POPULAR GOVERNMENT

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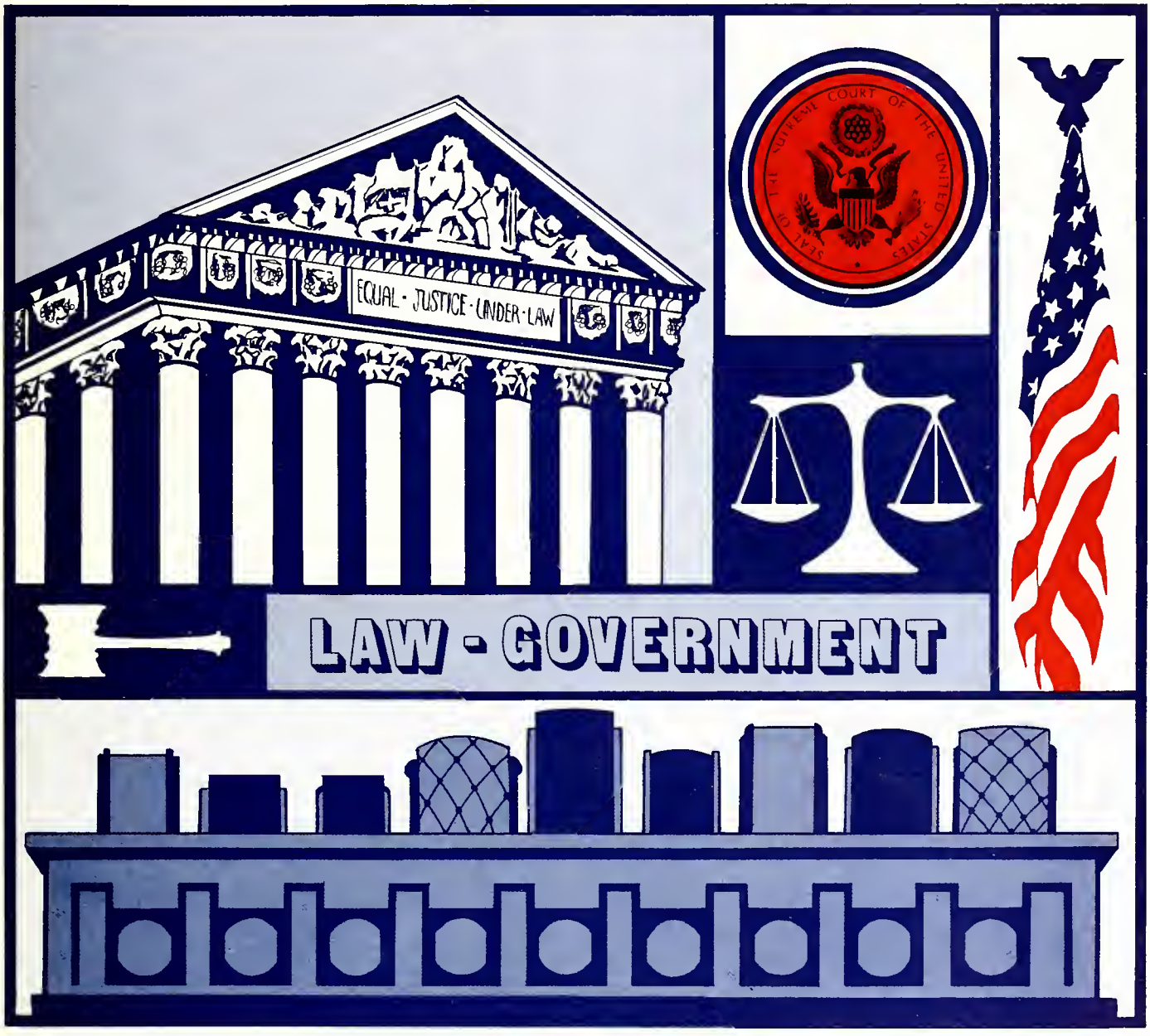

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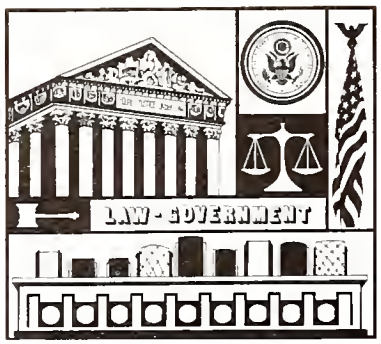

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Vol. 44 / No. 3 Winter 1979

Cover and Photos: Cover art is by Sarah McMillan. Photos are from the *Chapel Hill Newspaper*, the National Trust for Historic Preservation; the Library of Congress; and North Carolina Courthouse Study: School of Design, North Carolina State University.

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POPULAR GOVERNMENT (ISSN 0032-4515) is published four times a year (summer, fall, winter, spring) by the Institute of Government, the University of North Carolina at Chapel Hill, Country Club at Raleigh Road, Chapel Hill. Mailing address: Box 990, Chapel Hill, N.C. 27514. Subscription: per year $6.00. Second-class postage paid at Chapel Hill, N.C.

The Changing of the Guard at the Institute of Government

Henry W. Lewis Retires. When the Institute's third Director took office in November 1973, he told his colleagues that he would take early retirement at the end of his five-year term. Those who know him well knew then that his decision was made not by choice but from a profound understanding of the nature of the Institute, the Directorship, and the special relationship that an Institute faculty member develops and must maintain with the public officials who are both his students and his teachers. And so the time has come for the University, the Institute faculty, and thousands of public officials across North Carolina, past and present, to mark the retirement of Henry W. Lewis.

Words describing extremes tend to lose their meaning through overuse and misapplication. It is commonplace to describe the career of one about to retire as "distinguished"—so commonplace that one takes note of the omission. Searching for some way to counter this tendency, one is tempted to turn to the nearest adverb for help, so that a person who merits the unadorned adjective becomes "truly distinguished." Those who know Henry Lewis have no need to resort to tricks of language in describing his career. They can say, in quiet and simple confidence, that it has been distinguished.

Henry joined the Institute staff early in 1946 after service in the United States Army throughout World War II. He had received his undergraduate degree at Chapel Hill and his law degree from Harvard Law School. His roots were deep in North Carolina's soil, having grown up in Northampton County within earshot of the fine old courthouse in Jackson.

In 1946 new Institute staff members did not have the luxury of a year or even several months of study and preparation before launching out in service; they were too few and there was too much to be done. Within three months of his arrival, Henry published his first article in *Popular Government*, entitled "The Primary Election." It was a classic example of Institute work, laying down in concise yet complete detail the procedures to be followed by precinct officials in conducting the upcoming primary election. In what became typical practice for Henry, he polished and expanded this first effort into a *Guidebook for County and Precinct Election Officials*, which went through fifteen editions under his name and quickly became (and remains under Rud Turnbull's aegis since 1972) the "bible" of local elections officials.

In Henry's own words, "Following the 1947 General Assembly I was thrust unexpectedly into the Property Tax world, and I did not find the prospect hopeful." For the next twenty-six years he became first the student of local tax supervisors and tax collectors and then their teacher, confidant, and friend. He wrote articles for *Popular Government* about the property tax and its administration; he issued special bulletins; he designed and taught basic training courses for supervisors and collectors; he organized or revitalized their statewide professional organizations; he published guidebooks; he answered hundreds of written inquiries and took thousands of telephone calls; he worked tirelessly with a succession of legislative study commissions in revising the property tax law; he even wrote a guidebook for appraising real property, which to his surprise

Henry W. Lewis

(and to some extent, chagrin) was translated into Japanese and used by the United States Military Government for tax appraisals in Osaka. Looking back on his own career in a recent speech to the North Carolina Association of Assessing Officers, Henry summed it up in characteristic understatement: "I take heart in two fundamental changes that took place during my Property Tax experience: First, the tax statutes were made much easier to understand; most of the hidden favors and pitfalls were removed. Second, the men and women who administer North Carolina's property tax laws received better training and became far more knowledgeable than ever before."

In October 1973, Henry faced the most difficult decision of his career when Chancellor Taylor asked for permission to nominate him to the Board of Governors for appointment as Director of the Institute. Henry had had a brief tenure as an Acting Vice-President of The University of North Carolina in 1968-69 and, though he served with distinction, had come away from the experience convinced that his niche in life was that of the scholar-teacher, not an administrator. Nevertheless, he bowed to the wishes of the Chancellor and his colleagues. During his directorship the Institute has prospered. He leaves to his successor a better organization than he found, particularly in internal administration. Throughout his tenure as Director, he has had one overriding goal: to pass on to his younger colleagues the vision of the Institute's mission to the State of North Carolina and its public officials first conceived by Albert Coates.

Each Institute publication carries the simple statement that the Institute of Government is an integral part of The University of North Carolina at Chapel Hill. Since 1795 the University has been blessed from generation to generation with distinguished men and women who have made it the great institution it is today. Many of them are memorialized in plaques of stone in Memorial Hall, in portraits and statuary, in monuments, in the names of campus buildings. The particular mark of honor bestowed by the University on its most distinguished faculty is the Kenan Professorships. In 1975 Henry W. Lewis became the first Institute faculty member to be made a Kenan Professor. By this token, the University paid tribute not only to Henry Lewis but also to the institution that in large measure is the work of his hands.

Shakespeare said "What's past is prologue." So it is with the distinguished career of Henry W. Lewis. Retirement from the Institute will free him to pursue his life-long interest in historical research. For the Institute, his career will serve as the standard of excellence by which all our efforts are measured. It is a challenge in the present to face the future with his steadfastness of purpose and his abiding faith that the public officials of North Carolina and The University of North Carolina at Chapel Hill, joined in the Institute of Government, can work to improve our state and local governments for the benefit of all the people.—*Joseph S. Ferrell*

John Sanders Returns. Institute of Government faculty members and clients greeted the announcement this fall of John Sanders' appointment as the Institute's new director with the enthusiasm of a Homecoming. And indeed it was, for he has returned to a post he held for eleven years before becoming Vice-President for Planning of the University of North Carolina at the end of 1973.

Thus John Sanders becomes both the second and the fourth director of the Institute, having taken over the reins in 1962 from its founder and long-time director, Albert Coates, and now from Henry Lewis. One with his tastes for history and government might find an analogy in President Grover Cleveland's triumphal return to office for his second term after a four-year lapse.

On this occasion it might not be amiss to quote from an assessment by Jake Wicker five years ago, while the memory of Sanders' first directorship was fresh.

> If it is true that an administrator's chief role is to expedite the work of his colleagues and bring out the best in them, then John Sanders was an unqualified success at the Institute. First of all, he had a strong concept of the Institute's mission in serving the people of North Carolina, and all of his leadership was directed towards that end. He was utterly fair with all who worked at the Institute, and his colleagues knew that his comments and criticisms came from perceptive insights and were aimed at improving the Institute's service to the state. Members of the staff and faculty during his directorship did not work for John Sanders; they worked for the people of the state and their governments through the Institute and with Sanders.
>
> In his vision for the Institute, he saw its work expanding steadily, but he had constant concern for its quality. He was not interested in empire-building —he sought the growth and well-being of the Institute solely in order that its mission might be better accomplished. He believed strongly in the Institute's operating principles of competence, objectivity, and nonadvocacy, and he saw the Institute as being in the service of all the people of the state, of all political factions and parties, and of all levels and units of government.

John Sanders came quite honestly by the attitudes described in Wicker's appraisal, for by both birth and affection, he is a North Carolinian. He grew up in the town of Four Oaks, and thus is one of the remarkable group of Johnston County men who have served on the Institute's faculty: Albert Coates himself, UNC Chancellor and Law Professor William Aycock, Paul Johnston (later the state's first Director of Administration), and Dean Robert Byrd of the UNC Law School.

Sanders' education reinforced this heritage, first at North Carolina State University and then, following a stint in the U.S. Navy, at the University of North Carolina at Chapel Hill. At N.C. State he started to become an architect. At UNC he majored in history with a minor in political science; did a year's graduate study in American history; and finally graduated from the School of Law.

Throughout these years he was marked as a leader. At UNC he capped an active career in student government by winning election as president of the student body, and he was tapped for both the Order of the Golden Fleece and the Order of the Grail. He ranked near the top of his law class, was elected to the Order of the Coif, and served as an associate editor of the *UNC Law Review*. As a result of his law school record he received the singular honor of being chosen to serve as law clerk to Chief Judge John J. Parker, U.S. Court of Appeals for the Fourth Circuit.

In view of this background, it was natural that Albert Coates offered Sanders a position on the Institute faculty in 1956 and that he accepted this offer. He had worked as a research assistant for the Institute while a law student, and he had been impressed with its opportunities for public service while he was impressing the Institute faculty with his ability. Neither set of expectations was disappointed.

John L. Sanders

During the six years that preceded his directorship and on a part-time basis thereafter, Sanders' principal fields of interest were state government organization and administration; state constitutional revision; legislative representation; and higher education organization and administration.

In the area of state government, he served as principal staff member for a series of Commissions on Reorganization of State Government. Among his major accomplishments was drafting the legislation under which the state's first Department of Administration was created.

He assisted two commissions concerned with revision of the State Constitution: The North Carolina Constitutional Commission in 1958-59 and the North Carolina State Constitution Study Commission in 1968-69. The latter produced the extensive constitutional revisions that were adopted in 1970.

Sanders was recognized as the state's foremost authority in the field of legislative representation. As a disinterested expert he was consulted by the attorneys on both sides and the presiding federal judge in the landmark case which led to reapportionment of the General Assembly, and he assisted the legislative committee that drafted the new plan of representation in response to the court's decision.

As a staff member for the Governor's Commission on Education beyond the High School and adviser to subsequent commissions and the Governor, he played a key role in developing the plans by which the state's system of higher education was reorganized in the 1960s. This experience was supplemented by extensive administrative assignments within the University at Chapel Hill, including terms as chairman of the Chancellor's Advisory Committee; chairman of the special committee that produced the University's first affirmative action plan; chairman of the University Faculty Advisory Council; and first chairman of the All-University Faculty Assembly.

Obviously this background and experience fitted Sanders perfectly for the assignment as Vice-President for Planning of the University System to which he was called in the fall of 1973. And it explains why he has been at the center of most of the major struggles involving the University since that date.

A lesser man would have found that this multitude of professional activities effectively consumed all his waking hours. But somehow Sanders has managed to pursue other interests stemming from his background and education. He has had a longstanding love affair with the State Capitol building and its history, and he has become a recognized authority and adviser to those charged with its renovation. He has tramped over most of the major Civil War battlefields. He has explored London and Edinburgh, seeking architectural treasures and curiosities. Together with his wife, Ann, also a historian by training and instinct, he has become a collector of antique furniture and silver. And he and Ann are the parents of three lovely children—Tracy, Jane, and William.

To such a man and his family the Institute faculty bade a reluctant farewell in 1973. With great pleasure, they now say, "Welcome home!"—*Philip P. Green, Jr.*

Introduction to a Courts Issue

TWO YEARS AGO, the Winter 1977 issue of *Popular Government* reviewed United States Supreme Court decisions of the Court's 1975-76 term that affected state and local government. This issue of *Popular Government* renews and updates that effort.

The seven articles that follow examine U.S. Supreme Court decisions of the 1977-78 term that are important to state and local government, particularly in North Carolina. The articles, which are written by Institute of Government faculty members, deal with the following topics:

(1) **Criminal sentencing:** Especially the question of how much discretion judges should have in setting criminal sentences.

(2) **Capital punishment:** The overturn of the death penalty in two cases—one involving the intentional killing of a police officer and the other involving a forcible rape.

(3) **Election laws:** Corporate expenditures that are made to influence elections and referenda; apportionment of legislative bodies.

(4) **Land use regulation:** Exclusive and exclusionary zoning; historic preservation.

(5) **Governmental immunity:** The decision that a person whose federal civil rights are violated by a local government can sue the local government to recover money damages from public funds.

(6) **School law:** Most notably the *Bakke* case on affirmative action.

(7) **Government employment and personnel practices:** Particularly how they affect constitutional rights.

State court decisions also affect the course of North Carolina state and local government. The authors of the articles on criminal sentencing, election laws, and land use regulation review recent decisions by North Carolina courts affecting law and practice in their areas.

Another Institute of Government faculty member wrote the two articles that follow those reviewing court decisions. The articles discuss the North Carolina judiciary. One of these evaluates the state's experience with Governor Hunt's new voluntary merit method for selecting superior court judges. The other describes the work of the North Carolina Judicial Standards Commission. The Commission is authorized to recommend to the state Supreme Court censure or removal of judges for misconduct, failure to perform duties, and other causes.

We hope that all of the articles in this issue of *Popular Government* will be informative to those who read the magazine. In particular, we hope that the review and discussion of court cases will enable officials to assess whether the governmental practices for which they are responsible meet the judicially defined standards discussed here.

—AJV

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Sentencing Criminals: Issues in Recent Court Decisions

Stevens H. Clarke

Editor's Note—Since this article went to press, the presumptive-sentencing bill (mentioned on page 9) has been revised and reintroduced in the 1979 General Assembly as part of the Governor's legislative package.

The Locklear case

The recent North Carolina case of *State v. Locklear*[1] raises most of the issues in the law of criminal sentencing today. An undercover police agent approached a man named Leonard and told him he wanted to buy some marijuana. Leonard took the agent to the home of Locklear, the defendant; after receiving $20 from the agent, Leonard walked to the back of the defendant's house. He returned, accompanied by Locklear and carrying a bag of marijuana. Leonard handed the marijuana to the agent, who, after inspecting it, complained that it was of poor quality. Locklear then examined the bag and replied, "There is no trash in that pot. It's just like all the other I got, and I haven't had any complaint." The agent took the bag, which contained about 24 grams (less than an ounce) of marijuana. At Locklear's trial, Leonard testified that Locklear was not involved in the sale. Nevertheless, Locklear was convicted of two offenses: felonious possession of marijuana with intent to sell, and sale of marijuana. Although Locklear had no criminal record and was under 21 years of age, the trial judge imposed the maximum five-year term of imprisonment for each offense, the terms to run consecutively—a total of ten years.

The *Locklear* case brings out some important aspects of the law of sentencing. The sentencing judge has been given broad discretion. In Locklear's two offenses, the law permitted punishments that ranged from probation without imprisonment to five years' imprisonment.[2] (The range is even broader for some other offenses—second-degree rape, for example, is punishable by probation or imprisonment for any term up to life.[3]) The judge has complete discretion to impose probation or an active sentence and to make multiple sentences run concurrently or consecutively,[4] and the law provides no standards for him in exercising this discretion. The prison system and the Parole Commission also have broad discretion in deciding the actual amount of time an offender serves.

Like judges in most states, the sentencing judge in North Carolina not only has a wide choice of options, but also is not required to put any reasons for his sentence on the record. This means that the appellate courts rarely are able to review the appropriateness of a sentence. Furthermore, the judge has extensive latitude in choosing facts as a basis for sentencing. Whether a presentence investigation is ordered, and what it will cover, is entirely up to the judge.[5] The court is much less restricted in sentencing than at trial in the kind of evidence it may consider, as illustrated by the *Locklear* case. At Locklear's sentencing hearing, a deputy sheriff testified (over the defendant's objection) that a reliable informer, whom he would not name, had told him that Locklear had been selling from $500 to $1,000 worth of marijuana per week. (This was hearsay testimony and could not have been used at Locklear's trial.) The trial judge apparently based his two consecutive maximum sentences on this hearsay testimony and also on his belief, as he said at the hearing, that Locklear and Leonard had concocted a story.

On appeal, the North Carolina Court of Appeals held that Locklear's sentences were invalid because they were based solely on "rank hearsay." The court said that since Locklear had no record and was under 21, and since there was no other evidence in aggravation of punishment on the record, the deputy sheriff's hearsay testimony was apparently the only information on which the severe sentences were based. Furthermore, the hearsay was different from hearsay that had been allowed as the basis of sentencing in other cases.

The author is an Institute of Government faculty member who specializes in criminal law.

1. 34 N.C. App. 37 (1977), *modified*, 294 N.C. 210 (1978).

2. N.C. GEN. STAT. § 90-95.

3. N.C. GEN STAT § 14-21.

4. N.C. GEN STAT §§ 15A-1341, -1354.

5. N.C. GEN. STAT § 15A-1332.

The hearsay testimony related not to the offenses of which Locklear was found guilty but to other drug selling for which he had not been charged.

On further appeal, the North Carolina Supreme Court reversed, holding that the sentences were proper. The Supreme Court adopted the dissenting opinion of Court of Appeals Judge Naomi Morris. Judge Morris observed that a sentencing judge may rely on presentence reports, which often contain a great deal of hearsay. She also noted that a sentence may be based on hearsay if the defendant is given the opportunity to refute it, and Locklear was given that opportunity. Furthermore, Judge Morris said, the trial court's sentence was based not solely on hearsay but also on the judge's belief that the defendant had lied at his trial. Justice Exum, a critic of overly broad sentencing discretion, concurred in the Supreme Court's opinion. While disagreeing with the view that trial judges should have the broadest possible discretion in sentencing, Justice Exum agreed with Judge Morris that under present law, Locklear's sentences were valid because he had had an opportunity to refute the hearsay testimony. Locklear's failure to take advantage of this opportunity did not make his sentencing hearing unfair. Thus, Justice Exum concluded, "The sentence imposed, while far longer and harsher than is normally imposed under such circumstances, must, under our present sentencing procedures, be allowed to stand."

(Although the State Supreme Court found no error in Locklear's sentencing, it did grant him a new trial because of the district attorney's improper conduct in calling the defendant a liar during the trial.)

The controversy over indeterminate sentencing

The notion that government officials should have wide discretion in imposing and carrying out criminal punishments is based on the premise that the state—through the courts, prison administration, and parole board—is able to identify the offender's problems, predict his future dangerousness, prescribe appropriate correctional treatment for him, and decide how much treatment and confinement he must have to lessen his risk to society. Faith in this idea has been seriously shaken in recent years. Recent research has shown that correctional rehabilitation programs rarely succeed in reforming criminals and that predicting dangerous behavior is difficult.[6] Consequently many legal thinkers have begun to fall back on a more parsimonious philosophy of punishment. Many are beginning to feel that perhaps penal agencies (including the criminal courts) should simply stick to punishment as fair as possible, since the agencies stand little chance of influencing an offender's future behavior.

The loss of confidence in our ability to predict dangerous behavior and to rehabilitate criminals has taken away much of the justification for the large variation in sentences. A number of writers have recently proposed ways of making sentences more uniform, predictable, and fair. Marvin Frankel, a law professor and trial judge, has been perhaps the most eloquent critic of sentencing laws and practices. Judge Frankel believes that curbing the excessive variation in sentencing cannot be left to judges themselves, but requires more careful regulation by law. He recommends that legislation spell out the valid purposes of sentencing and that the legislature, or a sentencing commission, establish rules or guidelines on the factors to be considered in sentencing. He suggests that factors relevant to sentencing be stated as objectively as possible in the form of a checklist or numerical scale; these factors would be used by the sentencing judge, lawyers, and probation officers in recommending sentences and by appellate courts in reviewing the appropriateness of the sentence.[7] Some sentencing reform proposals have gone much further than Frankel's. For example, a task force on criminal sentencing recommended not only that factors relevant to sentencing be enumerated in the statutes but also that each statute specify the precise effect that each factor will have on the sentence.[8]

Critics have reacted to these demands for reducing judicial discretion in sentencing. They argue that determinate-sentencing proposals will make punishments too mechanical and harsh and will increase the population of prisons—as in North Carolina, where prisons are already bursting at the seams. Critics also feel that determinate-sentencing proposals ignore the reality of sentencing. They point out that the sentence is usually not the result of an independent decision by the judge after the defendant's guilt has been established; it is usually the product of plea bargaining between the prosecutor and the defense attorney, who may ignore or evade legislated sentencing standards. Albert Alschuler, a law professor who has spent much of the last 15 years closely observing plea bargaining practices throughout the country, has said that determinate-sentencing laws will simply give prosecutors more power in plea negotiations. While he agrees that reducing discretion in sentencing is necessary, he contends that it cannot be done effectively until we "bite the bullet on the question of plea bargaining."[9]

Action by legislatures and appellate courts

Several states—including Maine, Indiana, and California—have recently passed laws reducing discretion in sentencing and parole. California's is the most elaborate of these new laws. It establishes "presumptive" sentencing in

6. Robison & Smith, *The Effectiveness of Correctional Programs*, 17 CRIME AND DELINQUENCY 67 (1971); Martinson, *What Works?—Questions and Answers About Prison Reform*, THE PUBLIC INTEREST 22 (Spring 1974); Cocozza & Steadman, *The Failure of Psychiatric Predictions of Dangerousness: Clear and Convincing Evidence*, 29 RUTGERS L. REV. 1084 (1976); Wenk, Robison, & Smith, *Can Violence Be Predicted?* 18 CRIME & DELINQUENCY 393 (1972).

7. M. FRANKEL, CRIMINAL SENTENCES (1972).

8. TWENTIETH CENTURY FUND TASK FORCE ON CRIMINAL SENTENCING, FAIR AND CERTAIN PUNISHMENT (1976).

9. Alschuler, *Sentencing Reform and Prosecutorial Power*, 126 U. PENN L. REV. 550 (1978).

which a three-year range of prison terms is set for each crime (for example, two, three, or four years for robbery). The middle prison term (for robbery, three years) is the "presumptive" or "normal" sentence; the judge must impose it unless certain mitigating or aggravating circumstances are proved in a hearing after conviction. The California Judicial Council, as required by law, has issued specific guidelines that judges must follow in deciding whether to impose the upper or lower prison terms and whether to impose probation or active imprisonment. The Judicial Council's guidelines also include consideration of circumstances relating to the crime as well as to characteristics of the defendant—for example, whether the crime involved great bodily harm, whether the defendant was a leader in the crime or merely a passive participant, and whether he has had frequent and serious prior convictions. The law provides specific enhancements for certain circumstances—for example, one extra year in prison if the offender has previously been convicted of a felony for which he received a prison sentence. Release on parole is abolished, but a one-third reduction of the prison term is allowed for good behavior in prison. After release from prison, all offenders must be on parole supervision, normally for one year.[10]

In 1977 a bill[11] was introduced in the North Carolina General Assembly that would have narrowed judicial discretion in sentencing and laid a foundation for regular review of sentences by appellate courts. The bill, which died in committee, grouped felonies into five classes for punishment purposes and set a "presumptive" prison term for each type of felony. The sentencing judge would have been required to impose the presumptive term unless he found *and stated on the record* certain mitigating or aggravating circumstances. (This last provision of the bill would have made nonpresumptive sentences reviewable on appeal; as explained later, North Carolina has precedent for reviewing the appropriateness of a sentence once the basis of the sentence is a matter of record.) The 1977 bill would also have abolished release on parole for felons, although it would have allowed one day of reduction in the prison term for each day of good behavior in prison. The General Assembly not only rejected the presumptive-sentencing concept but also enacted an extensive Trial Procedure Act[12] that continues the sentencing judge's broad discretion, without requiring any presentence investigation or statement of reasons for the sentence. The General Assembly's passage of measures requiring seven years to be served before parole in certain offenses is the only recent indication of the legislature's concern about overly broad discretion in sentencing and paroling.[13]

The courts speak on sentencing

Recent case law contains some scattered signs that appellate courts are beginning to curb the breadth of sentencing laws and the discretion of the sentencing judge. The California Supreme Court held in 1978 that a sentencing judge abused his discretion when he placed a child-molester on probation even though the offender had a long history of similar offenses.[14] The Pennsylvania Supreme Court recently decided that Pennsylvania's trial judges must give reasons for the sentences they impose.[15] A 1974 decision of the U.S. Fourth Circuit Court of Appeals, which includes North Carolina, provided precedent for later federal court decisions striking down sentences that are disproportionate to the seriousness of the offense.[16] In 1969 a North Carolina court sentenced a man named Thacker to 48 to 50 years for the crime of safecracking—then punishable by 10 years to life imprisonment. (The trial judge gave no reasons for his long sentence, but they may have been Thacker's record of breaking and entering, larceny, and armed robbery and his refusal to tell who his accomplice was.) In 1978 a federal court ordered that Thacker be either resentenced or released from prison because his sentence amounted to unconstitutional cruel and unusual punishment.[17] That court emphasized that Thacker used no professional burglar tools, was unarmed, threatened no one personally, and stole less than $10. The court noted that only in North Carolina and three other states could such a long sentence have been imposed for safecracking, and it pointed out that the North Carolina legislature had recently reduced the maximum penalty for safecracking to 30 years.

Because the death penalty is unique in its severity and irrevocability, the U.S. Supreme Court has held that great care is needed in imposing capital punishment and that the basis of a death sentence must be reliable. The death penalty can be unconstitutional when it is disproportionately severe for the offense (as it has been held to be for rape)[18] and when the court's discretion in imposing it is improperly guided—for example, when it is imposed by a jury that has complete discretion to impose either death or life imprisonment without any legislative standards to guide it.[19] It is unconstitutional for death to be mandated by law for an offense without "particularized consideration of the relevant aspects of the character and record of each convicted defendant."[20] The Supreme Court upheld a Georgia capital-sentencing statute that established a separate sentencing proceeding in which the jury must consider both the circumstances of the crime and the character of the defendant before imposing death for first-degree murder.[21]

(continued on p. 11)

10. CAL. PENAL CODE, §§ 213, 667.5, 1170-1170.5, 2930-2932, 3000; JUDICIAL COUNCIL OF CALIFORNIA, 1978 ANNUAL REPORT.

11. N.C. General Assembly 1977, 1st sess., S441-H 799.

12. N.C. GEN. STAT. Ch. 15A, Arts. 81-85.

13. N.C. GEN. STAT. §§ 14-52, -87, -17, -21.

14. People v. Warner, 22 CRIM. L. REP. 2545 (1978).

15. Commonwealth v. Riggins, 21 CRIM. L. REP. 2477 (1977).

16. Hart v. Coiner, 483 F.2d 136 (4th Cir. 1974).

17. Thacker v. Garrison, 445 F. Supp. 376 (W.D.N.C. 1978).

18. Coker v. Georgia, 45 U.S.L.W. 4961 (1977).

19. Furman v. Georgia, 408 U.S. 238 (1972).

20. Woodson v. North Carolina, 428 U.S. 280 (1976).

21. Gregg v. Georgia, 428 U.S. 153 (1976).

Recent Decisions on Capital Punishment

Michael Crowell

IN A SERIES OF DECISIONS IN JULY, 1976, the United States Supreme Court severely limited the use of capital punishment. A clear majority held that since the death penalty was unique and its consequences irreversible, it could be imposed only under exceptionally restrictive procedures. Within that majority were three swing votes supporting the view that (1) the kinds of crimes subject to capital punishment had to be narrowly defined, (2) the sentencing proceeding had to be separate from the determination of guilt, (3) the sentencer had to be allowed to consider possible aggravating and mitigating circumstances in deciding whether to choose death as the punishment, and (4) the appellate courts had to review the propriety of each such choice. North Carolina was one of the states whose capital punishment procedures were disapproved. As a result, the 1977 General Assembly revised the murder statute and enacted new provisions for capital sentencing that closely tracked the Georgia and Florida laws accepted by the Court.

Despite the great length and multiple opinions of the 1976 decisions, the Supreme Court left several significant questions unanswered. The two most important of these were whether capital punishment could be imposed for any crime other than murder and whether a mandatory death penalty was ever constitutionally permissible. Since 1976, the Court has decided only a few capital cases. Most of these are of little general interest since they deal with peculiar problems of abuse of sentencing procedures or retroactive application of new statutes, but two cases do address the more important questions left over from 1976.

In early June, 1977, the Court in *Harry Roberts v. Louisiana*, overturned a mandatory death sentence imposed for intentionally killing a police officer.[1] The problem was that the mandatory sentence precluded any opportunity to consider the circumstances of the particular offense and the character and record of the individual defendant. The Court accepted that murder of a law enforcement officer might be a sufficient aggravating circumstance to allow consideration of capital punishment, but in this case no consideration had been given in sentencing to whether any mitigating circumstances existed—such as the defendant's youth, whether he had been under extreme duress or the influence of drugs or alcohol, and any other circumstance that might cause some reluctance to sentence him to death.

As in all death penalty cases, the majority opinion was lambasted by several dissents, but the door seems to have been closed on almost all forms of mandatory death penalty. The one exception—left open in the majority's footnotes—is a mandatory death sentence for a person who commits a capital offense while already serving a life sentence. The hints are strong that such a provision might be approved.

Later in the same month the Court rather clearly dealt an end to capital punishment for anything other than first-degree murder. In *Coker v. Georgia*, the justices decided that Ehrlich Anthony Coker could not be put to death for the forcible rape of Elnita Carver at knife point, even though the jury had followed the approved procedure in considering aggravating and mitigating circumstances.[2] (Coker had several prior violent-rape convictions; he committed this rape after an escape from a longer-than-life term and while committing armed robbery, another capital crime; and the sentencing court found no mitigating circumstances.)

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1. Harry Roberts v. Louisiana, 431 U.S. 633 (1977).
2. Coker v. Georgia, 433 U.S. 584 (1977).

Following the analysis used a year before in the murder cases, a majority of the Supreme Court found that death was excessive punishment for a crime that does not involve the taking of life. Support for this conclusion was found in the fact that an overwhelming majority of the states had not legislated the death penalty for rape, and Georgia juries had been reluctant to impose the death punishment for rape. The dissents emphasized the often severe consequences of rape, the extreme aggravating circumstances present in Coker's case, and the confusion created by earlier Court decisions, which probably prevented many states from attempting to make rape a capital crime. The dissenters thought that the majority's statement that capital punishment is never appropriate for rape went beyond what was necessary for a decision in that case.

Given the Court's analysis of the Georgia rape statute, it is hard to imagine that any offense that does not involve a killing can be subject to capital punishment. No other crime has the same effect on the victim or is likely to meet the majority's "popularity test" of being made punishable by death by a significant number of state legislatures.

North Carolina has retained the death penalty in its rape statute, but the legislature has never tried to revise the punishment provisions to comply with the 1976 Supreme Court decisions. For that reason the State Supreme Court has already held the statute unconstitutional. No other crimes but murder have been punishable by death in recent years.

From these two Supreme Court decisions, several general statements can be made about the future of capital punishment:

(1) Probably no crime other than one that includes a killing can be punishable by death.

(2) Probably no mandatory death sentence will be approved other than one involving a defendant who is already serving a life sentence.

(3) Because experimentation has been discouraged, probably the only kind of capital punishment provisions any state will try to adopt will be closely similar to the Georgia and Florida schemes approved in 1976.

(4) The Court's majority in capital cases is a fragile alliance and the Court's direction could be significantly altered by one or two changes in membership. □

Sentencing

(continued from p. 9)

North Carolina's present capital-sentencing law[22] is modeled after the Georgia law, which provided specific aggravating factors that the sentencing jury must consider—for example, whether the defendant had prior convictions for serious assaultive crimes, whether the murder created a great risk of death to more than one person, and whether it involved torture or "depravity of mind." The sentencing jury must consider, under Georgia case law, mitigating factors that include the defendant's age, the extent to which he cooperated with police, and his emotional state at the time of the crime.

The Supreme Court has said that "because of the qualitative difference [between death and life imprisonment], there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." But is there not a "qualitative difference" between probation and a sentence of active imprisonment, or between a short, discretionary prison sentence and a long, mandatory prison sentence? Perhaps, but the Supreme Court has never held that statutory standards are required in imposing noncapital sentences. It has, however, adopted the view that a punishment may be cruel and unusual (and thus unconstitutional) if the punishment is greatly disproportionate to the severity of the offense, and it has approved individualized sentencing—a position that it reaffirmed recently in *United States v. Grayson*.[23]

The issue in *Grayson* was whether the judge may impose a more severe sentence if he believes—as the judge in the *Locklear* case did—that the defendant lied on the witness stand. Grayson was charged with escape from a federal prison camp. He testified that he left the camp because another inmate threatened him with "a large stick with a nail in it." However, another inmate whom the defendant asked to testify in his behalf said that he heard only loud talking when the incident occurred and saw no stick or violence. Other evidence in the case tended to show that the escape was planned and that the defendant had an accomplice who supplied him with civilian clothes outside the prison. After the jury had found the defendant guilty, the judge imposed a sentence of two years (out of a possible five) to run consecutively to the remainder of the defendant's earlier sentence. Because he thought an appellate court might find

22. N.C. GEN. STAT. Ch. 15A, Art. 100.

23. 22 CRIM. L. REP. 3174 (1978).

this sentence improper, the judge was careful to give his reason for it: he believed the escapee's defense was "a complete fabrication without the slightest merit whatsoever."

The Court of Appeals for the Third Circuit decided that it was improper for the sentence to be based on the judge's belief that Grayson lied and ordered that he be resentenced without considering whether his testimony was false. The U.S. Supreme Court reversed, upholding the sentence. The Court reasoned that since it is proper for the sentencing judge to take into account the defendant's prospects for rehabilitation, and since the defendant's readiness to lie under oath is generally considered relevant to these prospects, the sentencing judge may appropriately take the false testimony into account—especially when he finds the lie to be flagrant, as he did in Grayson's case. The Court made clear that it approved of "individualized sentencing"—the idea that for purposes of rehabilitation the sentence should fit the offender and not merely the offense. In the Court's view, when the sentencing court has very broad discretion, it should have the fullest possible information on the offense and the defendant's character—in fact, on every aspect of his life. The Court recognized that the sentencing judge often obtained such information from a presentence report but noted that a federal judge was not limited to the information in that report. (In upholding Grayson's sentence, the Court also considered and rejected the argument that taking the defendant's false testimony into account in sentencing amounted to punishing him for the crime of perjury without due process of law, and it ruled that basing the sentence on false testimony does not constitutionally hamper the defendant's right to testify at this trial, since his only right is to testify truthfully.)

In *Lockett v. Ohio*,[24] decided after *Grayson*, the U.S. Supreme Court returned to the theme of individualized sentencing. A plurality of the Court (four of nine justices) made clear its approval of the practice in all cases and found that individualized sentencing was constitutionally required in capital cases. Because the death penalty is irrevocable, the Supreme Court held that the Eighth and Fourteenth Amendments require that the sentencing judge or jury, in all but the rarest capital case, not be precluded from considering as a mitigating factor any aspect of a defendant's character or record and any circumstance of the offense.

In this case the defendant, Sandra Lockett, participated in planning the robbery of a pawnshop and, although she did not enter the shop, guided the other conspirators to it and drove the getaway car. During the robbery the pawnbroker was killed. This made Lockett guilty of capital murder under an Ohio statute. The Ohio law required the sentencing judge to impose the death penalty unless the defendant could establish at least one of the mitigating circumstances: (1) the victim of the killing induced it; (2) the offender acted under duress or strong provocation; and (3) the killing was the product of the offender's psychosis or mental deficiency. The judge could not consider, for example, the absence of proof that Lockett intended to cause the pawnbroker's death, her relatively minor role in the offense, her age (she was 21), or the fact that she had no major criminal record.

Four Supreme Court justices held that this limitation on mitigating factors made the Ohio provisions for death sentencing unconstitutional. Justice Blackmun, although he wrote a separate opinion, agreed with the four justices that the sentencing judge must be permitted to consider evidence concerning the defendant's degree of participation in the crime and whether he intended the killing to occur or had reason to believe that it would occur. Justice White agreed with the Court majority that the Ohio death penalty was unconstitutional as applied to Sandra Lockett. In his view, a capital sentence cannot be imposed without a finding that the defendant intended to cause death. He disagreed, however, with the four justices' opinion regarding individualized sentencing. In his view, the reliability of the decision to impose the death sentence is not increased by unlimited discretion to consider mitigating factors. In fact, he said, the plurality's ruling left the way open for the same discriminatory and capricious imposition of the death sentence that the Court had condemned in the past.

These recent decisions show that the Supreme Court's divided opinions reflect the controversy about sentencing in the legal profession today. They also show that the concept of individualized sentencing—which was until fairly recently considered the most progressive penal philosophy—can be appraised in two ways. One view is that the more information the court has about the defendant and his offense and the more aggravating and mitigating factors it is allowed to consider, the fairer its sentencing will be. Another view is that where the court is free to consider all information and to give the information whatever weight it chooses, sentencing may be unfair or capricious.

Decisions in the North Carolina courts

Since 1962 North Carolina appellate courts' decisions have clung steadfastly to individualized sentencing. The sentencing judge in North Carolina is permitted—but not *required*—to consider nearly every factor concerning the offender and the offense. Thus the sentencing judge is *authorized* to make very precise determination of the appropriate sentence, but he is not *required* to do so. Except in first-degree murder cases, the judge is not compelled to take any particular factors into consideration; the law does not even guarantee that a presentence investigation will be ordered. There is ordinarily no means of raising on appeal the question of whether the sentencing judge abused his discretion because he is not required to put the reasons for his sentence on the record. Even in the rare cases in which the basis of the sentence can be reviewed on appeal, the sentence is upheld unless the judge is clearly out of bounds.

In a leading case from 1962, *State v. Pope*,[25] the North Carolina Supreme Court expressed its strong approval of individualized sentencing and of basing the sentence on the fullest information

24. 23 CRIM. L. REP. 3215 (1978).

25. 257 N.C. 326 (1962).

possible concerning the defendant's life and characteristics as well as his offense. The Court held that the sentencing judge should be permitted a wide latitude. Presentence investigations are "favored and encouraged," the Court said, and may extend to the defendant's criminal record, moral character, standing in the community, habits, occupation, social life, education, and mental and physical health, as well as to his offense. The sentencing judge should receive all of these sentence investigations in open court. The Supreme Court held that any information that comes to the sentencing judge that tends to aggravate punishment must be brought to the defendant's attention before sentencing, and the defendant must be given a full opportunity to refute or explain it. The defendant may give his version of the offense charged and may introduce any facts that may be relevant toward mitigation of the sentence.

In North Carolina appellate reversal of sentences is rare. Three recent cases illustrate the scope of review when it has resulted in reversal. In 1975 the North Carolina Court of Appeals considered a case in which the trial judge had imposed a sentence of not less than two years nor more than four. The sentence was within the statutory limit and would have raised no questions if the sentencing judge had said nothing further about it. However, the judge remarked on the record that he was imposing the two-year minimum because the defendant would be eligible for parole after serving six months and he wanted to insure that the defendant would serve at least six months. The Court of Appeals noted that the sentencing judge need not state any reasons for his sentence. If the sentence is within the lawful limits there is a presumption that it is valid. But if the record shows that the sentence was imposed "for a cause not within the indictment," then the appellate court may remand the case for resentencing. In this case the Court of Appeals said that the sentencing judge was mistaken in thinking that parole after service of one-fourth of the minimum was mandatory. Parole is always within the Parole Commission's discretion. The court held that the judiciary has the responsibility to determine guilt and impose punishment as provided by law, not to thwart the parole process, as the trial judge in this case had tried to do.[26] In a 1967 case[27] a woman pleaded guilty to involuntary manslaughter for shooting and killing her husband, who had attacked her after a drunken party and allegedly threatened to kill her. The trial judge imposed a sentence of five to seven years, which was within the legal limit, but stated on the record that he was punishing the defendant for her participation in the drunken party. The North Carolina Supreme Court remanded the case for resentencing because the record showed that the trial judge had imposed sentence for a cause that was not embraced within the criminal charge. In 1977 the North Carolina Supreme Court affirmed the Court of Appeals' ruling[28] that a prison sentence was invalid where the trial judge, in open court, had said he would have to give the defendant an active sentence, rather than probation, because the defendant would not plead guilty to a lesser offense. The judge had warned the defendant before trial that he would have to impose active imprisonment if the defendant failed to accept the plea bargain offered by the state, even though the judge knew nothing of the defendant's character and record. This sentence, the Court of Appeals held, clearly violated the defendant's right to a trial.

Perhaps the most interesting thing about each of these three North Carolina cases is that in each one, when the defendant was resentenced, the trial judge could have imposed the same sentence as before—even for the same reasons—if he did not state any improper reasons on the official record. Thus, the very few appellate decisions reversing sentences have probably encouraged North Carolina judges to keep silent about their sentencing criteria. □

26. State v. Snowden, 26 N.C. App. 45 (1975).

27. State v. Swinney, 271 N.C. 130 (1967).

28. State v. Boone, 33 N.C. App. 378 (1977), *aff'd*, 293 N.C. 702 (1977).

Election Laws

H. Rutherford Turnbull, III

Corporate expenditures made to influence elections and referenda

For many years North Carolina has prohibited corporations, insurance companies, labor unions, professional associations, and other business entities from making contributions or incurring expenditures on behalf of or in opposition to any candidates or political committee in any election "or for any political purpose whatsoever." The present prohibition (G.S. 163-269, -270, and -279.19) dates back to 1933 with respect to corporations and to 1901 with respect to insurance companies. While clearly proscribing contributions to candidates, the law contains other language—"or for any political purpose whatsoever"—that is less than precise. Does that language mean that a corporation could not legally spend its money on referenda? If so, does the prohibition violate the First Amendment guarantee of free speech?

In *First National Bank of Boston v. Bellotti*[1] the Supreme Court reached the issue for the first time. It held unconstitutional a Massachusetts statute that made it illegal for a corporation to spend its money "for the purpose of . . . influencing or affecting the vote on any question submitted to the voters, other than one materially affecting any of the property, business or assets of the corporation." The Court found that (1) there is no language in the First or Fourteenth Amendments or in the Court's decisions supporting the proposition that speech loses its protection simply because the source of the speech is a corporation that cannot prove that the success of a referendum will have a material effect on its business; (2) the risk that corporations will corrupt candidates is not present in a popular vote on a public issue; and (3) the statute cannot be supported on the ground that it protects the rights of corporate shareholders who have different views from those expressed by the corporation (because there are protections for dissenting shareholders under corporate law). On the basis of these findings the Court held the statute unconstitutional and cleared the way for resolving an important North Carolina issue.

In 1978 the General Assembly faced the "local liquor-by-the-drink" question. By allowing local governments to submit to their electorates a referendum on permitting the local sale of liquor by the drink, the General Assembly made it certain that corporations and other business associations would become active in liquor-by-the-drink referenda. A court or the Attorney General undoubtedly would have to construe G.S. 163-269, -270, and -279.19(a) in regard to these elections. Relying on *Bellotti*, the Attorney General issued an opinion on May 10 that a corporation may make an expenditure to express its views in support of or in opposition to referendum issues. The opinion is careful to note that it supersedes an earlier opinion (July 20, 1977) in which the Attorney General held that corporations are prohibited from making expenditures on behalf of either candidates or referenda; only the first part of that opinion, prohibiting corporate expenditures for candidates, now holds water.

Apportionment of legislative bodies and Section 5, Voting Rights Act

Six of the U.S. Supreme Court's eight decisions in election laws centered around the "political thicket" of legislative apportionment and compliance with Section 5 of the Voting Rights Act of 1965, as amended.

At the height of the "new equal protection" era (1964), the Warren-dominated Court held in *Reynolds v. Sims*[2] that the Fourteenth Amendment's guarantee of equal protection is violated when a state legislative body is apportioned so that the vote of one elector does not equal in strength the vote of each other elector. Justices Frankfurter and Harlan, among others, attacked the one-man, one-vote principle as unnecessarily involving federal courts in the "political thicket" of state and local politics. Their prophecy is both clear and accurate, as the present term of Court shows.

One year after *Reynolds*, Congress enacted President Johnson's most lasting contribution to racial equality and progress in the political arena, the Voting Rights Act of 1965. Section 4 of the act identifies those states and their political subdivisions (counties and cities) that have discriminated against electors

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1. 55 L.Ed. 2d 707 (1978).

2. 377 U.S. 533 (1964).

on the basis of race. Section 5 prohibits such a state or political subdivision from implementing a legislative reapportionment unless it has obtained either a declaratory judgment from the District Court for the District of Columbia or a ruling from the U.S. Attorney General that the reapportionment "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. . . ." Like the one-man, one-vote rule, Sections 4 and 5 have required the Court to oversee legislative apportionment plans and decide whether they violate the prohibitions of Section 5.

New York. The first salvo of the barrage under *Reynolds* was *United Jewish Organizations of Williamsburg, Inc. v. Carey*.[3] When the U.S. Attorney General objected to a 1972 reapportionment statute that affected Kings County, N.Y., the New York legislature enacted (in 1974) another statute and submitted it to the U.S. Attorney General in a second effort to obtain his approval. Although the 1974 plan did not change the number of districts with nonwhite majorities, it did change the size of nonwhite majorities in most of those districts.

In an effort to obtain a nonwhite majority of 65 per cent in each district, which apparently would satisfy the Attorney General, the 1974 reapportionment plan reassigned a portion of the white population—including part of the Hasidic Jewish community in Kings County—to an adjoining district and also split the Hasidic community, formerly in one district, between two senatorial districts. Alleging that the 1974 plan violated their Fourteenth and Fifteenth Amendment rights by diluting the value of their franchise solely for the purpose of achieving a racial quota and by assigning them to electoral districts solely on the basis of race, members of the Hasidic community sued to prevent the 1974 plan from taking effect. A federal district court held that: (1) the group had no constitutional right in reapportionment to recognition as a separate community; (2) the redistricting did not disenfranchise them; (3) racial considerations were permissible to correct past discrimination based on race; and (4) the 1974 plan would leave approximately 70 per cent of Kings County senate and assembly districts with white majorities although only 65 per cent of the county is white.

The Supreme Court affirmed the district court. It noted that (1) Section 5 will often require the use of racial considerations in drawing lines; (2) the Constitution does not prevent a state from deliberately creating or preserving black majorities in particular districts in order to comply with Section 5; (3) racial criteria may be used in districting or apportionment for reasons other than eliminating the effects of past discrimination; (4) the fact that a state uses specific numerical quotas in establishing a certain number of black majority districts does not of itself make the state's reapportionment plan violate the Fourteenth and Fifteenth amendments; and (5) there was no proof that the 1974 plan increased minority voting strength over minority voting strength produced by the 1966 reapportionment and New York had therefore done more than the Attorney General was authorized to require the state to do under Section 5. The Supreme Court concluded that the Constitution permits a state to draw district lines so that the percentage of districts with a nonwhite majority roughly approximates the percentage of nonwhites in the county; if Kings County's white population, as a group, had fair representation, there was no discrimination against them that the Constitution will redress.

Mississippi. Having disposed of the Kings County Hasidic Jews' voting problems, the Court next turned its attention for the fifth time to Mississippi's none-too-successful efforts to comply with *Reynolds*. The issue in *Connor v. Finch*[4] was whether a federal district court legislative reapportionment plan for the Mississippi senate and house of representatives satisfied the one-man, one-vote test. In an effort to preserve the state's historic respect for the integrity of county boundaries in conjunction with state legislative districts, the district court followed a policy of single-member districts; it fashioned a plan that resulted in maximum population deviations of 16.5 per cent in the senate districts and 19.3 per cent in the house districts. The Court found that these deviations failed to meet the test imposed on district courts that must reapportion state legislatures—namely, that "unless there are persuasive justifications, a court-ordered reapportionment plan . . . must avoid use of multimember districts, and, as well, must ordinarily achieve the goal of population equality with little more than *de minimis* variation."[5] The Court noted that, with respect to the multimember and single-member district issue, Mississippi's "unalloyed reliance" on its historic policy against fragmenting districts is insufficient to overcome the strong preference for single-member districts that the Court ordered in an earlier version of this case.[6] The Court said that there was not sufficient proof of any such "unique features" of the state's political structure that would permit the district court to recognize the sanctity of county boundaries. (It dismissed county boundaries as a basis for determining legislative district boundaries because counties have little legislative power over their own affairs and must rely on private bills introduced on their behalf in the state legislature. This argument would be hard to make against North Carolina.) The Court also found that the district court had abused its discretion and should have given greater weight to the one-man, one-vote rule.

South Carolina. Like the beleaguered ball in a world championship Ping-Pong game, the reapportionment plan enacted by South Carolina in 1972 found itself being hit from one court into another and back again in a frustrating series of litigation involving Section 4. As required by Section 4, South Carolina submitted its 1972 reapportionment plan to the U.S. Attorney General for review and also filed it with a federal district court because that court had invalidated an earlier plan. The district court found that the new plan was constitutional, and the Attorney General interposed no objection.

Thereafter, a suit was filed by South Carolina voters in the federal district court for the District of Columbia chal-

3. 430 U.S. 144 (1977).

4. Connor v. Finch, 431 U.S. 407 (1977).

5. Chapman v. Meier, 420 U.S. 1, 26-27 (1975).

6. Connor v. Williams, 404 U.S. 549, 551 (1972).

lenging the Attorney General's failure to object to the 1972 plan. In reply to the suit, the Attorney General said that he found the plan unconstitutional, but he refused to interpose an objection in deference to the district court in South Carolina that found the plan constitutional. Under order by the district court in the District of Columbia to review the plan, the Attorney General interposed an objection, thereby raising the issue: Is the Attorney General's discretion reviewable by a federal court? When the Court of Appeals for the District of Columbia held that his discretion *is* reviewable, other South Carolina voters filed a new lawsuit in the district court in South Carolina seeking to enjoin the new plan from being carried out and arguing that the Attorney General had in fact interposed an objection. That district court dismissed the complaint, holding that the Attorney General's objection came too late—after the 60-day period in which he may object.

In *Morris v. Gressette*,[7] the Supreme Court affirmed and held that the Attorney General's objection, filed retroactively, is invalid and the reapportionment plan that the district court in South Carolina found constitutional may be implemented. The Court thereby established the principle that the Attorney General's discretion in acting in a Section 5 review capacity may not be judicially reviewed but can be challenged only in traditional constitutional (one-man, one-vote) litigation.

On the same day it decided *Morris v. Gressette*, the Court also held in *Briscoe v. Bell*[8] that the determination by the Attorney General or Director of the Census that a state—in this case, Texas—is covered by the Voting Rights Act, and thus must comply with Section 5, absolutely precludes any judicial review of that decision. This result was required by a provision in Section 4 stating that the determination may not be reviewed by any court.

Alabama. Sheffield, a small Alabama town, found itself on the losing side of a Section 5 case. *United States v. Board*, when it sought to change from a commissioner form of government to a mayor-council form.[9] Since Alabama is covered by Section 4, Sheffield was required by Section 5 to submit to the Attorney General any proposed change in its voting qualifications, standards, practices, or procedures. It therefore notified the Attorney General that it was planning to hold a referendum on whether to change its form of government. The city also notified the Attorney General that if the vote favored the change, the change would become effective immediately, pursuant to the provisions of state law. The Attorney General filed no objection to the referendum, in which the voters approved a change in government. After the referendum, however, the Attorney General interposed his objection to the mayor-council form of government, which, among other things, established a system of at-large elections for councilmen. The city refused to take his objection into account and scheduled an at-large council election, thereby triggering a suit by the Attorney General against the city. At issue was whether Sheffield was a "political subdivision" and thereby covered by the Voting Rights Act. If so, was the Attorney General precluded from objecting to the mayor-council form because he had given prior approval to holding the referendum? The city argued that it was not a political subdivision because Section 14(c)(2) of the act defines the term as any county or parish except that where the registration for voting is not conducted under the supervision of a county or parish the term includes any other subdivision of a state that conducts voter registration. Sheffield had never conducted voter registration; and the city therefore argued that it could not be considered a political subdivision under the act. The Court held that the act does not mean what the city contended. Instead, Section 5 applies to all entities that have power over any aspect of the electoral process within covered jurisdictions, not just those that conduct voter registration. The Court also held that the Attorney General's failure to object to the referendum was not an approval of the change in form of government and that he may interpose a Section 5 objection after the referendum.

Texas. Finally, the Court again made it clear in *Wise v. Lipscomb* that a reapportionment plan created by a legislative body (the Dallas [Texas] City Council) need not meet the stringent standards required of court-created reapportionment plans.[10] In *East Carroll Parish School Board v. Marshall*,[11] the Court had established the principle that, absent exceptional circumstances, judicially imposed reapportionment plans should use only single-member districts. In *Wise*, a federal district court held the Dallas at-large election scheme unconstitutional because it diluted the voting strength of Negroes and Mexican-Americans. In response to the court order, the Dallas City Council enacted a mixed district (eight members) and at-large (three members) plan. The district court approved the plan, but the federal appeals court reversed, holding that the district court should have taken the *East Carroll* principle into account and that, if the principle were applied, the district court could not have approved the city council's plan. The Supreme Court rejected the court of appeals' view of the matter, holding that the eight/three plan is legislatively devised and is not required to meet the more stringent standards (including the *East Carroll* standard) that apply to judicially created plans.

Conclusion. The effect of the Court's multiple rulings is clear, and the following lessons may be drawn from these rulings:

1. A state legislature may deliberately draw district lines so that the percentage of legislative districts that have a nonwhite majority roughly approximates the percentage of nonwhites in a county; there is no discrimination against whites if, as a group, they are provided fair representation. The legislature may consider ethnic and neighborhood integrity, but such considerations may not impede plans that seek racial equality.[12]

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7. 432 U.S. 491 (1977).

8. Briscoe v. Bell, 432 U.S. 404 (1977).

9. United States v. Board, _____ U.S. _____ (1978), 55 L.Ed. 2d 148 (1978).

10. Wise v. Lipscomb, 54 L.Ed. 2d 41 (1978), *reaffing* East Carroll Parish School Bd. v. Marshall, 424 U.S. 636 (1976). *See* 42 POPULAR GOVERNMENT 20 (Winter 1977).

11. 424 U.S. 636 (1976).

12. United Jewish Org. v. Carey, *supra* note 3.

2. County boundaries may be taken into account when a legislature draws up a reapportionment plan, but a redistricting court must pay greater attention to strict population equality than even to single-member-district requirements, and much more than to county boundaries.[13]

3. Neither the United States Attorney General's discretion in approving reapportionment plans submitted pursuant to Section 5 nor his discretion in designating a state as covered by the Voting Rights Act may be reviewed by the courts.[14]

4. The Voting Rights Act applies to *all* political subdivisions in a state that is covered by the act, even though they may never have conducted voter registrations. The Attorney General's approval of holding a referendum that could effect a change in the election system of a covered political subdivision is not to be taken as approval of the change; it is approval of only the referendum.[15]

5. The standards that apply to reapportionment by district courts (preference for single-member districts and close adherence to *de minimis* deviation in population equality) are more stringent than the standards for legislatively sponsored reapportionment plans.[16]

North Carolina will undergo a reapportionment after the 1980 census. It is therefore relevant to note that the Supreme Court clearly treats plans that are created by the legislature more hospitably than court-created plans. Also, the standards of population equality are more relaxed, and thus considerations of county boundaries and multi- and single-member districts are given more leeway when legislatively created plans are reviewed. Under *Gaffney v. Cummings*[17] (7.83 per cent maximum deviation from population norm) and *White v. Regester*[18] (19.9 per cent maximum deviation from population norm), the Court has established the benchmark that, for legislatively created plans, a deviation of 10 per cent or more is not of prima facie constitutional validity; nonetheless, the Court earlier (in *Mahan v. Howell*[19]) had sustained a 16.5 per cent population deviation in the plan for the Virginia House of Delegates, but that plan produced the minimum deviation above and below the norm while keeping intact political boundaries. But the *Mahan* standard (16.5 per cent), adopted to preserve county boundaries, may be in trouble. North Carolina's tradition of using county boundaries to draw district lines; the more recent 10 per cent rule; and the Court's somewhat summary short-changing of the Mississippi argument in favor of preserving the integrity of county boundaries (coupled with the Court's wholesale unwillingness to consider ethnic and neighborhood factors) are potentially troublesome. Legislative reapportionment committees will have to watch the Court's further forays into the political thicket carefully, for the thicket gets thicker and contains more briers every year. Only Br'er Rabbit and a majority of the Court seem to find it tolerable.

Legal qualifications for officeholding

When a candidate is elected in a partisan general election but later is found ineligible for the office under the terms of North Carolina's General Statutes, does his defeated opponent then become the victorious candidate and eligible to take the office? That was the issue before the North Carolina Supreme Court in *Duncan v. Beach*,[20] and the answer was "no."

Judge Duncan, a Republican, was appointed to a district court judgeship and took office in April 1973. In the 1974 general election, he was defeated by Judge Beach, a Democrat, who succeeded him in office. When he was elected, however, Judge Beach was already 70 and thus was not eligible to hold office as a district court judge because G.S. 7A-4.20(a) makes it illegal for a person to hold that office after he becomes 70. Three years after his election and at the request of the Administrative Office of the Courts, Judge Beach resigned his office. Governor Hunt appointed Judge Noble to fill the vacancy. Duncan then brought a lawsuit claiming that he should be the judge, not Noble.

Duncan rested his claim on three grounds: (1) Since Beach was an ineligible candidate during the 1974 general election, his election was a nullity. Duncan was the only legally qualified candidate and under G.S. 163-110 (which provides that a sole candidate for a nomination [not election] should be nominated), he was entitled to office. (2) Since Beach was ineligible to hold or seek office, the votes cast for him were a nullity and were not to be counted, so that the candidate with the next highest number of votes (Duncan) was elected. (3) Under G.S. 128-7, which provides that officeholders shall continue in their offices until their successors are elected (or appointed) and qualified, Duncan, as the incumbent, was entitled to continue in office.

In rejecting Duncan's arguments, the Supreme Court noted that the voters' will had been clearly expressed in favor of Judge Beach and reiterated the rule of *State ex rel. Spruill v. Bateman*:[21] Votes cast for an ineligible candidate, though not effective to entitle him to office, are nonetheless not void and are effective in determining the result of the election in regard to other candidates. Accordingly, neither the ineligible candidate nor the defeated candidate should have taken office, because one was ineligible and the other did not receive a majority of the votes. The Court also found that it was immaterial whether the public knew that Beach was ineligible for office (and the voters may well have known his age, since his birth certificate was on file in the Caldwell County register of deeds' office).

(Note: The Court also discussed the *de jure* and *de facto* officeholding principles, but the discussion is not relevant to the elections law problem treated above and is not digested here.) □

13. Connor v. Finch, *supra* note 4.

14. Morris v. Gressette, *supra* note 7, and Briscoe v. Bell, *supra* note 8.

15. United States v. Board, *supra* note 9.

16. Wise v. Lipscomb, *supra* note 10; Connor v. Finch, *supra* note 4.

17. 412 U.S. 735 (1973).

18. 412 U.S. 755 (1973).

19. 410 U.S. 315 (1973).

20. 294 N.C. 713 (1978).

21. 162 N.C. 588 (1913).

Land Use Regulation

Richard D. Ducker and Philip P. Green, Jr.

IN 1926 THE United States Supreme Court first considered the legality of zoning. In *Euclid v. Ambler Realty Co.*[1] it held that this type of land-use regulation did not violate the U.S. Constitution. In the next two years the Court handed down three more zoning decisions.[2] But then it refused to review another zoning case for 46 years, even though state courts were full of zoning litigation. (North Carolina's appellate courts alone have issued 130 published zoning decisions as of this writing.)

This long drought at the Supreme Court level ended with the *Belle Terre* decision[3] in 1974, followed by *Eastlake*[4] and *American Mini Theatres*[5] in 1975-76. The 1977-78 term added another zoning decision[6] and three others with implications for land-use regulation.[7] Only time will tell whether these cases presage a continuing upsurge of judicial activism in the area of local land-use regulation or whether there will soon begin another half-century of "benign neglect." But the 1977-78 decisions are of more than passing interest.

Arlington Heights: "exclusive" or "exclusionary" zoning?

Although the exclusionary effects of local zoning ordinances have attracted considerable national attention in the past decade, proponents of governmental housing programs have had relatively few legal weapons with which to fight local resistance to subsidized, racially integrated, low- and moderate-income housing. For those who hoped that an expansive interpretation of the federal constitutional principle of equal protection could be invoked to challenge local rezoning actions with racial overtones, the Supreme Court's holding in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*[8] is disappointing. According to the Court, the disproportionate racial impact of Arlington Heights' refusal to rezone property to allow construction of low- and moderate-income housing was insufficient to show a violation of the equal protection clause, absent any evidence of racially discriminatory intent by the village.

In the early 1970s, a nonprofit developer in the Chicago area (Metropolitan Housing Development Corporation, or MHDC) entered into a lease/purchase agreement for a 15-acre parcel of land located in the affluent Chicago suburb of Arlington Heights. The corporation planned to develop a 190-unit townhouse project that would be federally subsidized with Section 236 low- and moderate-income housing funds. Although the 1970 Census had revealed that only 27 blacks lived in Arlington Heights (population roughly 64,000), the completed project was expected to attract a substantial number of blacks from other communities in the metropolitan area. The Arlington Heights Village Council denied MHDC's petition to rezone the proposed site from an R-3 classification to a higher-density R-5 district that would have allowed townhouse development. The developer and several potential minority tenants then brought suit against the village alleging racial discrimination.

In the *Arlington Heights* decision, the Court first pointed to the federal district court's determination that no evidence existed that race was a motivating factor in the village's denial of the rezoning petition. No racially discriminatory purpose in the refusal to rezone had been proved. However, the Seventh Circuit Court had made an additional determination that the rezoning denial had a racially discriminatory effect on those who might have lived in the project. Was this result sufficient to render the village's refusal to rezone the site a violation of the equal protection clause? No, according to the Supreme Court. *Wash-*

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1. 272 U.S. 365 (1926).
2. Zahn v. Board of Public Works, 274 U.S. 325 (1927); Nectow v. Cambridge, 277 U.S. 183 (1928); Washington *ex rel.* Seattle Title & Trust Co. v. Roberge, 278 U.S. 116 (1928).
3. Village of Belle Terre v. Boraas, 416 U.S. 1 (1974).
4. Eastlake v. Forest City Enterprises, 426 U.S. 668 (1976).
5. Young v. American Mini Theaters, 427 U.S. 50 (1976).
6. Arlington Heights v. Metro. Housing Corp., 429 U.S. 252 (1977).
7. Linmark Associates v. Township of Willingboro, 431 U.S. 85 (1977); Moore v. East Cleveland, 431 U.S. 494 (1977); Penn Central Transportation Co. v. City of New York, ____ U.S. ____ (1978), 57 L.Ed. 2d 631.
8. 429 U.S. 252 (1977).

ington v. Davis[9] made clear that official governmental action will not be held unconstitutional solely because it results in a "racially disproportionate impact." The Court in *Arlington Heights* concluded that the discriminatory "ultimate effect" of the village's refusal to rezone, considered alone, did not prove a constitutional violation.[10] According to the *Arlington Heights* rule, plaintiffs must prove an intention or motivation to discriminate on the basis of race in order to bring a successful cause of action under the equal protection clause.[11]

Arlington Heights illustrates the difficulties of applying federal constitutional principles and civil rights legislation to the local zoning process. The possible justifications for amending a zoning ordinance are many, and isolating racial prejudice in the zoning area is especially difficult. Many zoning ordinances attempt to protect property values as a primary objective, although the antidiscrimination principles of constitutional jurisprudence and "fair housing" legislation have the effect of prohibiting racial discrimination in housing regardless of the effect on property values. The Village of Arlington Heights justified its refusal to rezone the subsidized-housing site on the basis that it was upholding a zoning policy designed to separate incompatible land uses and protect property values.[12] That the Supreme Court implicitly accepted these as legitimate zoning objectives is noteworthy.

The holding in *Arlington Heights* will probably have little importance in North Carolina. Most substantive challenges to local zoning decisions will still be made on the grounds that the decision is unreasonable under state or federal due process principles. No claim was made in *Arlington Heights* that the village's refusal to rezone could be challenged under a traditional due process test, first applied by the U.S. Supreme Court to zoning in 1926 and reaffirmed several times since then.[13] After *Arlington Heights*, proving that a city council's zoning decision is racially motivated is likely to be no easier than proving that an amendment to the zoning ordinance is capricious, arbitrary, or unreasonable.

The *Arlington Heights* case is a racial discrimination case. It does not attempt to speak to the social policy question of whether local governments have an obligation to provide housing for poor people, regardless of race, who would choose to live in the community if affordable housing were available. A few state courts have tried to articulate affirmative duties for developing municipalities to make certain that each community's zoning pattern provides for its "fair share" of regional low- and moderate-income housing needs. These approaches, focusing on the maldistribution of housing opportunities among local governments in the same region, are primarily geared to the kind of development patterns found in very large metropolitan areas outside the South.

Moore: all in the "family"?

Since most draftsmen of ordinances treat the "Definitions" section in an offhand manner, it is interesting to note that two recent Supreme Court decisions have turned on the validity of a definition of "family."

In *Village of Belle Terre v. Boraas*[14] six *unrelated* college students had rented a dwelling in the Long Island village of Belle Terre, where the zoning ordinance permitted only single-family dwellings. The ordinance defined a "family" to be "one or more persons related by blood, adoption, or marriage, living and cooking together as a single housekeeping unit, exclusive of household servants. A number of persons but not exceeding two (2) living and cooking together as a single housekeeping unit though not related by blood, adoption, or marriage shall be deemed to constitute a family." When the village served notice on the owners of the house that they were violating this ordinance, the owners and three of the students brought a federal court action to have the zoning provisions declared unconstitutional on a variety of grounds, mostly discrimination against unrelated persons. Ultimately the Supreme Court upheld the definition against all of those attacks.

Moore v. East Cleveland,[15] focused on a restriction limiting the number of *related* persons who could live as a single housekeeping unit. It involved a housing ordinance rather than a zoning ordinance. The intention of that ordinance was to limit the number of people who occupied a particular structure, as opposed to the Belle Terre intention to preserve a "family type" of community. Its definition of "family" was longer and more complicated, but essentially it began by excluding *all* unrelated persons and then limited related persons to (a)

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9. 426 U.S. 229 (1976).

10. 429 U.S. at 271. It is important to note that the U.S. Supreme Court ultimately disposed of the *Arlington Heights* case by remanding it to the Seventh Circuit for a ruling on the separate issue of whether the Fair Housing Act had been violated. Section 3604(a) of that statute reads: "It shall be unlawful to make unavailable . . . or deny a dwelling to any person because of race, color, religion, or national origin. . . ." Relying primarily on the case of *United States v. City of Black Jack*, 508 F.2d 1179 (8th Cir. 1974), the Seventh Circuit concluded in *Metropolitan Housing Development Corporation v. Arlington Heights*, 558 F.2d 1283 (1977), that the racially discriminatory effect of Arlington Heights' refusal to rezone *was* sufficient to prove a statutory violation of Section 3604(a). Thus, despite the Supreme Court's refusal to give an expansive reading of the equal protection clause in its decision, the Seventh Circuit gave a very expansive reading to the Fair Housing Act. The Seventh Circuit's decision may turn out to be a little-noticed but important victory for proponents of subsidized housing.

11. At one point in the decision the Supreme Court says: "[I]f the property involved here always had been zoned R-5 but suddenly was changed to R-3 when the town learned of MHDC's plans to erect integrated housing, we would have a far different case." (429 U.S. at 267.) Apparently the Court distinguishes between a city's failure to take the affirmative step to rezone property to permit the construction of subsidized housing and its affirmative step to rezone a property properly classified for the proposed subsidized housing to a district which would make the development of such housing impossible. The Court hints that the former situation (*Arlington Heights*) would not give rise to a violation whereas the latter might.

12. 429 U.S. 269-70.

13. Village of Belle Terre v. Boraas, 416 U.S. 1 (1974); City of Eastlake v. Forest City Enterprises, Inc., 426 U.S. 668 (1976).

14. 416 U.S. 1 (1974).

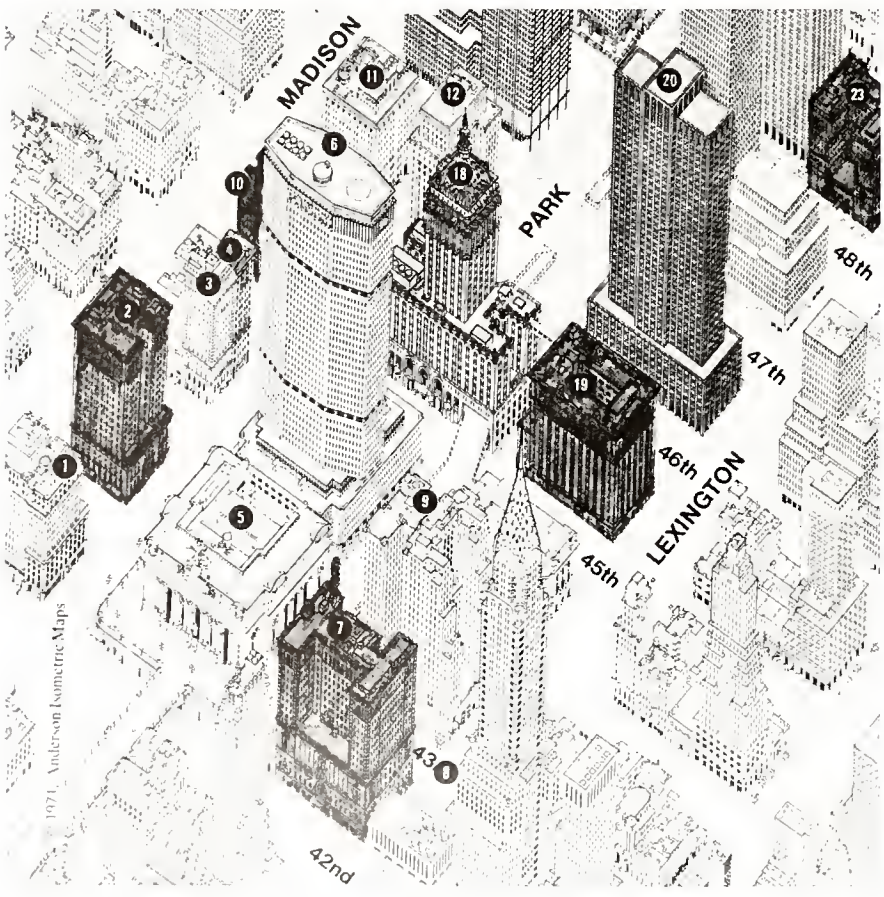
15. 431 U.S. 494 (1977).

the head of the household and spouse, (b) their parents, (c) their unmarried children, and (d) not more than one dependent child with a spouse and dependent children. Only such a family could occupy a dwelling.

Mrs. Moore was the head of her household. Her son and his son lived with her [under category (d) in our listing], along with an orphaned grandson (the son of Mrs. Moore's deceased daughter). Somehow the city learned that this second grandson was also living in the dwelling and brought criminal charges against Mrs. Moore. She was convicted of violating the ordinance. The Ohio Court of Appeals affirmed, the Ohio Supreme Court denied further review, and finally the U.S. Supreme Court reversed the conviction on constitutional grounds.

Incredibly, the Court took six separate opinions to deal with this essentially simple issue. The "majority" opinion held that (1) freedom of personal choice in matters of family life is one of the liberties afforded "special protection" by the due process clause of the Fourteenth Amendment; (2) this freedom extends beyond the "nuclear family" to include uncles, aunts, cousins, and grandparents (the "extended family"); (3) this special protection requires the court to look especially hard at the purposes served by regulations that limit this freedom and also to determine to what extent a particular regulation actually serves such purposes; and (4) East Cleveland's regulation restricting the "family" who could live together had only marginal effects on the city's avowed purposes of preventing overcrowding, minimizing traffic and parking congestion, and avoiding undue financial burdens on the city's school system.

Normally local zoning ordinances regulate the *types* of residences permitted in particular districts (e.g., single-family, duplex, multi-family), or they may key lot-area requirements or off-street parking requirements to the number of dwelling units or families living on the lot. This means that "dwelling" and/or "family" must be defined if the local government wishes to avoid holdings (like those in a number of states) that a convent, a boarding house, a fraternity or sorority, or even a college dormitory is a single-family residence. *Moore* indicates the hazards of restricting the types of related individuals who may live together as a family, while *Belle Terre* indicates that at least some restrictions on unrelated individuals will be sustained.



Architect's rendering of Grand Central Terminal and surrounding area. Grand Central is no. 5; Pan Am Building, 6; Biltmore Hotel, 2; and Commodore Hotel, 7.

Penn Central: a solid foundation for historic preservation

In *Penn Central Transportation Co. v. City of New York*[16] the Supreme Court moved onto some new turf (this was its first major case involving regulations aimed at historic preservation), but it broke little new ground in the principles it applied. The case upheld the application of New York City's Landmarks Preservation Law to the Grand Central Terminal.

Under that law a Landmarks Preservation Commission is empowered to designate (after appropriate study and hearings) "historic districts," "landmark sites," and "landmarks."[17] Grand Central Terminal had been designated as a "landmark" (defined as "any improvement, any part of which is thirty years old or older, which has a special character or special historical or aesthetic

16. _____ U.S. _____ (1978), 57 L.Ed. 2d 631.

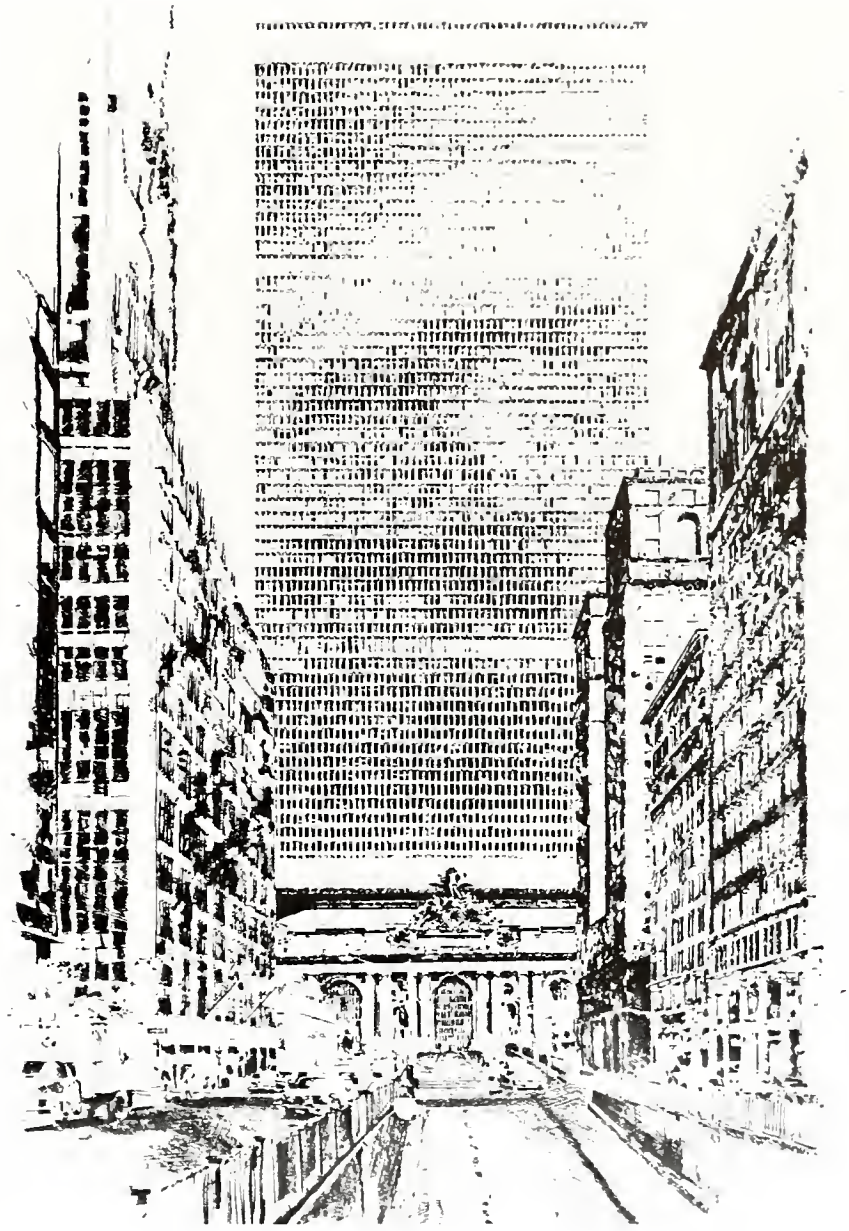
17. North Carolina cities and counties are given somewhat similar authority to designate "historic districts" by Part 3A of Article 19 of G.S. Ch. 160A and individual "historic properties" by Part 3B of that article. However, the North Carolina legislation is neither so complicated nor so restrictive in its effects as New York City's law.

interest or value as part of the development, heritage or cultural characteristics of the city, state or nation. . . ."). A designation must be approved by the city's Board of Estimate, and the owner may have judicial review of that decision. At the time of the case the city had designated 31 historic districts and over 400 individual landmarks and was considering more sites for designation.

Under the law landmark designation of a property imposes a duty on the owner to keep the building's exterior features in good repair and obligates him to secure Commission approval before altering the landmark's exterior architectural features or making any exterior improvements on the site. If he applies to the Commission for permission to make changes, he may receive a certificate stating that the alteration would have no effect on protected architectural features; or a certificate of "appropriateness" indicating that the proposed construction would not unduly hinder the protection, enhancement, perpetuation, and use of the landmark; or a certificate of appropriateness on the ground of "insufficient return" to insure that the designation does not cause an economic hardship. Decisions on the granting or denial of such certificates are subject to judicial review.

The owner of a landmark parcel who is restricted by its landmark designation from exercising his full rights under the New York City zoning ordinance may under the provisions of that ordinance transfer his unused development rights to other properties he owns.

Penn Central took no judicial appeal from the Grand Central Terminal's designation as a landmark. It applied to the Commission for a certificate permitting it to erect either a 55-story office building above the terminal, without disturbing its facade, or a 53-story building that would require removing portions of that facade. When the Commission denied a certificate for either proposal, instead of filing an appeal to court, Penn Central brought a separate action seeking (a) a declaratory judgment that the Landmarks Preservation Law amounted to an unconstitutional "taking" of its property, (b) an injunction against applying the law to the terminal, and (c) damages for its losses between the time of designation and the court decision. The trial court granted the declaratory and injunctive relief requested; it was reversed by the Appellate Division,[18] and the New York Court of Appeals affirmed.[19] The U.S. Supreme Court affirmed the Court of Appeals' decision by a 6-3 margin, with Justices Rehnquist, Stevens, and Chief Justice Burger dissenting.



Architect's rendering of Grand Central with proposed office structure above the terminal.

After reviewing the general principles that had been applied in previous decisions involving a "taking," the Court's majority examined the specific elements of this case. First, it found that preserving structures and areas with special historic, architectural, or cultural significance is an entirely permissible governmental goal (which Penn Central did not dispute). Next, it disposed of Penn Central's claims that:

(a) A restriction against using the "air rights" over the terminal amounted to an automatic "taking" of those

18. 50 App. Div. 2d 265, 377 N.Y.S. 2d 20 (1975).

19. 42 N.Y.2d 324, 366 N.E.2d 1271 (1977).

Grand Central Terminal

Photograph and renderings of the terminal site are from the National Trust for Historic Preservation, taken from Vol. IV of the Record on Appeal to the Appellate Division of the New York State Supreme Court in Penn Central Transportation Company v. City of New York.

rights. (The Court said that it had to look at the *whole* of the regulated property to determine whether restrictions were overly severe.)

(b) The restriction decreased the value of Grand Central Terminal and amounted to a "taking." (The Court noted that many regulations that diminished value had been upheld and that because the designation was based on a comprehensive plan applying to similar properties throughout the city, this law was similar to zoning and historic district regulations that had been upheld.)

(c) Designation is inevitably arbitrary and subjective. (The Court noted that no judicial appeal had been taken from the designation decision.)

(d) Unlike zoning regulations, the Landmarks Law singled out particular properties for regulation and placed an unfair burden on those few. (The Court said that every regulation bears unevenly on some people, that the Landmarks Law applied to "vast numbers" of properties, and that the City Council had found that everyone in the city would benefit from such regulation.)

(e) The city had appropriated part of Penn Central's property for a strictly governmental purpose. (The Court said that this simply was not so.)

Finally, the Court considered whether the regulation was so severe in its impact that it should be treated as an exercise of eminent domain. It concluded that the regulation was not that extreme, noting that (1) Penn Central could continue using the property as a railroad terminal with related office space and concessions, as it had for many years; (2) there was no demonstration that Penn Central would be denied permission to place a less dominant addition on its terminal; and (3) Penn Central owned a number of nearby properties to which it could transfer its unused development rights, thus recouping some of its lost opportunity.

The *Penn Central* decision appears to be a clear affirmation that North Carolina's historic district and historic properties laws are constitutionally permissible under the Fourteenth Amendment. Our historic district law requires a certificate of appropriateness before exterior architectural features can be modified within a district, and both laws provide for notice and a 90-day waiting period before a historic building can be demolished, materially altered, or removed. During this period the historic district commission or historic properties commission can negotiate with the owner and others in an effort to find a mutually agreeable means of preserving the building. These restraints are obviously less severe in their impact than those provided by the New York Landmarks Preservation Law.

Linmark Associates: a troublesome sign

Linmark Associates v. Township of Willingboro,[20] may have consequences for local governments that try to regulate signs, placards, and other public displays of the written word. Willingboro, a New Jersey suburb undergoing racial transition, was particularly troubled by the blockbusting activities of local real estate agents who were capitalizing on brisk housing sales that were induced by a near-panic atmosphere

20. 431 U.S. 85 (1977).

among local homeowners. In an effort to soothe community anxiety by concealing the number and location of homes offered for sale in certain "tipping" neighborhoods, the township enacted an ordinance prohibiting "For Sale" signs on residential property. In *Linmark* the U.S. Supreme Court invalidated the ordinance on grounds that the ban on "For Sale" signs was an impermissible restriction on free expression guaranteed by the First Amendment of the U.S. Constitution.

In reaching this conclusion the Court held that placing the signs on front lawns was a form of so-called "commercial speech"—messages designed to advertise economic goods and services—and therefore merited First Amendment protection.[21] Recent case law has indicated that ordinances regulating conduct that involves First Amendment rights must balance the interests of the municipality in exercising its police power and the interests of free expression. If the regulation advances the interest of government at the expense of suppressing the content of the message, then only in exceptional circumstances may such a regulation be constitutionally valid.[22] According to the Supreme Court, the Willingboro ordinance that banned the placement of "For Sale" signs on front lawns improperly restricted the public's right of access to a particular sort of commercial speech or information that concerned the number and location of homes on the market.

The message of the *Linmark* case is clear: Local governments should avoid regulations that classify, differentiate, restrict, or prohibit signs on the basis of their message or content. Even the objectives of promoting "fair housing" and neighborhood stability must yield to the First Amendment's guarantee of free access to public information.

State court decisions: not what you do, but how you do it

A quick review of North Carolina's recent zoning decisions indicates increasing concentration on procedural rather than substantive issues.

Challenges to zoning amendments. *Allred v. City of Raleigh*[23] and *Blades v. City of Raleigh*[24] pointed the way toward successful challenges of zoning amendments. They also highlighted a special danger for developers: What happens to a developer who makes large expenditures in reliance upon a zoning amendment that ultimately is held invalid?

Taylor v. City of Raleigh[25] supplied at least a partial answer to this problem. For the first time in a North Carolina zoning case, the Supreme Court applied the legal doctrines of "standing" and "laches" to foreclose a challenge against a zoning amendment. (By using these defenses, a defendant can have a suit dismissed before its merits are considered. "Standing" is a contention that the plaintiff does not have enough interest in the case's subject matter to sue. "Laches" is a contention that the plaintiff unduly delayed bringing the suit.)

In *Taylor* the Court stopped short of a definite holding that the property owners who challenged the amendment lacked standing or were guilty of laches, but it said in effect that the legal situations with respect to both issues tended to reinforce one another sufficiently to bar the action. With respect to standing, the Court noted that the plaintiff who lived closest to the rezoned property was about a half-mile away and that the impact of the change on the plaintiffs as a whole was "minimal."

On the issue of laches, the Court pointed out that the plaintiffs were aware of the proposed rezoning; that they did not institute the court action until two years and 22 days after the ordinance was amended; and that the owner of the rezoned property, relying on the amendment, had spent over $23,000 before the suit was begun. The Court said that while there is no definite period of delay that would always trigger a holding of laches, in this case the delay was unreasonable and worked to the detriment of the owner.

Stutts v. Swaim[26] would seem to fall under the same rules, since the lawsuit challenging a rezoning amendment was initiated almost 6½ years after the amendment was passed. But in this case the court found that there was no "unreasonable" delay by plaintiffs (since no work pursuant to the rezoning took place until almost five years after the amendment, and the owner then misled the plaintiffs as to the nature of the work), and the owner presented no evidence of any expenditures that he had made in reliance on the rezoning.

Having ruled out laches as a defense, the court then held that rezoning a four-acre tract for mobile homes in the middle of some 500 acres zoned for single-family residences amounted to spot zoning. There is considerable doubt as to the validity of the spot-zoning concept when it is applied to a rural situation. (The property here was in the extraterritorial jurisdiction of the city of Randleman.) The court was obviously impressed by the description of spot zoning in the *Blades* case.

The court also examined the doctrine of laches in *Capps v. City of Raleigh.*[27] In *Capps* the plaintiffs sought to stop a public housing project by bringing an action on July 23, 1976, to invalidate an amendment enacted on September 15, 1969. The owners of the property in question had spent over $600,000 in reliance on the rezoning, and the court had no difficulty in applying the laches doctrine.

In both the *Stutts* and the *Capps* cases the plaintiffs argued that they had not had actual notice of the rezoning hearing, but the court said that compliance with the statutory provision requiring newspaper advertisements was all that was legally necessary. In *Capps* the court also held that a metes and bounds description of the property to be rezoned is *not* required.

Two North Carolina municipalities have had zoning ordinances invalidated because they failed to give the proper notice. In *George v. Town of Edenton*[28]

21. *See also* Virginia State Board of Pharmacy v. Virginia Citizens Council, Inc., 425 U.S. 748 (1976), and Bigelow v. Virginia, 421 U.S. 809 (1975).

22. U.S. v. O'Brien, 391 U.S. 367 (1968).

23. 277 N.C. 530 (1971).

24. 280 N.C. 531 (1972).

25. 290 N.C. 608 (1976).

26. 30 N.C. App. 611 (1976).

27. 35 N.C. App. 290 (1978).

28. 31 N.C. App. 648 (1977); 294 N.C. 679 (1978).

the city attempted to rezone two separate tracts on either side of a highway from residential to commercial. The Court of Appeals invalidated the rezoning of the south tract on the basis that only twelve days' notice rather than the statutorily required 15 days' had been given before the public hearing. The north tract was rezoned as part of a comprehensive revision of the Edenton zoning ordinance. Both the original and the revised ordinances provided that when the Town Board had denied an application for a change in zoning, it could not accept another application for the same type of amendment relating to the property for the following six months. The Supreme Court (disagreeing with the Court of Appeals ruling) held that this provision applied to a rezoning included in a comprehensive revision as well as one made independently. Therefore the Court invalidated the rezoning of the north tract as well. The Court also, as dicta, said that when there is a comprehensive revision of a zoning ordinance, the procedural requirements for adopting a new ordinance must be followed.

In *Sellers v. City of Asheville*[29] the notice of the zoning hearing was defective because of its content rather than its timing. In this case a zoning amendment would have applied Asheville's zoning ordinance to the area outside the city limits for the first time. However, the notice merely said there would be a public hearing on "an ordinance amending and revising . . . the Zoning Ordinance of the City of Asheville." The Court of Appeals said that this clearly could not alert someone in the affected area that Asheville was going to do some extraterritorial zoning.

The court found a second defect in the amendment itself. It noted that G.S. 160A-360(b) directs that extraterritorial boundaries "shall be defined, to the extent feasible, in terms of geographical features identifiable on the ground." The Asheville ordinance in its terms merely referred to "the territory beyond the corporate limits for a distance of one mile in all directions," and the zoning map, according to the court, showed the boundary "in sweeping curves, except where the city bordered on adjacent municipalities." The court found this type of mapping inadequate.

Wake County courthouse facade

Interpreting a zoning ordinance. There was no appellate decision in this period relating to the substance of zoning regulations, other than *Town of Southern Pines v. Mohr*.[30] In this case the Court of Appeals had little difficulty in finding that the ordinance's listing of "public buildings—town, county, city, state, federal, or regional authority—" among the permitted uses in a district included a children's treatment center funded and operated under the direct control and supervision of the State Department of Human Resources. □

29. 33 N.C. App. 544 (1977).

30. 30 N.C. App. 342 (1976).

A New Supreme Court View of Governmental Immunity

Anne M. Dellinger

ON JUNE 6, 1978, the United States Supreme Court handed down a decision with important implications for all local governments. In *Monell v. New York City Department of Social Services*[1] the Court held that a person whose federal civil rights are violated by the official policy or custom of a local government may sue the government directly and may recover money damages from the unit's public funds.

The facts before the Court were these: The New York City social services department and the city's board of education had written policies forcing employees to take unpaid leave at an arbitrary point during pregnancy. In 1971 certain affected employees filed a § 1983 claim[2] as a class action, asking for an injunction against further enforcement of the policies and back pay for the time involuntarily lost from work. Significantly, they sued the governmental agencies directly and the agency heads in their official capacities rather than suing them as private individuals. (The six defendants were the department of social services and its commissioner, the board of education and its chancellor, and the City of New York and its mayor.) Once action was filed, the departments dropped their leave requirements, but the employee-plaintiffs continued to press the back-pay portion of their claim. In 1974 the United States Supreme Court held such forced-leave policies unconstitutional.[3]

In *Monell*, the district court and the Second Circuit Court of Appeals, which affirmed, recognized that the defendants had violated the employees' constitutional rights; following the precedent of *Monroe v. Pape*,[4] however, these courts held that no monetary recovery was possible under § 1983 against any local government agency or its officers in their official capacities. Section 1983 states that "any person" who deprives another of his federal constitutional rights shall be liable to the aggrieved party. *Monroe* held that a municipality was not a "person" within the meaning of § 1983 and that Congress had never intended by that legislation to obligate public treasuries to reimburse individuals whose rights were violated by public agencies.

The Supreme Court here overruled the *Monroe* holding, thereby opening the way for the *Monell* plaintiffs to recover from the governmental defendants and indicating that in the future government itself, in certain circumstances, must reimburse persons with cognizable § 1983 claims against the governmental unit. The *Monell* majority opinion (by Justice Brennan joined by Justices Stewart, White, Marshall, Blackmun, Powell, and, in part, Stevens) first reviews the legislative history of § 1983 and reaches a different conclusion from the *Monroe* Court's holding—that is, "that Congress *did* intend municipalities and other local government units to be included among those persons to whom § 1983 applies." From that premise the Court reasons that plaintiffs may gain financial, declaratory, or injunctive relief from local governments when the plaintiff's constitutional rights have been abrogated by persons who are carrying out an official policy or custom of the governmental body. The opinion justifies overruling *Monroe* on four grounds. First, re-examination of congressional debate on § 1983 proves beyond a doubt that the *Monroe* Court misunderstood the meaning of the act. Second, *Monroe* has never been clear precedent because other opinions of the Court, ones in which jurisdiction was not challenged, *have* held some

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1. Monell v. New York City Department of Social Services, ____ U.S. ____, 56 L.Ed. 2d 611 (1978).

2. "1983" refers to 42 U.S.C. § 1983, a portion of the federal Civil Rights Act of 1871, which provides: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

3. Cleveland Board of Education v. La Fleur, 414 U.S. 632 (1974).

4. Monroe v. Pape, 365 U.S. 167 (1961).

local governments (specifically school boards) liable under § 1983. Third, Congress has recently indicated (through the Civil Rights Attorneys' Fees Act) a desire to hold all local governments liable under § 1983. Finally, the usual reason for keeping to precedent—that parties have relied on it—should not apply when reliance would mean allowing parties (here local governments) to continue to violate constitutional rights without fear of the consequences. Justice Powell's concurring opinion elaborates on the ill effects of *Monroe* and the need to overrule it, as well as on the advisability of placing responsibility on local government for its constitutional torts. The dissenting opinion, by Justice Rehnquist joined by the Chief Justice, reiterates the benefits of maintaining legal precedents, denies that the *Monroe* Court's construction of § 1983 was clearly mistaken, and expresses concern over the practical consequences for local government of removing its protection from liability.

Though *Monell* also reverses the holding[5] that local governments are immune from suits for injunctions, its greater impact no doubt lies in the holding that these units can be liable for damages in § 1983 actions. The opinion raises, but does not answer, certain important questions concerning the scope of that damage liability. First, the Court left unclear which officials or employees are in a position to make the "official policies" that create potential liability. It stated that government is not liable for an independent wrongful action of an employee merely because of the employer-employee relationship: "[I]n particular, we conclude that a municipality cannot be held liable *solely* because it employs a tortfeasor—or in other words, a municipality cannot be held liable under § 1983 on a *respondeat superior* theory."[6] The facts of *Monell* made it easy for the Court to conclude that in that case the challenged actions were taken in accordance with "official policies." The two New York City departments— education and social services—had written personnel policies over a period of years that were shown to be unconstitutional by an earlier case, *Cleveland v. La Fleur*. Still, the Court chose not to limit itself merely to recognizing liability for written policies or even liability for policies approved by the governing boards of defendant agencies. Instead, it specifically noted, in the following language, that employees beneath the level of board members may make policies for which the unit itself will be liable: "[I]t is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983." I infer from this that most actions taken by sheriffs or city and county managers, for instance, and quite possibly many actions taken by lesser officers like chief jailers or department heads, are likely to be viewed by the courts as "official" actions (though of course, any official can also take independent wrongful actions for which he alone would be liable). It seems clear, on the other hand, that the unit need not bear the responsibility for unconstitutional actions taken by individual city or county employees without the approval of the governing board or a high-ranking official.

Attention should also be paid to the Court's use of the word "custom." Again, the majority could have restricted itself on the facts before it to holding that governments will be liable for their official policies, but it chose to point out that § 1983 applies to both policies and customs. "Although the touchstone of the § 1983 action against a government body is an allegation that official policy is responsible for a deprivation of rights protected by the Constitution, local governments, like every other § 1983 'person,' by the very terms of the statute, may be sued for constitutional deprivations visited pursuant to the governmental 'custom' even though such a custom has not received formal approval through the body's official decision-making channels." Just as the Court has warned that persons other than board (or council) members may incur liability for the unit, it is warning here that rules and regulations need not have been adopted by the unit's governing board in order to have official status for imposing liability.

The Court was careful to note that this case did not settle the issue of whether governments retain some kind of immunity that will partially protect them from § 1983 judgments even though they are "persons" who may be sued. The majority states, "[W]e have no occasion to address, and do not address what the full contours of municipal liability under § 1983 may be"—and later, "[W]e express no views on the scope of any municipal immunity beyond holding that municipal bodies sued under § 1983 cannot be entitled to an absolute immunity, lest our decision that such bodies are subject to suit under § 1983 'be drained of meaning.'"

Thus a full understanding of *Monell*'s effect must await further litigation. Lower federal courts may apply the *Wood v. Strickland*[7] standard of immunity to governmental bodies, or they may develop a different standard. (*Wood* imposes personal liability on officials who violate basic constitutional rights of which they knew or should have known.) All that we know from *Monell* is that the Supreme Court will not allow an immunity so broad as to eliminate liability entirely. □

5. City of Kenosha v. Bruno, 412 U.S. 507 (1973).

6. Monell, *supra* note 1, at 4578. *Tortfeasor* is the legal term for a wrongdoer; *respondeat superior* is the legal doctrine that an employer is liable in certain instances for the wrongful acts of his workers.

7. Wood v. Strickland, 420 U.S. 308 (1975).

School Law

Robert E. Phay and Anne M. Dellinger

THE LAST TWO YEARS have produced many important decisions in school law, several of which also affect public officials generally. The United States Supreme Court heard not only the long-awaited reverse-discrimination *Bakke* case but also cases involving teacher speech, liability of school boards for violating rights of employees or students, and student expulsion. These cases have been digested in the Institute's *School Law Bulletin*, and some of them are summarized below.

Affirmative action: Bakke

The most heralded school-related case since *Brown v. Board of Education* was decided in 1954 came at the end of the Court's 1978 term. *Regents of the University of California v. Bakke*[1] raised the question of how far a state may go in trying to achieve a racially diverse student body. May it give preference to blacks over whites in order to remedy the effects of past discrimination? In *Bakke* the Court answered: sometimes yes, sometimes no. It approved the principle of affirmative action but rejected rigid quotas based solely on race if there was no record of past racial discrimination.

Bakke arose from a challenge to the medical school at the University of California-Davis, which had two admissions programs for each entering class of 100 students—a regular admissions program for 84 places and a special program for admitting 16 applicants from minority groups or "economically and/or educationally disadvantaged" backgrounds (blacks, Chicanos, Asians, and American Indians). Bakke, a white male, applied to the medical school in 1973 and again in 1974, but was rejected both times although his test scores were significantly higher than those of applicants admitted under the special program. After his second rejection, he filed suit in state court to compel his admission, alleging that the special program operated to exclude him on the basis of race in violation of the equal protection clause of the Fourteenth Amendment to the United States Constitution, the California Constitution, and Title VI of the Civil Rights Act of 1964. The trial court found that the program operated as a racial quota system and therefore violated both the equal protection clause of the federal and state constitutions and Title VI, which prohibits excluding on the grounds of race or color any person from participating in any program that receives federal financial assistance. This court did not order Bakke's admittance, however, because he failed to prove that he would have been admitted except for the special program. On appeal the California Supreme Court, applying the strict-scrutiny test for constitutional questions, agreed that the special admissions program violated the equal protection clause and ordered Bakke admitted because the medical school could not show that he would not have been admitted even if there had been no special program. The University of California then appealed the decision to the United States Supreme Court.

The Court affirmed the order admitting Bakke and invalidating the special admissions program, but it reversed the California Supreme Court's decision to the extent that it prohibited using race as a factor in decisions on student admissions. Although it is difficult to find many points on which a majority of the Court agreed (there are six separate opinions totaling 154 pages), a majority of five justices found the quota system unconstitutional and another majority of five agreed that race could be taken into consideration in some circumstances. Justice Powell was the swing vote that created the two majorities; the other eight justices were split four and four. He said that the quota system used by the medical school violated Title VI of the Civil Rights Act and the equal protection clause because it foreclosed consideration to persons like Bakke

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1. 46 U.S.L.W. 4896 (U.S. June 28, 1978).

solely because of their race. No matter how strong Bakke's qualifications, he was "never afforded a chance to compete with applicants from preferred groups for the special admission seats. At the same time, the preferred applicants have every opportunity to compete for every seat in the class." Justice Powell found this use of race in the admissions procedure to be unnecessary in achieving the goal of a diverse student body. Justices Burger, Rehnquist, Stevens, and Stewart agreed with Powell's conclusion that Bakke must be admitted, but they maintained that the decision should be based solely on Title VI, which categorically prohibits excluding anyone on the basis of race from participating in any program that receives federal funds. They argued, therefore, that Title VI prohibits any consideration of race in student admissions.

Justice Powell, however, concluded that the need to remedy disadvantages created by past racial prejudice and to achieve a diverse student body justified considering race in admission decisions when appropriate findings have been made by competent bodies. Justices Blackmun, Brennan, Marshall, and White agreed, although they would have upheld a quota system of the Davis type that Powell and the other four justices rejected. Thus, for the first time the Supreme Court upheld affirmative action programs. Race may be taken into consideration if it is only one factor in admissions decisions and does not insulate the individual from comparison with all other candidates for available seats.

Justice Powell was careful to distinguish between the California quota system that was found to be unconstitutional and the use of racial preferences that has been required to desegregate schools and to overcome clearly documented discrimination in employment or admissions. In these situations racial quotas have been imposed in response to past discrimination. (The Davis medical school was founded in 1968, and past discrimination was not part of the school's record.) Thus racial or ethnic classifications are permissible in remedying past discrimination, but only when the "extent of the injury and the consequent remedy will have been judicially, legislatively or administratively defined." Powell made it clear that in these cases the remedy is subject to continuing oversight "to assure that it will work the least harm possible to other innocent persons who bear no responsibility for whatever harm the beneficiaries of the special admissions programs are thought to have suffered." When the evidence indicates that the state has discriminated intentionally, a racial quota system or preference based on race is constitutional as long as it provides a reasonable remedy for past discrimination without unfairly harming innocent persons.

Bakke is now admitted, voluntary rigid quota systems based solely on race are unconstitutional, and affirmative action programs are permissible. But these issues are far from settled. The *Bakke* decision did not provide a decisive answer to the permissible use of race in employment and admissions questions, a result that constitutional scholar Paul Freund found salutary. He observed that "the very fact that [the decision] is somewhat fuzzy leaves room for development, and on the whole that's a good thing." Perhaps *Time* magazine summed up the decision best when it commented that "[m]any more *Bakke*-like cases are sure to follow, and none of them is likely to be final. In an evolving democratic society there are, inevitably, no final answers."

School personnel

Does a nontenured teacher who was not reappointed to his teaching position have an absolute right to reinstatement when the decision not to reappoint was partially based on his exercise of a constitutional right? This question was presented to the Supreme Court in *Mt. Healthy City School District v. Doyle*.[2] This case involved a probationary teacher with five years of service. Doyle had called a local radio station and given it the substance of a school memorandum on teacher dress. The station later used this memorandum as a news item, which embarrassed school officials. Doyle claimed that this call to the radio station was the basis for the school board's decision not to rehire him; therefore his speech rights under the First and Fourteenth Amendments had been violated. But during his employment Doyle also had been given a one-day suspension following an altercation with another teacher, had referred to students as "sons of bitches" in a disciplinary complaint, and had made an obscene gesture to female students when they had not obeyed him. The school cited Doyle's "notable lack of tact in handling professional matters" as the reason for nonrenewal and used the radio station and obscene-gesture incidents as examples. The district court said that the telephone call was protected by the First Amendment. Because it had played a substantial part in the board's decision not to rehire Doyle, he was entitled to reinstatement and back pay. The court of appeals affirmed.

On appeal the Supreme Court held that a nonreappointed teacher may establish a claim to reinstatement if the exercise of a constitutionally protected freedom was a substantial factor in the decision not to rehire. The Court said, however, that his nonreappointment would be permissible if the school board could show that Doyle would not have been reappointed even if the

2. 429 U.S. 274 (1977).

telephone call had not been made. It then remanded the case to the district court because the board had not been allowed to make this showing.

A recent Supreme Court decision on the use of the National Teacher Examination (NTE) is particularly important to North Carolina because this state is embroiled in a case challenging its use in teacher certification. In *National Educational Association v. South Carolina*,[3] the Supreme Court upheld use of the test in a case brought against the State of South Carolina by the United States Department of Justice and several intervening teacher associations. The plaintiffs alleged that the use of the NTE for certifying teachers and setting salary schedules unlawfully discriminated against blacks in violation of the federal Constitution and Title VII of the Civil Rights Act. Without opinion, the Supreme Court affirmed a three-judge lower court's holding that South Carolina's use of the NTE was constitutional and did not violate the Civil Rights Act.

The lower court held that to meet their burden of proof the plaintiffs must show either that the state intended to discriminate against blacks by using the NTE or that the NTE served no rationally permissible state objective. The court found that the plaintiffs had shown no discriminatory intent by the state, although they had shown that the defendant officials knew continued use of the NTE would disqualify a much larger percentage of black applicants than white applicants. The lower court concluded that the test was rationally related to legitimate state interests—to assure that teachers have a minimum level of competence and to provide financial incentives for teacher improvement—and held that the state's use of the test was constitutionally permissible.

The court held that to establish their Title VII claim, the plaintiffs must first show that the state's use of the NTE excluded a disproportionate number of black applicants from teaching positions. They need not prove discriminatory intent. Nor is the fact that there is a rational basis for the state's use of the test a sufficient justification for continuing the test if it excludes a disproportionate number of blacks. If using the test has this result, the court says, the state must "validate" the NTE in terms of job performance and the test must be a "business necessity." The court concluded that the state's validation study of the NTE established the test as a lawful tool for teacher certification and salary-setting. It also held that the NTE met the "business necessity test" under Title VII because the Justice Department had not shown an acceptable alternative to the test.

3. 98 S.Ct. 756 (1978), *aff'g mem.*, United States v. South Carolina, 15 Empl. Prac. Dec. 6585 (1977).

Desegregation

The Supreme Court decided three important desegregation cases in 1977. One, *Hazelwood School District v. U.S.*,[4] involved a charge that the Hazelwood (Mo.) School District discriminated (in violation of Title VII of the 1964 Civil Rights Act) against black teacher applicants because the percentage of black teachers it employed was lower than the percentage of black teachers employed in St. Louis County schools, where the district is located. The federal district court compared the school district's percentage of black teachers with the percentage of black students in the county and found no discrimination. The Supreme Court disagreed, holding that the correct statistical measure of a Title VII violation is the relation between the racial composition of the school district's staff and the racial composition of the qualified public school teacher population *in the relevant labor market*. It remanded the case to the district court for a decision on whether averages from the St. Louis city schools, which maintain a 50 per cent black faculty, should be included in the relevant labor market.

The other two desegregation decisions dealt with the power of lower federal courts to require certain remedies of school districts in overcoming past discrimination. The Supreme Court, in *Dayton Board of Education v. Brinkman*,[5] warned that predominantly white or black schools do not, by themselves, violate the Constitution. It reproached the court of appeals for insisting on a sweeping systemwide desegregation plan to eliminate segregation found in isolated schools. The Court said that only systemwide discrimination requires a systemwide remedy. It ordered the trial court to determine whether the school board had intentionally discriminated in the case of particular schools and, if it had, to design a remedy *specifically tailored* to cure the effects of discrimination in these schools.

In *Milliken v. Bradley*,[6] the Court held that the state can be required to share the cost of compensatory educational programs when state officials have not assumed responsibility for eliminating all vestiges of state-imposed segregation. The district court, after finding pupil assignments to be unconstitutional, had ordered both the Detroit school board and the state to share the $11.6 million cost of establishing programs in reading, teacher-training, testing, and counseling that were offered in Detroit only. In affirming this order, the Supreme Court held that a trial court's equitable remedies are not limited to pupil assignment if they

4. 433 U.S. 299 (1977).
5. 433 U.S. 406 (1977).
6. 433 U.S. 267 (1977).

cure the unconstitutional condition or its "lingering consequences." Therefore the remedial educational components of the decree were constitutional. The Court also said that the required funding of these programs is not equivalent to an award of money damages against the state in violation of the Eleventh Amendment because such an award operates prospectively to bring about the benefits of a unitary school system.

Students

In 1978 the Supreme Court decided two dismissal cases: one was a disciplinary action and the other was an action based on academic reasons.

In *Carey v. Piphus*,[7] two students were suspended—the first for smoking marijuana and the second for violating a rule that prohibited males from wearing earrings that denoted gang membership. Both students were suspended without procedural due process. They then sought reinstatement and actual and punitive damages under Section 1983 of the Civil Rights Act of 1871. The district court ordered reinstatement but refused to award damages. The court of appeals reversed and allowed recovery of substantial nonpunitive damages even though the suspensions might have been justified. The Supreme Court reversed the appeals court and held that unless the students could prove that an actual injury resulted from the denial of due process, they could recover only nominal damages. The Court also made it clear that if procedural due process is denied in a school discipline case, a resulting injury is compensable only if the suspension was not justified.

In *Board of Curators v. Horowitz*,[8] the Court distinguished between academic and disciplinary dismissals. Horowitz, a medical student, had been expelled from medical school because of her substandard clinical performance. Because she received no formal hearing when expelled, she sued under Section 1983 of the Civil Rights Act of 1871, contending that she had been denied procedural due process.

The Court said that an academic decision, unlike a disciplinary one, does not adapt to the procedural tools of judicial or administrative decision-making and requires an expert evaluation of cumulative information. The Court held that academic dismissals do not require a hearing before the institution's governing board and found that the medical school's procedures used to dismiss her had met due process requirements. This decision was based on the Court's opinion that courts are ill equipped to evaluate academic performance and that the final decision to dismiss Horowitz had been careful and deliberate.

Foreign students

Under the established interpretation of the Fourteenth Amendment's equal protection clause, a state classification based on alienage is permissible only if it passes the strict-scrutiny test, the most exacting standard in testing the constitutionality of a state statute. This principle was applied in *Nyquist v. Mauclet*,[9] in which the Supreme Court declared that a state may not require that students be American citizens or be in the process of becoming citizens in order to receive financial aid from the state's program of assistance in higher education.

In *Elkins v. Moreno*,[10] the state denied resident status for tuition purposes to foreign students who held G-4 nonimmigrant visas. G-4 visas are issued only to certain foreign nationals (and their dependents) for the length of their employment in the United States. The university had automatically denied resident status to these students because they could not demonstrate an intent to live permanently or indefinitely within the state.

The Supreme Court decided that it is possible for a G-4 alien to remain in the United States indefinitely and to claim the United States as his domicile because a G-4 alien can keep his G-4 status as long as he keeps his job. But it then noted that the fact that federal law allows a G-4 alien to change his domicile to the United States does not affect whether he may become domiciled in a particular state: The determination of state domicile is a question of state law, and the Supreme Court directed the Maryland Court of Appeals to address this matter.

State aid to private education

Even as it protests that it does not want the job of overseeing the nation's schools, the Supreme Court fueled the fire over public aid to private schools with its decision last term in *Wolman v. Walter*.[11] The case arose when Ohio taxpayers challenged a state statute that offered six types of financial aid to private school students. The challengers (plaintiffs) claimed that the statute violated the First Amendment of the United States Constitution, which forbids Congress (and by

7. 98 S.Ct. 1042 (1978).
8. 98 S.Ct. 948 (1978).
9. 432 U.S. 1 (1977).
10. 98 S.Ct. 1338 (1978).
11. 433 U.S. 229 (1977).

later interpretation, the states) to legislate concerning "an establishment of religion." The federal court for the southern district of Ohio found the entire statute to be constitutional. On direct appeal, the Supreme Court approved certain portions of the statute and disapproved others in a series of opinions that clearly illustrate the extent to which the state-aid issue divides the Court as thoroughly as it divides legislatures and the public.

(The Court's standard for judging such aid comes from its decision in *Lemon v. Kurtzman*.[12] In that case it held that aid does not violate the First Amendment if it has a secular legislative purpose, has a primary effect that neither helps nor hurts religion, and does not require excessive government entanglement with religion. The Court noted that, as usual with state-aid devices, Ohio's statute had difficulty in meeting the second and third rules.)

In *Wolman* the Court approved the following four provisions of the Ohio law under the *Lemon* test. (1) The state lent private school students the same textbooks as the public schools used. (2) The state supplied to private schools the same standardized tests and scoring service used by public schools. (3) Physicians, who were under contract with local school boards, and public school employees entered the private schools to diagnose speech, hearing, and psychological problems among the students. (4) Private school students were to be given treatment for the preceding problems, guidance/counseling services, and remedial instruction either in public school buildings or at "neutral" sites.

The Court disapproved two other types of aid for private school students: (1) The state supplied instructional materials and equipment (tape recorders, projectors, maps, globes, etc.) to private schools. The Court disapproved this form of aid on the ground that "even though the loan ostensibly was limited to neutral and secular instructional material and equipment, it inescapably had the primary effect of providing a direct and substantial advancement of the sectarian enterprise." It concluded, in other words, that these materials were an essential part of the religious teaching given in the private schools. (2) The state supplied private school students with bus transportation for field trips. Although once before the Court had allowed transportation of private school students to and from school (*Everson v. Board of Education*[13]), this time it ruled that, because the private school teacher chose the destination and number of trips, such aid contributed directly to the religious curriculum and hence violated the First Amendment.

The decision splintered the Court. The majority opinion written by Justice Blackmun was joined in full by only Justice Stewart. Justices Rehnquist and White agreed with each other that all six portions of the statute were constitutional. The remaining five justices went their own ways, sometimes joining Justice Blackmun to create the majority vote, sometimes dissenting.

The Court's wavering approval of aid to private schools comes at a time when the subject is being debated with renewed interest. The National Council of Chief State [Public] School Officers recently reversed a 25-year stand against aid. The Council now supports "educational benefits to all children to the full extent allowable." The last session of Congress seriously considered bills to allow tax credits or deductions for all tuition, including private schooling. Although tuition credits did not pass in 1978, the plan seems likely to be reconsidered this year. Most important, North Carolina's General Assembly has made a clear commitment to private education in recent years, at least on the college level, by giving state money toward tuition credit for North Carolina students who attend private institutions in North Carolina. A legal challenge to that program has been defeated.[14]

Corporal punishment

The Court did settle another question—corporal punishment—that has troubled schools and courts in recent years. The decision came in *Ingraham v. Wright*.[15] Several junior high school boys who claimed serious injuries from beatings inflicted on them by school officials asked the court to hold (1) that corporal punishment of that severity violated the Eighth Amendment prohibition against cruel and unusual punishment; and (2) that corporal punishment is always an infringement of personal liberty. Had the Court agreed with the second proposition, the Fourteenth Amendment would require it to hold that corporal punishment could not be inflicted without "due process of law"—that is, without following certain procedures to insure fairness. A panel of the Fifth Circuit Court of Appeals had found for the students, but when the full court reheard the case, it reversed.[16] The Supreme Court affirmed the latter result in a 5-4 decision. On the Eighth Amendment issue, the majority ruled that the amendment applied only to the punishment of persons convicted of crime and not to school children. As for the Fourteenth Amendment issue, the Court agreed that corporal punishment is a deprivation of liberty that requires due process. It held, however, that after-the-

12. 403 U.S. 602 (1971).
13. 330 U.S. 1 (1947).
14. Smith v. Board of Governors, C-C-76-131, W.D.N.C. (March 30, 1977).
15. 430 U.S. 651 (1977).
16. 525 F.2d 909 (1976).

U.S. Supreme Court, courtroom interior

fact remedies, such as the possibility of bringing civil or criminal actions against the school officials responsible, provided sufficient due process to protect students' constitutional right. The four dissenting justices would have extended the Eighth Amendment to severe corporal punishment situations and would have required at least an informal give-and-take between student and disciplinarian *before* punishment to satisfy the due process requirement.

Following *Ingraham*, North Carolina teachers and administrators who use corporal punishment can be confident that federal courts will not interfere with the operation of the state law[17] that permits it. Even so, it is always possible that parents or students will claim that the punishment was excessive—beyond the bounds of the "reasonable force" approved by the statute. If they do so, they can bring civil or criminal assault and battery charges or even attempt prosecution under the statute forbidding child abuse.[18] To protect both students and employees, many school units adopt regulations that require greater prior due process than either state or federal law requires. These regulations often insist on the presence of a second school official whenever corporal punishment is given.

Single-sex public schools

In a ruling on the constitutionality of single-sex public schools, the Supreme Court, equally divided, merely affirmed the decision below—that such schools are not unconstitutional. There is no opinion to explain the justices' reasoning, nor do we know what the result would have been had the ninth justice participated. The City of Philadelphia maintained two public high schools for honors students—one for boys and one for girls. Susan Vorchheimer[19] sought admission to the boys' school as a matter of personal preference. She did not claim that the program available to her at the girls' school was inferior. The Court of Appeals for the Third Circuit, reversing the district court, held that no federal legislation clearly forbids single-sex high schools, nor do these schools violate the equal protection clause of the Fourteenth Amendment. The court of appeals noted that "[i]f there are benefits or detriments inherent in the system, they fall on both sexes in equal measure." Making no judgment on the ultimate wisdom of sex-segregated schools, the court found that the school board's decision to segregate did bear a rational—in fact, even a substantial—relationship to the legitimate purpose of providing quality education. The dissenting judge disagreed on all points. He concluded that the Equal Educational Opportunities Act of 1974[20] forbids sex-segregated public schools. He also thought that the "separate but equal" argument, no longer adequate in the area of racial segregation, was unacceptable. Finally, he said that the board's segregation policy could be constitutional only if it bore a substantial (not merely a rational) relationship to legitimate educational policy—and he found that it did not. □

17. N.C. GEN STAT § 115-146.
18. N.C. GEN STAT § 110-119.
19. Vorchheimer v. School District of Philadelphia, 430 U.S. 703 (1977).
20. 20 U.S.C. §§ 1701-1758 (Supp. 1976).

Employment and Personnel Practices

Donald B. Hayman, Anne M. Dellinger, and Robert E. Phay

Citizenship

In *Sugarman v. Dougall*[1] the United States Supreme Court declared unconstitutional a New York statute providing that only United States citizens may hold permanent positions in the competitive class of the state civil service. The Court stated that the flat ban on the employment of aliens in state positions that have little if any relation to a state's legitimate interest violated the equal protection clause of the Fourteenth Amendment.

This case concerning public employment of noncitizens cast doubt on citizenship requirements—as had other cases denying welfare benefits to noncitizens,[2] excluding aliens from financial assistance for higher education,[3] and excluding aliens from practicing licensed professions.[4]

In *Foley v. Connelie*,[5] the Court removed some of this doubt by upholding in a 6-3 decision a New York statute requiring members of the state police force to be citizens of the United States. The Court noted that aliens are excluded from voting, running for elective office, and jury service; it cited the *Sugarman* decision as recognizing that citizenship may be a relevant qualification for fulfilling important nonelective executive, legislative, and judicial positions held by officers who participate directly in forming, executing, or reviewing broad public policy. Six of the justices stated that the police function is a basic function of government, that a policeman is clothed with authority to exercise a large variety of discretionary powers, and that citizenship bears a rational relationship to the demands of the position. The three dissenting justices doubted that a trooper's duties included forming or executing broad public policy to the extent that a state police officer should be excluded from the equal protection clause. *Foley* appears to remove any doubt as to the constitutionality of citizenship requirements for policemen that now appear in city charters and personnel ordinances and in the minimum standards adopted by the North Carolina Criminal Justice Training and Standards Council. But it alerts local officials to the possible unconstitutionality of citizenship requirements for nonelective officers who do not directly formulate, execute, or review broad public policy.

Determination of lost wages

In *Lorillard v. Pons*[6] the Court held that a trial by jury is available in civil actions for recouping lost wages under the Age Discrimination in Employment Act of 1967. After reviewing the legislative history of the act, the Court concluded that Congress had intended that it be enforced as the Fair Labor Standards Act is. The Court added that by using the words "legal or equitable relief," Congress intended that there be a jury trial on demand.

Attorney's fees in employment discrimination cases

The Civil Rights Act of 1964 authorizes federal district courts to award attorney's fees to the prevailing party in Title VII suits.[7] In an increasing number of

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1. 413 U.S. 634 (1973).
2. Graham v. Richardson, 403 U.S. 365 (1971).
3. Nyquist v. Mauclet, 432 U.S. 1 (1977).
4. Examining Board v. Flores de Otero, 426 U.S. 572 (1976); *In re* Griffiths, 413 U.S. 717 (1973).
5. 55 L.Ed. 2d 287 (1978).
6. *Id.* at 40 (1978).
7. Civil Rights Act of 1964, Title VII, § 706(k).

cases, including *Albemarle Paper Company v. Moody*,[8] attorney's fees have been awarded when the courts found the employer guilty of discrimination.

In *Christiansburg Garment Company v. EEOC*[9] a private corporation sought attorney's fees after a district court dismissed the case against it on the ground that the plaintiff's charge had not been "pending" when 1972 amendments to the Equal Employment Opportunity Act were passed. The employer alleged that every prevailing defendant in a Title VII action should receive attorney's fees "unless special circumstances would render such an award unjust."

The Court sided with the Equal Employment Opportunity Commission and held that a prevailing defendant is to be awarded attorney's fees only when the court, exercising its discretion, finds that the plaintiff's action was frivolous, unreasonable, or without foundation. The Court offered two reasons why attorney's fees should be awarded to a plaintiff that are wholly absent in regard to a defendant. First, the plaintiff is Congress's chosen instrument to vindicate a policy that Congress considers of highest priority. Second, when a district court awards counsel fees to a prevailing plaintiff, it is awarding them against a violator of federal law.

Pregnancy insurance exclusion upheld; seniority loss prohibited

In *General Electric v. Gilbert*[10] the Court held that a disability income protection plan that excluded pregnancy-related disabilities does not constitute sex discrimination and therefore does not violate Title VII of the 1964 Civil Rights Act.

The General Electric Company provided a disability plan that paid nonoccupational sickness and accident benefits to employees but excluded pregnancy. EEOC guidelines issued in 1972 provide that disabilities caused by pregnancies shall be treated as any other temporary disability under an employer's disability insurance or sick-leave plan. Female employees of General Electric in Virginia who had been denied disability benefits while pregnant sued, believing that the exclusion violated Title VII of the Civil Rights Act.

In an earlier case brought against the State of California under the equal protection clause of the Fourteenth Amendment,[11] the Court had held that such an exclusion did not represent sex discrimination, but whether such an exclusion violated the Civil Rights Act had not been raised.

The federal district court and the court of appeals held that the exclusion did indeed constitute sex discrimination and violate Title VII. The Court reversed the lower courts and held that unless it can be proved that the exclusion of benefits for pregnancy (or any other physical condition) is a mere pretext to effect an invidious discrimination against the members of one sex, employers are free to exclude pregnancy or any other physical condition from the coverage of the insurance package. In *Gilbert* the Court pointed out that Congress did not confer authority on the EEOC to promulgate administrative rules or regulations. Consequently, EEOC guidelines should be considered but accorded less weight than administrative regulations, which Congress has declared as having the force of law. (In October, 1978, Congress amended Title VII to forbid insurance plans like that in *Gilbert*.)

Nashville Gas Company v. Satty[12] also concerned pregnancy benefits under an employer-provided disability plan, but another issue was at stake as well. The case was brought by a woman who had worked for the gas company from 1969 to 1972. In 1972 she took a twelve-week leave for childbirth as required by company policy when a female employee approaches delivery. The company disability policy did not cover her pregnancy and childbirth expenses and she lost seniority for job-bidding purposes. When she returned to work, she found that her former position had been eliminated by cutbacks, and the company placed her in a temporary position. While holding that job, Mrs. Satty sought three permanent positions as each became available. Because company policy denied her credit for seniority accumulated before the mandatory maternity leave, each position went to a person first employed *before* she returned to work from maternity leave but *after* her date of first employment.

The two questions before the Supreme Court were whether the deprivation of accumulated seniority violated Title VII and whether the company's failure to provide disability coverage for pregnancy violated Title VII. Mrs. Satty won on both counts in the district court and in the Sixth Circuit Court of Appeals.

The Supreme Court was unanimous in deciding for her on the first question (seniority) and eight justices joined the majority opinion on that point. In distinguishing the seniority question in this case from the issue in *General Electric v. Gilbert*[13] (which upheld disability policies that excluded pregnancy), the Court differentiated between refusal to give women special benefits (*Gilbert*) and policies that impose on women

8. 422 U.S. 405 (1975).
9. 54 L.Ed. 2d 648 (1978).
10. 429 U.S. 125 (1976).
11. Geduldig v. Aiello, 417 U.S. 484 (1974).
12. 54 L.Ed. 2d 356 (1977).
13. *Supra* note 10.

employment burdens that men do not face. The facts stressed in *Gilbert* tended to show that men and women were both susceptible to all the disabilities covered and that, in fact, GE's women employees drew more in benefits from the disability insurance fund than males. Thus, the Court concluded, requiring GE to pay for pregnancy disability would be requiring a very substantial additional benefit for women employees. Turning to the Nashville Gas situation, the Court said:

> Here, by comparison, petitioner has not merely refused to extend to women a benefit that men cannot and do not receive, but has imposed on women a substantial burden that men need not suffer. The distinction between benefits and burdens is more than one of semantics. We held in *Gilbert* that [Title VII] did not require that greater economic benefits be paid to one sex or the other "because of their different roles in the scheme of existence."[14] But that holding does not allow us to read [Title VII] to permit an employer to burden female employees in such a way as to deprive them of employment opportunities because of their different role.

The Court went on to state that in circumstances of business necessity it would be permissible to impose an employment burden on one sex. However, no business necessity existed here for revoking seniority.

On the second point—whether disability insurance must cover pregnancy—all members of the Court agreed that no evidence had been presented to distinguish the case from *Gilbert*. Hence the Court did not find the absence of sick-leave pay for pregnancy a violation of Title VII. The majority remanded to allow Mrs. Satty an opportunity to prove that Nashville Gas's insurance policy, unlike GE's, was a mere pretext designed to discriminate unfairly against women. Three more justices would have required a rehearing on a broader issue. They would have let the plaintiff try to prove that her company's policy paid greater benefits to men. If she did so, those justices would have found the policy a violation of Title VII.

Employee records

The Supreme Court also heard a case about the right of an ex-employee to demand a hearing about the information contained in his employment file. In *Codd v. Velger*[15] the plaintiff had been a probationary New York City patrolman until he was dismissed. He was then employed as a policeman with the Penn Central Railroad, which dismissed him after it inspected (with his permission) his New York City personnel file and found damaging information.

The Court held that a hearing is required "only if the employer creates and disseminates a false and defamatory impression about the employee in connection with his demotion." Since the purpose of a hearing is to offer an opportunity to refute the charge, the Court said that giving the plaintiff a hearing in this case would have been useless; he had not alleged that the derogatory material in his file was untrue.

Employment and religious freedom

Title VII of the Civil Rights Act of 1964 makes it unlawful to discriminate in employment because of race, color, religion, sex, or national origin. The act provides that an employer must make reasonable accommodation, short of undue hardship, for the religious practices of employees and prospective employees.

The difficulty in determining "reasonable accommodation" and "undue hardship" is highlighted by *Trans World Airlines v. Hardison*.[16] Hardison worked in a maintenance shop that operated twenty-four hours a day throughout the year, and he asked to be excused from work or to be allowed to trade shifts because his religious beliefs prohibited him from working on Saturday. The employer accommodated Hardison temporarily because of his seniority. Later Hardison asked to be transferred to another job. Because he lacked seniority, he was assigned Saturday work. He refused to work on this day and was fired. In later legal action, the federal district court ruled in favor of the employer and the union; the Court of Appeals ruled in favor of the employee and the union; and the Supreme Court reversed the judgment as to the employer, holding that TWA had made a reasonable effort to accommodate Hardison's religious needs and had not violated Title VII of the Civil Rights Act. To require TWA to do more would constitute undue hardship. The Court held that the statute cannot be construed to require an employer to discriminate against some employees in order to enable others to observe their Sabbath. □

14. *Id.* at 139.

15. 429 U.S. 624 (1977).

16. 432 U.S. 63 (1977).

North Carolina's Experience with Voluntary Merit Selection of Superior Court Judges

C. E. Hinsdale

HARD ON THE HEELS of the legislative defeat (the fourth in four consecutive sessions) of a proposal for merit selection of judges, Governor Hunt in June 1977 announced his support for the principle of merit selection. Shortly thereafter he instituted a voluntary (non-statutory) merit selection plan to fill the eleven new superior court judgeships created by the 1977 General Assembly.

Voluntary merit selection plans are not new. Governors of a number of states and mayors of large cities have promulgated these plans in the past twenty years. Because they do not involve legislative action, voluntary plans do not change the statutory basis for electing and re-electing judges in a particular jurisdiction. They are limited to the filling of vacancies through gubernatorial (or mayoral) appointment. Thereafter the merit appointee must stand for election and re-election under the existing (and unchanged) election laws. Voluntary plans are thus deficient because they affect only initial appointments of judges and not their merit *retention*. Even so, voluntary plans have received favorable comment as a step away from politics and toward quality in the selection of judges.

The merit selection package that failed in the 1977 General Assembly called for a constitutional amendment and implementing legislation that in tandem would have established a full merit appointment and merit retention system for judges in the place of North Carolina's present partisan election system. A judicial nominating committee, composed of equal numbers of lawyers appointed by the Chief Justice and laymen appointed by the Governor and a lesser number of legislative appointees (lawyers and laymen), would have screened applicants for each judicial vacancy and recommended the two or three best-qualified candidates to the Governor. The Governor would have selected one of these to serve until the next general election, and at that election the appointee would have faced the voters on a retention (Shall Judge _____ be retained in office?) ballot. If retained, the judge would have served a regular six- or eight-year term and then faced another retention election.

Executive Order No. 12, promulgated on July 28, 1977, followed closely the provisions of the defeated legislative proposals for filling vacancies in the *superior court* bench.[1] It created a Judicial Nominating Committee of 32 voting members, one from each judicial *district* of the state, plus a chairman (and chairman pro tem) from the Supreme Court, who votes only to break ties. It called for the Governor to appoint 13 nonlawyer members, the Chief Justice to appoint 13 lawyer members, and the President Pro-Tem of the Senate and the Speaker of the House of Representatives to appoint two nonlawyers and one lawyer each. As far as possible, appointees, lawyers and nonlawyers, of each appointing authority were to be spread among the four geographic *divisions* (there are seven to nine *districts* per division) of the state for one-year terms. (The executive order was to expire after one year, unless the Governor, after evaluating its usefulness, renewed it or it was superseded by legislation.)

The Nominating Committee, operating through its four divisional panels of seven to nine members each (one from each of the seven to nine districts in each division), was directed to publicize information about judicial vacancies, solicit written declarations of avail-

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1. The North Carolina Bar Association special committee that drafted the legislative package contributed substantially to the Governor's executive order.

ability (applications) therefor, screen lists of applicants, and within 60 days recommend three to five candidates to the Governor for each superior court vacancy. The Committee was also directed to promulgate its own rules of procedure for best carrying out its mission. The Governor obligated himself to make the names of the candidates available to the public when he received them from the Committee. Finally, he reserved the right to reject any nominees if he determined that the Committee had "not given due consideration to all qualified applicants" or if question arose as to the constitutionality or legality of his order. When he received the list of candidates for the first vacancies, however, he announced that he would make all his selections from the list.

When the Nominating Committee's last member was appointed in late August 1977, it promptly met, considered, and adopted a set of procedural rules.[2] The rules dealt with such matters as: adequate publicity concerning vacancies; public hearings; procedures for submitting recommendations or applications; questionnaires for applicants; investigation of applicants by the State Bureau of Investigation; circulation of names of applicants to various judges, district attorneys, and clerks of superior court for comment; interviews of applicants; confidentiality of committee records and proceedings; and screening and voting procedures. A key provision of the rules provided that nominees within each division would be selected not by the committee of 32 but by the four divisional panels, thus assuring that candidates would be considered only by members who lived within their judicial division.

By the time the Committee had settled well into its work, three more vacancies had arisen among the 47 regular incumbent superior court judges, and a fourth occurred in November 1977—in all, 15 vacancies. In late October the committee recommended candidates to fill 13 judgeships to the Governor. By January 1978 it had recommended candidates for all 15 vacancies, and the Governor had filled each judgeship.

The Governor's voluntary plan received considerable publicity—some favorable, some critical, and some based on rumor and speculation. In an effort to determine how well the procedure had worked and to render some sort of evaluation, however premature, an informal questionnaire was sent to the Nominating Committee's members and to all 62 applicants for the 15 judgeships. Twenty-four of the committee members and 17 applicants, including both successful and unsuccessful ones, responded. The following commentary is based largely on this survey.

The Committee

Composition. There were no requirements for Committee membership other than that almost half be lawyers. The 15 lawyers were outnumbered by 17 laymen, who represented about 14 callings—from dentist to teacher to housewife to sheriff. (Composition of the divisional panels is discussed below.) Three panel members were under 50 and ten were over 60. Eleven more were in their 50s, and eight who did not return the questionnaire were "estimated" to be over 50. While the average age of this group was demonstrably "mature," this is not too significant. Maturity is a characteristic of good judges, and probably essential in the selecting group if the selectees are to have it also. (The ages of the 15 selected judges ran from the low 30s to the mid 60s; the average was about 45.)

The press criticized Chief Justice Susie Sharp for appointing "establishment" attorneys to the Committee—members of larger firms, wheelhorses of the organized bar, and no women. (Five Committee members were former presidents of the North Carolina State Bar or the North Carolina Bar Association, and three were former superior court judges.) Of course, the Chief Justice appointed persons whom she knew and had faith in. An advantage in appointing these established lawyers was that they had a wide acquaintance among the members of the bar and could probably bring more personal knowledge to bear than younger or less experienced lawyers. But a broader cross-section of the legal profession among Committee members might have encouraged more applications from single practitioners and "nonestablishment" lawyers. Whether this would have produced better nominees in the long run is sheer speculation.

The Committee had five female and three black members. In terms of the general population these groups were under-represented, but in terms of the number of female and black lawyers (persons realistically eligible for nomination for judge) the representation was considered adequate. (Of the 62 applicants, there were no females and only three blacks.)

Apparently there were 31 Democrats and one Republican on the Committee. (Party representation cannot be reported accurately because not all the Committee responded to the questionnaire.) This is probably not surprising, since all the appointing authorities were Democrats. A higher percentage of representatives from the minority political party would have strengthened the desired impression of a nonpartisan search for judicial talent.

2. These rules were proposed by the same Bar Association special committee that had prepared the legislative drafts and the executive order.

Courtroom interior, Johnston County

The divisional panels. Each divisional panel of seven to nine members had three to four lawyers. Three to five other occupations were also represented. There was a nonlawyer majority on two of the four panels, a 4-3 lawyer majority on another, and a 4-4 tie on the fourth. Each panel had a woman member; one panel had two black members, and another panel had the third. No panelist who responded to the questionnaire criticized the membership of the panels; in fact, many considered the membership to be well-balanced in all respects and just the right size.

Provisions of the executive order and the Judicial Nominating Committee's rules

The respondents to the questionnaire felt that the executive order and the Committee's rules were reasonable and proper and worked well, with two exceptions. A few members of the Committee found that the 60-day time limit prescribed in the executive order for recommending candidates to the Governor for all vacancies was too short. There were 13 vacancies to be filled originally, and no doubt this criticism is valid, especially in the first and second divisions, where most of the vacancies existed. Sixty days is a reasonable time for a well-established selection system with no start-up problems to do its work. Ordinarily vacancies will arise one or two at a time, and established machinery will take care of them adequately. More time was needed when the process was tried for the first time and there were a number of vacancies to be filled, but this problem will not arise again.

The second difficulty arose with the rules' requirement that the nominees' names be submitted to the Governor in alphabetical order. This provision was borrowed from other states that apparently always had enough candidates to assure that the three top names are all well qualified. Some North Carolina districts had a shortage of applicants, and the Committee, which was required to send forward at least three names (if there were that many applicants), apparently found itself having to send forward second and third names that were markedly less qualified than the first choice. The alphabetical arrangement concealed this spread in quality, and a number of Committee members argued that the rules should be amended to permit recommendations in order of merit. The Governor preferred alphabetical order for its flexibility; he then could not be criticized for whatever name he chose, since in theory all recommended names were qualified.

The best solution to this difficulty probably is to recruit more intensively for applicants. A larger number of applicants for each vacancy will permit true measuring and screening, and the theory that all nominees are qualified will more likely be true in practice. When there are few applicants, whether because of a small field from which applicants must come or because publicity and recruiting fail to produce enough applicants, the Committee should be permitted to number its recommendations in order of quality. In such a case the Governor needs and should welcome the ranking. He can still depart from it, but if he does so he should be prepared to give good reasons. As an alternative, the rankings could be made for the Governor's knowledge only.

Public hearings

Public hearings were held in three districts, each in a different division. Comments of panel members who attended were about evenly divided on whether the hearings were useful. Apparently there had been fears that a hearing would be used primarily for making "nominating speeches" for certain candidates, but little of this occurred. While hearings can be abused, they can also generate much-needed publicity in a district with few applicants, and they offer an opportunity for citizen participation in the judicial selection process. For these reasons they should be extended to all districts in which a vacancy exists.

Assessing the applicants

Questionnaires. The Committee required each applicant to submit answers to an extensive questionnaire about his personal and professional background. While one or two Committee members and some applicants thought that the questionnaires were more detailed than was necessary, the members all agreed that they were indispensable.

State Bureau of Investigation reports. Comments on the SBI background reports ranged from "shallow" to "incomplete and poor" to "not always available" to "helpful." The problem seems to have been that the Committee's 60-day deadline (and consequently a shorter deadline for the SBI) left too little time to investigate each applicant properly and prepare the reports. One member commented that the Committee was not allowed to see the reports; instead, the Governor's legal aide, acting as the Committee's executive secretary, prepared and submitted summaries. Another member thought that in the future the Committee should prepare a brief list of questions for the SBI to answer for each applicant. Ideally the SBI report should serve as a double check on information the applicant supplies in the questionnaire and satisfy any questions raised by it.

Evaluation sheets. Evaluation sheets, by means of which members might have weighed and compared one by one the various talents and characteristics of each applicant, were not used—apparently for lack of deliberating time. But members may find this informal rating system useful for future screenings when time is available for unhurried analysis and comparsion of the candidates.

Interviews. Each panel interviewed the applicants for the vacancies in its division. Both members and interviewees overwhelmingly considered this interview to be most useful. Some members commented that 15 to 20 minutes for the average interview was not long enough. In the future, with fewer vacancies to fill at one time, interviews can be longer.

Applicants, nominees, and appointees

For the 15 vacancies arising in 1977, there were 62 applicants, divided among the districts as follows:

District	Nominees	Total Applicants
3	2	3
4*	4	7
6	1	1
7	2	2
8	3	5
10	3	8
12	4	8
14*	4	7
15	3	5
19	3	5
20	1	1
22	4	6
26	3	4

*Two vacancies.

Courtroom interior, Chowan County

The figures reveal a distressing shortage of applicants in most districts. Two districts had only one applicant; in three districts, every applicant was nominated; and two more districts had only one more applicant than nominees. Only two districts had more than twice as many applicants as nominees. The insufficient number (for screening) of applicants in most districts was the most serious difficulty with early selections under the voluntary merit selection plan.

Problems in attracting more qualified applicants

The Committee members were asked what could be done to attract more qualified applicants to superior court judgeships. Their responses are discussed in the following paragraphs.

The rotation system. Six members said that North Carolina's system of rotation—requiring a superior court judge to move from district to district within his division every six months—does more than any other single factor to discourage good lawyers from seeking judicial appointments. Rotation is a state constitutional requirement, and while the order of rotation can be changed by the Supreme Court and the Chief Justice, the *fact* of rotation—being away from the district of residence perhaps for years at a time and commuting to home on weekends—remains. Even the judges who like rotation because of the independence it fosters admit that it is inefficient and consumes a lot of travel time that might be better devoted to being a judge. Potential judges who still have school-age children, and many do, are particularly reluctant to give up their family life four nights a week for life in a distant motel. The Supreme Court and the Chief Justice are making every effort to vary the order of rotation to give a judge more frequent six-month terms in his home district, but only the legislature, by increasing the number of divisions or

proposing a constitutional amendment, can substantially reduce the rigors of rotation.

Judicial salary. Several Committee members recommended salary increases to attract more lawyers to judicial careers. The 1978 annual salary ($35,758 raised to $39,500 this past July) compares unfavorably with that of many successful attorneys in their mid-forties—the group in which most potential judges are found. Again legislative action is required. And, while more money will help, it is unlikely that enough will ever be offered to eliminate the salary problem entirely.

Election immediately after appointment. Problems of rotation and adequate salaries exist whether or not a voluntary selection exists, and the plan should not be faulted because of these problems.

Several thoughtful Committee members did comment in the questionnaire on shortcomings in the plan itself. The most serious of these is that the plan does not (cannot) do anything to change the way judges, once appointed by the merit process, are *retained* in office. Unfortunately, the Governor's plan highlighted this difficulty. The Nominating Committee made its initial nominations to the Governor in late October 1977; appointments were made and the appointees sworn in, for the most part, in December; the election books opened for filings of judicial candidates in January; the filing deadline for the 1978 primary occurred in early February; the primary was in early May; and the general election was in November. Undoubtedly the imminence of the 1978 election cycle discouraged some qualified lawyers who might otherwise have been willing to apply for a judgeship. Few lawyers will abandon their practices for the bench in midcareer if they have to face a primary election—perhaps a contested one—a few weeks after being sworn in. More lawyers probably would have applied if the appointments could have been made earlier in the biennium between elections, thus giving the appointees the decided advantage of a year's incumbency (a course that was not possible in this instance, since enabling legislation for 11 of the vacancies was not effective until July 1, 1977). At least this would have been true of Democratic applicants; Republican applicants (apparently there was only one) in most cases could look forward only to defeat in the November general election even if they were appointed and survived the primary.[3] Since the voluntary plan is designed to fill vacancies as they arise, it cannot guarantee an appointee any particular length of time in office before he may have to defend his record in a contested election.

Publicity. Some Committee members said that some attorneys did not apply because they feared adverse publicity if they were not nominated and appointed. No lawyer wants his clients—present or potential—to know that he is considering leaving the practice or that he has been weighed for judicial appointment and found wanting. (The reasons for nonselection may reflect no discredit on the applicant—indeed, the very nomination is an honor—but the client may not understand that or may be inclined to think the worst.) This is a problem with no ready solution. The Committee did not publicize the names of applicants, but under its rules it did submit for comment a list of applicants to dozens of judges, district attorneys, and clerks of court. While such circulation was prudent, it inevitably meant that applicants' names would become widely known. Also, as the executive order required, the Governor released the names of the thirty-seven nominees when he received them.

Releasing the names from which the Governor must choose is essential to maintain public faith in the process and to counter rumor and speculation. This is a price the nominated but unsuccessful candidate must pay. Since his name appeared on the final list and all on that list by definition are qualified, he should count it an honor, and so should his clients. Some unnecessary circulation of applicants' names could be curtailed, however, by restricting the number to whom the raw list is sent for comment and by reminding the addressees that the information is confidential.

Maintaining impartiality. Two Committee members and several unsuccessful applicants observed that there was widespread speculation that the Governor had committed himself before the nominating process to certain applicants and that this rumor discouraged potential applicants not so favored. This argument

Courtroom interior, Moore County

3. This is so because superior court judges are elected on a statewide ballot, and voter registration is predominantly Democratic; no Republican has been *elected* to a superior court judgeship in modern times.

presupposes that the members of the divisional panels would bow to the assumed desires of the Governor, ignore their duty, and select a nominee for a reason other than merit. (The Governor's appointees did not constitute a majority on any of the panels.) There is no evidence that any panel did so or that the Governor in fact precommitted himself, but rumors of precommitment apparently did exist in some districts, and it is entirely possible that they inhibited applications from those districts. Of course, *anything* that discourages applications undermines the usefulness of the system.

In the Twenty-Sixth District, a close and influential friend of the Governor urged selection of one qualified nominee; the Governor chose another.[4] In the Seventh District, the Governor's former law partner was a nominee; he was not appointed. Lawyers who may aspire to judgeships under the voluntary merit plan should keep these examples in mind. Whether any "precommitment rumors" discouraged applications in those districts that offered only one or two applicants is impossible to determine. It is certain, however, that such a shortage of applicants is a disservice both to the people and to the Governor that must be corrected if future screenings are to be broadly accepted.

More active recruitment. Two Committee members commented that the provisions of the executive order and the Committee rule requiring written applications for consideration for judgeships should be abandoned in favor of a more idealistic practice: The Committee should search for the best possible candidates—"The office should seek the man." The Committee Rules, while requiring publicity and inviting written applications, did encourage members to look for persons whom they believed to be highly qualified and urge them to apply for consideration, with the understanding that such urging did not constitute endorsement. In a small rural district where the number of attorneys to be screened would be small, seeking-out can be useful. In larger districts that have hundreds of lawyers, such an approach would require a vast amount of investigation and information-gathering and thus probably would be prohibitive in both time and expense. But useful steps in this direction could, nevertheless, be undertaken.

Conclusion. The shortcomings of voluntary merit selection are easy to catalogue. Some of them are rooted in the law and can be overcome only by legislative action; a few are merely procedural and can be minimized by the Nominating Committee as it acquires experience. All shortcomings, however, can be overlooked if the end product of the plan is an improved judiciary.

Does voluntary merit selection produce better judges than unilateral selection by the Governor? This is the ultimate question. Unfortunately we will probably never know the answer. We will never know who the Governor by himself might have selected for each of the fifteen vacancies he filled from lists of nominees, and we will therefore never know how well his direct selectees might have served. In a year or two we will know generally what kind of judges the voluntary plan can produce. (All of the Governor's appointees were elected to regular terms in 1978; only four had contested primaries and only one had a contested election.) If the performance of these judges collectively is good, the Governor may be encouraged to extend the plan, both in years and in kinds of judges covered, until the General Assembly can consider once more—and this time with the Governor's endorsement—the advantages of statutory merit selection.[5] □

4. Perhaps he chose the other candidate because that candidate was black, but this is not inconsistent with the merit principle; both candidates had been recommended, and both were qualified.

Courtroom interior, Northampton County

5. In July 1978, after this article was completed but before the original executive order had expired on July 28, a vacancy arose in a *special* superior court judgeship. A special judgeship (there are only eight) is filled by law by gubernatorial appointment. Residence in a particular district is not a requirement, but apparently because the retiring judge was from the Fourth Division, the Governor amended his executive order to direct the Fourth Division panel of the Nominating Commission (rather than the entire Commission, which would otherwise have acted on a special judgeship) to nominate three candidates from the 29 counties of that division. Although this judgeship expires June 30, 1979, subject to the Governor's power to renew for four years, there were ten applicants for this vacancy. This was an adequate number for screening purposes, but perhaps not as many as might have been desirable from such a large area. The three nominees included a chief district court judge and two private practitioners. One of the practitioners had served as a special judge over a decade earlier; he was the Governor's choice.

At a press conference in late August 1978, the Governor announced that he anticipated renewing the executive order upon the completion of some technical amendments. At press time the order had not been reissued.

A Summary of the Judicial Standards Commission's Work

C. E. Hinsdale

IN NOVEMBER, 1972, North Carolina voters ratified a constitutional amendment that authorized the General Assembly to prescribe an additional procedure for removal of judges, and for the first time, a procedure for censuring judges. Procedures for removal by impeachment and joint legislative resolution existed, but they were clumsy and seldom used. In addition, the General Assembly felt the need for a disciplinary measure, short of removal, for less severe judicial misconduct that was not being corrected at the time.

Effective January 1, 1973, the General Assembly established a Judicial Standards Commission[1] to carry out the amendment's provisions—namely, (1) removal of a judge for mental or physical incapacity, and (2) censure or removal of a judge for (a) willful misconduct in office, (b) willful and persistent failure to perform his duties, (c) habitual intemperance, (d) conviction of a crime involving moral turpitude, or (e) conduct prejudicial to the administration of justice that brings the judicial office into disrepute. Under the new law a removed judge is disqualified from holding further judicial office.

The Judicial Standards Commission has seven members: a Court of Appeals judge, a superior court judge, and a district court judge, each appointed by the Chief Justice of the State Supreme Court; two lawyers, active practitioners for at least ten years, appointed by the State Bar Council; and two laymen, appointed by the Governor. The Commission investigates complaints against judges. If its preliminary inquiry indicates some substance to the complaint and if it has authority over the subject, the Commission offers a confidential due-process hearing to the judge. After the formal hearing, if five Commission members concur, a recommendation for censure or removal of an offending judge is forwarded to the Supreme Court for final action. The Court may approve the recommendation, change it (from censure to removal or vice versa), disapprove it, or remand it for further action (for example, investigation).

In its 1977 annual report, the Commission included some caseload figures for the first five years. The total number of inquiries (complaints) concerning judges during this period was 215. Of this number, 128 (about 60 per cent) were not within the Commission's jurisdiction. Primarily these complaints related to litigation results (who won and by what procedural means), and the proper channel for disposition is the traditional appeal to a higher court. (This 60 per cent figure is consistent with that of many other states that have similar commissions.) The Commission decided that 26 complaints (12 per cent) were too trivial to warrant further investigation. It conducted a preliminary investigation in about 25 per cent of the complaints with the following results: fifteen complaints were terminated without further action; the respondent judge accepted an informal (nonstatutory) reprimand in seven cases; the respondent judge vacated office during the investigation in seven cases; several cases were unfinished; and five were recommended to the Supreme Court for censure (the Court issued a formal censure in each of them). In 1978 the Commission recommended the removal of a judge, but the Court issued a censure instead. At this time (December 1978) a recommendation for removing a resigned judge is pending before the Supreme Court.

In the first case to reach the Supreme Court under the new procedure (*In re Crutchfield*), District Court Judge Crutchfield was censured for signing judgments authorizing limited driving permits without inquiry as

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1. N.C. GEN. STAT. § 7A-375 et seq.

to the factual basis for the permits, when the facts did not authorize his action, and in the absence of the district attorney. The Court held this to be conduct prejudicial to the administration of justice that brings the judicial office into disrepute.[2] In all subsequent censures (*In re Edens*, *In re Stuhl*, *In re Nowell*, *In re Hardy*, *In re Martin*), the facts have been held to constitute both willful misconduct in office *and* conduct prejudicial to the administration of justice that brings the judicial office into disrepute.[3] Generally, the conduct in these cases consisted of disposing of criminal charges out of court in the absence of the district attorney and the general public.

Speaking for the Court in *Nowell*, Chief Justice Sharp has distinguished between willful misconduct and prejudicial conduct as follows:

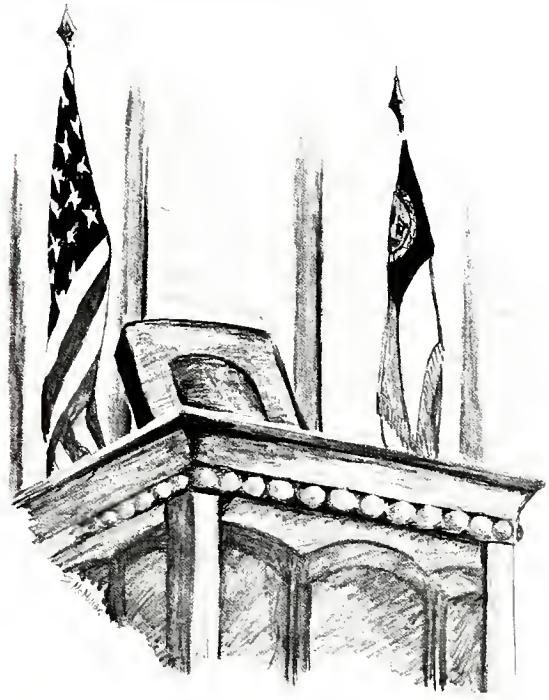
> *Wilful misconduct in office* is the improper or wrongful use of the power of his office by a judge acting intentionally, or with gross unconcern for his conduct, and generally in bad faith. It involves more than an error of judgment or a mere lack of diligence. Necessarily, the term would encompass conduct involving moral turpitude, dishonesty, or corruption, and also any knowing misuse of the office, whatever the motive. However, these elements are not necessary to a finding of bad faith. A specific intent to use the powers of the judicial office to accomplish a purpose which the judge knew or should have known was beyond the legitimate exercise of his authority constitutes bad faith. . . .
>
> Wilful misconduct in office of necessity is *conduct prejudicial to the administration of justice that brings the judicial office into disrepute.* However, a judge may also, through negligence or ignorance not amounting to bad faith, behave in a manner prejudicial to the administration of justice so as to bring the judicial office into disrepute. . . . Likewise, a judge may also commit indiscretions, or worse, in his private life which nonetheless brings the judicial office into disrepute. . . .[4]

The Court has repeatedly pointed out that the conduct of each of the censured judges also violates Canon 3A(4) of the Code of Judicial Conduct, which reads as follows:

> A judge should accord to every person who is legally interested in a proceeding, or his lawyer, full right to be heard according to law, and, except as authorized by law, neither initiate nor consider *ex parte* or other communications concerning a pending or impending proceeding. . . .

2. *In re* Crutchfield, 289 N.C. 597 (1975).

3. *In re* Edens, 290 N.C. 299 (1976); *In re* Stuhl, 292 N.C. 379 (1977); *In re* Nowell, 293 N.C. 235 (1977); *In re* Hardy, 294 N.C. 90 (1978); and *In re* Martin, 295 N.C. 291 (1978).



4. *In re* Nowell, 293 N.C. 235, 248 (1977).

The Supreme Court has promulgated the Code of Judicial Conduct on authorization by the General Assembly,[5] and the Court consults the Code to give meaning to the constitutional standards.

In *Crutchfield* Justice Lake dissented on the grounds that the statute creating the Judicial Standards Commission violated the due process and equal protection clauses of the state and federal constitutions in various ways. In *Nowell* the Court answered these challenges to the constitutionality of the statute and rejected them in a 6-1 decision. In doing so, it relied heavily on favorable decisions on the same issues in a number of other states that have established judicial discipline commissions similar to North Carolina's. Nearly all of the states now have equivalent procedures.

The Supreme Court has taken the position that a proceeding before the Commission is neither civil nor criminal, but merely an inquiry into the conduct of one who exercises judicial power to determine whether he is unfit to hold a judgeship. Since this is true, censure or removal is to be regarded not as punishment but merely as a legal consequence attached to adjudged judicial misconduct.

In *Nowell* the Supreme Court decided that the amount of proof before the Standards Commission must be "clear and convincing," and that, on review, the Court must make an independent evaluation of the evidence in determining that the proof in the record meets that standard.

Judge Hardy was the fifth judge recommended for censure for ex parte (one-sided) dispositions of criminal cases. The Supreme Court, apparently noting the ineffectiveness of its previous censures in halting this unethical practice, examined the applicable statute[6] very closely and concluded in a 4-3 decision that it could *remove* a judge even though the Commission had recommended only censure. This is a dictum (unnecessary to disposition of the case at issue), since the Court further decided that fairness required that Hardy receive the same discipline meted out to earlier similar offenders. Still, it is a stern warning to judges as to their future conduct. The Court reached the view as to its enlarged removal power despite a sentence in the statute that limits its action on a Commission recommendation to approval, remand, or rejection. A well-reasoned dissent by Justice Lake, in which Justices Branch and Moore joined, is supported by the law's legislative history. When the proposal for a judicial disciplinary procedure was before the legislature (1971), the idea was fairly new, sensitive, and controversial; if the bill had contained a provision allowing the Supreme Court to remove an elected judge on a Commission recommendation for censure, it probably would not have survived.

In *Martin*, the sixth and latest censure case, the Court received a recommendation for removal for various ex parte actions and soliciting another to commit perjury. The latter charge it found unsupported by the "clear and convincing" standard, and it reduced the discipline to censure, apparently on the authority of *Nowell*. While the Court might have removed Martin for ex parte dispositions, consistent with its warning in *Hardy*, it chose not to do so—possibly because Martin is a nonlawyer and was inexperienced as a judge when the misconduct occurred.

Currently pending before the Supreme Court is a recommendation that former District Court Judge Peoples be removed and disqualified from holding judicial office for ex parte disposition of several criminal cases; for placing numerous criminal cases in several counties in inactive files and not disposing of these cases in open court; and for receiving "costs of court" from defendants in some active cases and not turning the costs in to the clerk's office or disposing of these cases in open court. While under investigation and before the Commission made its recommendation, Judge Peoples resigned. The case thus presents the interesting question of whether the Court may "remove" (and thereby disqualify from future judicial office) a former judge for misconduct arising before he resigned. It is complicated by the fact that Peoples was elected without opposition to a superior court judgeship in the November 1978 election. Further, Peoples was tried and acquitted by a superior court jury in August and again in November 1978 of various counts of embezzlement based on some of the same facts that support the Commission's recommendation for removal. Finally, in October 1978, between the felony trials, he was acquitted by a district court judge of several violations of G.S. 14-231 (misconduct by a public official, a misdemeanor). The specific misconduct charged was a violation of the Code of Judicial Conduct—ex parte disposition of cases. The judge ruled that a violation of the Code was not a crime. On December 29, 1978, the Supreme Court removed Judge Peoples, and disqualified him from further judicial office, for willful misconduct in office.

No judges have been removed for mental or physical incapacity to date, but the imminence of such proceedings expedited a judicial retirement in at least one instance. The mandatory retirement law—age 72 for appellate judges and 70 for trial judges—has reduced the frequency of need for the incapacity clause. □

5. N.C. GEN STAT. § 7A-10.1.
6. N.C. GEN STAT. § 7A-377(a).

The North Carolina Sunset Law

Milton S. Heath, Jr.

ON JUNE 23, 1977, North Carolina joined a growing number of states that have enacted sunset laws. Senator Willis Whichard of Durham was the principal sponsor of this act. Enactment of a sunset law was also part of Lieutenant Governor Green's legislative program. The North Carolina chapter of Common Cause played an important role in promoting the proposal, and it significantly shaped the structure and content of the bill in pre-introduction conferences with legislators.

Although some state programs are scrutinized closely by each legislature during the budget process, some agencies are rarely if ever re-evaluated by the legislature once the initial stir of interest attending their creation has passed. The Sunset Law is aimed especially, though not exclusively, at these unexamined programs. It provides for automatic termination at a specified time of the statutes creating certain state programs unless they are later continued by the state legislature. The termination provision will force a periodic evaluation by the legislature based on the recommendations of a new "Sunset Commission" and compel a calculated decision to continue or abolish the program. For some agencies on the list, this may mean little more than a mild dose of publicity and some minor renovations, but for others it could well mean oblivion or at least a reduced role as they are merged into other organizations.

About thirty-three program-enabling laws are scheduled to be examined in each of three biennia, beginning with 1977-79. Each listed program will be given a performance evaluation based on detailed standards spelled out in the Sunset Law. These standards lean heavily on performance of program objectives, economic or accounting criteria, and consumer-oriented criteria.

During the first biennium, ending June 30, 1979, the focus will be mainly on occupational licensing laws that lie outside the medical and health field, which itself will be the focus of attention in the second biennium. Agricultural business licensing laws, plus an assortment of very recently enacted legislation and some insurance licensing laws, will be considered in the third biennium. Outside the business and occupational licensing field, one other important subject is covered by the Sunset Law: legislation concerning environmental protection and natural resources management. Beginning in the first biennium but coming to a head in the second biennium, most of the state's important environmental and natural resources laws will be reviewed. This coverage was not included in the original bill but resulted from an amendment added in Senate committee.

The Sunset Commission will make recommendations to the legislature concerning the listed agencies, after holding hearings and developing a record with the help of its staff. Officially designated the Governmental Evaluation Commission, this Commission itself will be "sunsetted" in 1983 when it completes its third biennium of work. Six Commission members are appointed by the Governor, two by the Speaker of the House, and two by the Lieutenant Governor. Aside from these four legislative appointees, no legislators or other state employees or officials are allowed to serve.

The Commission and its staff are organized and under way, after some beginning delays in selection of the Commission members. Governor Hunt, Lieutenant Governor Green, and Speaker Stewart have appointed an exceptionally able and experienced group of public servants as initial Commission members. The Commission has selected one of its members, Paul Vick, as chairman for a one-year term, which expires in March, 1979, and it has designated as executive director Paul Jordan, who is experienced in industrial management and state government and has a master's degree from the University of Iowa in industrial and management engineering. The Commission is composed as follows:

Appointed by Governor (terms expire June 30, 1980)—

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Paul Vick (Chairman), Nancy Chase, Emanuel Douglas, Jack Fleer, Jack Stevens, Wymene Valand. *Senators appointed by Lieutenant Governor (until successors appointed)*—Robert Jordan, Marshall Rauch. *Representatives appointed by Speaker (until successors appointed)*—David Bumgardner, Ben Tison.

The genesis and spread of the sunset idea

Robert Behn, policy sciences professor at Duke University, recently summarized the origin of the sunset idea:

> The notion of placing a statute of limitations on government programs is not new. When he was chairman of the Securities and Exchange Commission, William O. Douglas frequently told President Roosevelt that regulatory agencies should last only 10 years. In *The End of Liberalism*, Theodore J. Lowi proposed a Tenure-of-Statutes Act to provide for automatic termination. The idea has been incorporated into several Congressional proposals. A few years ago, Representative Wilbur Mills and Senator Mike Mansfield introduced legislation that would automatically terminate a number of tax deductions over a three-year period unless Congress voted to reinstitute them. More recently Representative Abner Mikva proposed a Regulatory Agency Self-Destruct Act, and Senator Gary Hart proposed a Federal Agency Pilot Termination Act. Senators Charles H. Percy, Robert C. Byrd, and Abraham Ribicoff have a similar (if less exotically titled) bill that would terminate all regulatory activities over a period of eight years.
>
> The idea attracted little attention, however, until the Colorado chapter of Common Cause christened the automatic-termination concept "sunset," developed a bill for the periodic termination of 43 state regulatory boards and commissions, and organized an ideologically very diverse coalition of legislators that overwhelmingly enacted the first sunset law. One columnist called the Colorado bill "the freshest and possibly most significant law of the 1970's."[1]

Two sunset bills are currently pending before Congress (as of September 15, 1978). The Senate Governmental Affairs Committee has reported Senator Muskie's bill (S. 2), co-sponsored by Senators Glenn and Roth (S. Rep. No. 981, 95th Cong., 2d Sess. July 13, 1978). It would put most federal programs on six-year review and termination cycles. (Two years' work has already been devoted to the Muskie bill. In an earlier form it had over 100 House signers and 55 Senate co-sponsors, including Senators Goldwater, McGovern, Eastland, Kennedy, Helms, and Percy.)[2] Another bill (S. 600)—limited to regulatory activities and sponsored by Senators Percy, Ribicoff, and Byrd—is still before the Senate Governmental Affairs Committee.

Since Colorado passed its sunset law in 1976, twenty-nine other states have followed suit: Alabama, Alaska, Arizona, Arkansas, Connecticut, Florida, Georgia, Hawaii, Indiana, Kansas, Louisiana, Maine, Maryland, Montana, Nebraska, New Hampshire, New Mexico, North Carolina, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Vermont, and Washington. Eight other states, at latest word, were considering sunset bills: California, Delaware, Illinois, Massachusetts, Michigan, New Jersey, Ohio, and Pennsylvania.[3] The Alabama and Virginia sunset laws do not include an automatic termination mechanism; in these states the burden remains on the legislature to terminate programs. (Alabama's program has been dubbed a "high-noon" law.) Sunset laws have been vetoed by the governor in Iowa, Mississippi, and West Virginia.

Experience in implementing the state laws is still limited, but some early evaluations are coming in. As might be expected, the results are mixed. Common Cause makes a rather optimistic overall assessment in its most recent report:

> In 1977, Colorado and Alabama were the first two states to implement Sunset laws. In Colorado, the experience was good, with 13 agencies subject to two outside evaluations each. Three boards were terminated and others consolidated or re-established with modifications designed to improve their performance. Action on several boards was delayed until 1978. The 1977 Alabama experience was a case study in how a Sunset process should not work. The part time legislature acted on over 200 agencies. Because of the crushing workload, few detailed evaluations were prepared and the information that was assembled was not used to change statutes or adjust budgets.
>
> The 1978 Sunset implementation experience has been positive. In the seven states implementing Sunset laws for the first time—Florida, Georgia, Hawaii, Nebraska, New Mexico, Oklahoma, and South Dakota—legislative action has been respon-

1. Robert D. Behn, "The False Dawn of the Sunset Laws," *The Public Interest* (Fall 1977), 103-18, 104.

2. *Id.* at 103.

3. The information contained in this paragraph speaks as of September 10, 1978, and is drawn from a memorandum presented by Common Cause's Washington office to the U.S. Senate Committee on Rules and Administration in April 1978 (updated to September).

sible, based on evaluation and deliberation. The results to date generally resemble the 1977 Colorado experience. Some agencies have been terminated but most have been recreated with modifications designed to improve their performance. Internal improvements not requiring statutory change have been made by many boards in anticipation of their Sunset reviews.[4]

A less optimistic, if somewhat impressionistic view, was expressed by *U.S. News and World Report*:

> The early experience of states pioneering the sunset concept has shattered any notion that the technique is a panacea for bureaucratic sprawl. In those states
> — Only a handful of obscure agencies have actually been dissolved.
> — While some agencies have been cut back, others have been expanded.
> — State legislators are demonstrating that they can easily spend more money evaluating agencies than they save as a result of such reviews.[5]

Scholarly skepticism has been expressed in articles such as Robert Behn's, "The False Dawn of the Sunset Laws."[6] Speaking particularly to proposed federal legislation, Behn questions the seriousness of sunset's threat of agency termination. He also echoes complaints of witnesses at Senate hearings on the Muskie bill concerning the heavy workload it would impose on congressional committees. Concern about the burden of sunset on overloaded legislators and the risk of politically inspired inroads on unpopular but needed programs is reflected elsewhere.[7]

Common Cause's figures show the following results for state evaluations conducted through 1978 in eight states:

Alabama: Legislature voted on 269 agencies with little formal evaluation, terminating 28 nonfunctioning agencies and continuing 241; *Colorado:* 13 evaluations, 3 boards terminated, and 10 consolidated or continued with changes; *Florida:* 12 evaluations, 4 laws repealed, 8 re-enacted with changes; *Georgia:* 10 evaluations, 1 board terminated, and 9 continued with changes; *Hawaii:* 6 evaluations, all boards and agencies continued with changes; *Nebraska:* 19 evaluations, 4 boards terminated, and 15 continued with changes; *Oklahoma:* 21 boards evaluated, 12 terminated, and 9 continued with changes; and *South Dakota:* 9 boards and agencies evaluated, 1 terminated, and 8 continued with changes (including one one-year extension for further study).[8]

Colorado's year of experience in reviewing 13 agencies gives some idea of the cost of an active sunset program. Performance audits by the state auditor consumed 9,000 man-hours at a cost of $133,315 in professional staff time. Another $25,000 in grants was spent to hire University of Colorado graduate students to work as staff to the sunset agency.[9]

How does North Carolina's law compare with others?

Comparing North Carolina's law with those of 29 states in detail would be impractical, but a general model of comparison endorsed by Common Cause and accepted in large part by most states is available. This model, first enunciated by John Gardner in testifying before a U.S. Senate subcommittee in 1976, consists of ten principles:

> First: Programs and agencies should automatically terminate at a certain date unless affirmatively re-created by law. [All but two states have done this.]
>
> Second: Termination should be periodic (e.g., every seven or nine years) in order to institutionalize the program review process.
>
> Third: Like all significant innovations, introduction of the Sunset mechanism will be a learning process and should be phased in gradually. [About one-fourth of the states that have a sunset law have not followed this advice and have taken on almost all government agencies.]
>
> Fourth: Programs and agencies in the same policy area should be reviewed simultaneously in order to encourage coordination, consolidation, and responsible pruning.
>
> Fifth: Existing entities (e.g., budget and planning offices, legislative auditor) should undertake the preliminary program evaluation work, but their evaluation capacities must be strengthened.
>
> Sixth: In order to facilitate meaningful review, the Sunset proposal should establish general criteria to guide the program evaluation process.

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4. Common Cause, "State-by-State Summary of Sunset Legislation" (memorandum presented to U.S. Senate Committee on Rules and Administration, April 26, 1978), pp. 1-2.

5. *U.S. News and World Report*, May 29, 1978, p. 45.

6. *Op. cit. supra* note 1.

7. *E.g.*, Mark Green and Andrew Feinstein, "'Sunset' Laws Would Hurt Important Agencies," reprinted from the Washington Post-Times Service in the *Durham Morning Herald*, Nov. 1, 1977.

8. *Op. cit. supra* note 4.

9. Bruce Adams and Betsy Sherman, "Sunset Implementation: A Positive Partnership to Make Government Work," *Public Administration Review* (Jan.-Feb. 1978), 79.

Seventh: Substantive preliminary work must be packaged in manageable decision-making reports for top decisionmakers to use in exercising their common sense political judgments.

Eighth: Substantive [legislative] committee reorganization is a prerequisite to meaningful Sunset review.

Ninth: Safeguards must be built into the Sunset mechanism to guard against arbitrary termination and to provide for outstanding obligations and displaced personnel.

Tenth: Public participation in the form of public access to information and public hearings is an essential part of the Sunset process.[10]

Most of these principles are incorporated in the North Carolina Sunset Law and the policies that are being followed in implementing it. This state departed from the fifth principle by giving the preliminary evaluation responsibility to a new independent commission rather than to an existing agency. Since the Sunset Law itself is sunsetted in 1983, North Carolina has not yet decided whether to follow the second principle of periodic termination; nor has the General Assembly yet faced the issue of legislative committee reorganization (the eighth principle). Also, this law represents a compromise on the third principle: While the original bill proposed a manageable phased program, the law as enacted added a significant number and variety of agencies to the sunset list.

A progress report on the North Carolina program

As of October, 1978, the North Carolina Governmental Evaluation Commission was organized, almost fully staffed within the limits of its budget, and settled into its office. It was moving into the evaluation of the laws and programs on the 1979 sunset list. Staff composition was strong on legal talent but light on economic and financial analysis skills; the executive director is seeking to achieve a better staff balance by adding personnel and using consultants or assistance from other agencies.

An important preliminary, the format of the evaluation process, has now been established. Basic information has been gathered concerning the agencies on the 1979 sunset list, and the Commission's staff is analyzing this information. The statute requires public hearings to be held on the Commission's proposed report concerning each agency under review. The Commission has also held a set of pre-evaluation hearings to provide a formal opportunity for public input to the report.

The Commission plans to concentrate first on two groups of agencies associated with the construction and housing industry: *Group I:* Real Estate Licensing Board, Licensing Board for Contractors, Board of Architecture, Board of Landscape Architects, and Board of Water Well Contractor Examiners; *Group II:* State Board of Examiners of Electrical Contractors, Board of Examiners of Plumbing and Heating Contractors, Board of Refrigeration Examiners, Board of Registration for Engineers and Land Surveyors, and State Board of Examiners of Watchmaking and Repairing.

These two groups were selected as a work unit, partly because of the strong public interest in the industry and partly because of previous work done by the Attorney General's Office that will help the Commission and its staff get off to a running start.

Other laws soon to be studied include the Mining Act and the Dam Safety Law, two of the environmental laws on the 1979 sunset list. The sunset staff has also identified several inactive or unconstitutional laws on the 1979 list as possible subjects for recommendations to the 1979 General Assembly.

Although it is possible that additional agencies can be reviewed this biennium, realistically it is unlikely. Thus the Commission has a target of evaluating approximately half of the 33 laws assigned to it for review by the General Assembly in 1978-79. Since its staff will be able to devote only about four months of work to these agencies, the average pace of work appears to be much faster than was projected by the Sunset Law.

The prospect for the Sunset Law is in many respects promising. An opportunity is provided for weeding out obsolete and unnecessary programs that have accumulated for want of continuing surveillance. Abuses that may have crept into some programs can be eliminated. Desirable consolidation or reorganization of some functions or programs may be uncovered. Long-needed statutory revisions may be stimulated. Some economies may be possible as a byproduct of one or another of these opportunities. And, of course, the General Assembly may decide to renew the law and extend the sunset process to other parts of state government.

After a late start, the sunset program is now on a sound footing. But if much has been accomplished, much more remains to be done. What are some of the challenges and obstacles that lie ahead?

(1) The Commission and its staff must work their way through the evaluative process and make some hard decisions that will break new ground. For these decisions to stand up under the pressures that will be

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10. Bruce Adams, "Guidelines for Sunset," *State Government News* (Summer 1976), 139-40. This magazine is published by the Council of State Governments in Lexington, Kentucky. The Summer 1976 issue also includes an article by Benjamin Shimberg entitled "The Sunset Approach: The Key to Regulatory Reform?" on pages 140-47.

exerted on them, they must be based on an independent, high-quality record. Along the way, the evaluative capability of the Commission's staff or other resources must be expanded in areas such as economics in order to mold an effective decision-making machinery.

(2) If the Commission recommends substantial revisions in any of the laws that it reviews this biennium, a great deal of bill-drafting may need to be done within a short period of time in preparation for the 1979 General Assembly. As of September 1978, the bill-drafting delivery system had not been developed, though the subject was under consideration. A number of important and delicate questions will need to be answered in this respect. Who will draft the bills? Who will review the drafts? Who will translate the Commission's recommendations into drafting instructions and work with the draftsmen to ensure that the intended results were obtained? Need the bill-drafting process be fully completed before the General Assembly's committees deliberate and act on the Commission's recommendations? These are no mere paper or academic questions. Each of them involves the issue of how to get a job done most effectively while giving adequate weight to the niceties of interagency relations.

(3) As this article is being written, some of the issues raised in the preceding two paragraphs are being considered and resolved. The next major set of issues will open up an entirely new and untracked ground: the General Assembly's role in considering Commission reports and the relationships between the General Assembly and the Commission. Among the important questions to be faced in this area are: What legislative committee or committees will review sunset reports and develop recommendations for legislative action? How can the work of the Senate and the House best be coordinated? What staffing arrangements should be made for the legislative committees? At what stage should proposed amendments to laws on the 1979 sunset list be drafted (an issue foreshadowed in the preceding paragraph)? On what schedule should the legislative committees operate? How much time should be anticipated for floor debates on sunset bills (a serious question, if recent experience with occupational licensing bills is any guide)? What preliminary matters need to be resolved, such as extensions for some sunset studies now scheduled for consideration and action in 1979, and when should these matters be resolved? What extensions should be granted, if any, and for how long? What arrangements should be made for cooperation between the legislative committees and the Sunset Commission? By the time this article is published, these and related questions will need to be well along toward resolution if the first round of the sunset program is to be completed in reasonably good style. □

POPULAR GOVERNMENT (ISSN 0032-4515)
Institute of Government
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P.O. Box 990
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