases in which there was no dispute about paternity and the respective fathers had taken certain actions during their lifetime to acknowledge paternity. The justices divided six to three in both cases, with the same justices participating in the majority and dissenting opinions.

These companion cases illustrate the types of problems that arise in protecting the support rights of illegitimate children under the social security system. In *Mathews v. Lucas*, 49 L. Ed. 2d 651 (1976), an unmarried couple lived together for eighteen years and had two children. The father supported the children while he and the mother lived together. The father died two years after they separated, never having acknowledged paternity of the children in writing. There was never any judicial determination of paternity during his life. After his death, the mother applied for surviving childrens' benefits based on the father's earnings record. A federal hearing examiner determined that the children's paternity was established but denied the claim because there was no showing of dependency by proof that the father was living with the children or contributing to their support when he died (nor were the children qualified by any of the statutory presumptions of dependency).

A federal district court ruling that these statutory classifications were unconstitutional (since legitimate and legitimated children were more entitled to support than illegitimate children) was reversed by the U.S. Supreme Court. The Court found these statutory classifications are permissible because they are reasonably related to the likelihood of dependency at the time of the father's death. It is constitutionally permissible to presume dependency based on documented facts such as legitimate birth, a court support

Associate Justice Byron R. White

order, or a paternity decree. This presumption of dependency enables Congress to avoid the trouble and expense of determining dependency case-by-case. This was found to be constitutionally permissible for the purpose of "administrative convenience."

The dissenting opinion objected to the "mechanical test of dependency" as a substitute for the kind of inquiry that would be needed to distinguish genuine from false claims. This opinion felt that to allow legitimate children to receive benefits without proof of dependency is "illogical and unjust."

In *Norton v. Mathews*, 49 L. Ed. 2d 672 (1976), a child was born out of wedlock to unmarried high school students ages 16 and 14. The father contributed $6 when the child was born along with some clothing and other items, but never supported the child because he was unemployed. The father joined the military service when the child was a year old and was killed about a year later in Vietnam. The father took some steps (including securing a birth certificate) that would be necessary to process a dependent child's military allotment but had not completed the procedural requirements when he died. The child's application for surviving child's benefits was denied by the hearing examiner because the father was not living with the child or contributing to his support when he died. The district court and the U.S. Supreme Court affirmed.

These two decisions have significant implications for state and local North Carolina officials who are responsible for implementing the 1975 legislation designed to provide more adequate support services (Art. 9, G.S. Ch. 110, G.S. 110-128 to -141). One major thrust of this legislation is to encourage voluntary agreements between child support officials and unmarried fathers, which acknowledge paternity and agree to provide support. Such agreements have the effect of a judicial determination of paternity and a court order for child support when the agreement is court-approved according to the procedures outlined in G.S. 110-132. Thus, local officials should be careful to document paternity by a court-approved agreement if possible.

Another significant implication of these decisions is that an illegitimate child's eligibility for survivor benefits on the work record of his unmarried father may vary with whether or not the child is entitled to inherit from the father under the applicable state intestacy law. In the fact situations presented by these companion cases, none of the children could have inherited from the father under the North Carolina intestate succession laws. G.S. 29-19 limits inheritance by the child under the intestate succession laws to cases in which either paternity has been established during the life of the father by a civil action under G.S. Ch. 49, Art. 3, or the father has acknowledged paternity of the child during his lifetime according to the procedure established by G.S. 29-19 (2). Thus, it is not clear whether a court-approved acknowledgement of paternity and agreement to support under G.S. 110-132 would be sufficient for the child to inherit by intestate sucession under G.S. 29-19.

Protecting the right of an illegitimate child to receive support from his father seems to be a fertile area for legislative reform at the federal and state levels. Pending such reforms, state and local officials concerned wih child support matters should take care that children they deal with have adequate documentation of paternity to be included under the legislative presumption of dependency—by judicial determination of paternity, a support order, or written acknowledgement of paternity. Further, there should be more thought to protecting the inheritance rights of illegitimate children in North Carolina. The typical judicial determination of paternity for purposes of support occurs in a criminal prosecution under the "Bastardy Chapter" of the General Statutes (G.S. 49-2). A determination of paternity in a criminal case is not sufficient for the child to inherit from the father by intestate succession in North Carolina. Thus in order to protect the child's possible intestacy inheritance rights, state and local officials might consider more frequent use of the civil procedure for determining paternity under Article 3, Chapter 49 of the General Statutes.

Mason P. Thomas, Jr.

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