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Abuse and Neglect of Children and Disabled Adults: North Carolina's Mandatory Reporting Laws

Janet Mason

Joey

Joey was placed in a day-care program in an effort to reduce his developmental retardation. He enjoyed himself and made substantial progress. Still, quite often his mother just didn't get him ready for the bus—he was absent a lot, and eventually he stopped going to the day-care center altogether. When a housing inspector visited Joey's home, he found the apartment dirty and overrun with vermin. One cold day a deputy sheriff who was dispatched to the apartment found Joey locked out, coatless and barefoot. The boy's ears and throat were infected. Both parents were intoxicated. Pots and pans caked with dried food stood on the floor. The apartment was filthy and smelled of urine.

Larry

When Larry's parents took him to the emergency room, he was close to death—in severe shock. Several of his teeth were missing. His head, abdomen, and extremities were bruised. X-rays showed fractures of the skull, one rib, and the bones of both arms—some breaks recent and some several months old. The parents told the physician that Larry fell frequently. They denied hitting him. Later his mother admitted that she quite often got angry and whipped Larry with a plastic belt because he cried a lot and played in the toilet. Physicians diagnosed Larry as suffering from "battered child syndrome."

Mrs. Wall

Mrs. Wall, age 80, lived in her own home with her son. Volunteers who delivered hot meals to her noticed that she frequently had bruises or cuts on her face and arms. When asked about these, she said she had fallen. The volunteers also noticed that Mrs. Wall was unusually withdrawn if her son was present when they arrived. During one visit a volunteer saw that her arm was badly bruised and extremely swollen—perhaps broken. When the volunteer offered to take her to a doctor, Mrs. Wall began to cry and finally explained that she was afraid to go because if her son found out he would be angry and might beat her or carry out his threat to put her in a nursing home.

Situations like these occur with distressing frequency. During the year ending June 30, 1982, county departments of social services in North Carolina investigated almost 27,000 cases of alleged child abuse or neglect, of which 11,000 cases were confirmed. During the first quarter of 1982 over 900 disabled adults in North Carolina were provided protective services by county social services departments.

Twenty years ago child abuse and neglect were largely hidden or unacknowledged problems. That is not true today. A survey conducted in 1981 by Louis Harris and Associates found that 91 per cent of the American public considered child

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abuse a serious problem. The substantial progress that has been made in bringing public and governmental attention to the problems of maltreated children is beginning to be matched in the area of abuse, neglect, and exploitation of elderly and disabled adults.

Since 1971 North Carolina has had a mandatory child abuse and neglect reporting law. A similar law requires that instances of abuse, neglect, or exploitation of disabled adults also be reported. The main purposes of both acts are (1) to identify those children and disabled adults who either are being harmed or are at risk of being harmed as a result of abuse, neglect, or exploitation; (2) to authorize intervention on their behalf; and (3) to provide for protective services to them and services for their families.

Child abuse and neglect are reported almost four times more often since the reporting law was passed, and the number of confirmed cases has more than doubled. Still, it is estimated that these figures represent only about one-fifth of the children who are actually abused or neglected each year.[1] Probably an even lower percentage of disabled adults in need of protective services is reported.

Our system of justice has historically distinguished between legal duties and moral obligations. In the absence of a statute or special relationship, private citizens are not legally obligated to involve themselves in seeing that those who need assistance receive it. By creating a duty on the part of all citizens to report cases of suspected child abuse and neglect and of disabled adults in need of protective services, the North Carolina General Assembly has expressed a strong public policy of assuring that these helpless groups receive the services and protection they need.

This article will explain the reporting requirements contained in the North Carolina Juvenile Code[2] and in the Protection of the Abused, Neglected or Exploited Disabled Adult Act.[3] Its aim is to help public officials and others identify those situations for which reporting is required and to address some of the questions that one who is faced with a duty to report may have.

Child Abuse and Neglect

The law then and now

North Carolina first enacted the Child Abuse and Neglect Reporting Statute in 1965. Reporting under that law was voluntary. In 1971 that statute was amended to make reporting mandatory and to create different reporting duties for professionals and for lay citizens. Specified professionals were required to report if they had reasonable cause to suspect that a child was abused or neglected. All other people were required to report only if they had actual knowledge of abuse or neglect. In 1979 the Child Abuse Reporting Law was repealed, and comparable provisions were included in the Juvenile Code adopted in that year. The new statute that became effective on January 1, 1980, deletes the distinction between professionals and others and requires reporting by any person or institution who has cause to suspect that any juvenile is abused or neglected.

Who must report?

The statute recognizes no exclusions from the reporting requirement: "Any person or institution who has cause to suspect that any juvenile is abused or neglected shall report the case of that juvenile to the Director of the Department of Social Services . . . ." If a person knows that the social services department is already aware of the particular instance of abuse or neglect, it might be safe – given the purposes of the statute – to assume that another report of the same incident or condition is not required. It should not be necessary, for instance, for both a school teacher and the principal to report the case of a child who comes to school with suspicious injuries. But merely knowing that the social services department is involved with the child or the family does not justify failure to report.

The reporting requirement applies to counselors, law enforcement personnel, judges, and others who may be involved in responding professionally to the problem of abuse or neglect—physicians, surgeons, psychologists, other health and mental health workers, social workers, and school personnel.[4] This requirement sometimes raises troublesome issues for professionals who by tradition, ethics, or legal obligation consider confidentiality to be an essential element of their relationships with clients or patients. North Carolina law recognizes the following types of confidential communications as being privileged and protected from compelled disclosure: physician-patient,[5] clergyman-communicant,[6] psychologist-client,[7] school counselor-student,[8] marital and family therapist-client,[9] and husband-wife.[10] The privileges are not absolute,

1. "Neglect and Abuse of Children in North Carolina, Fiscal Year 1979-80." Special Report (Raleigh: Department of Human Resources, December 1980), p. 1. *See also*, STUDY FINDINGS: NATIONAL STUDY OF THE INCIDENCE AND SEVERITY OF CHILD ABUSE AND NEGLECT (Washington: U.S. Department of Health and Human Services, September 1981).

2. N.C. GEN. STAT. § 7A-516 et seq. The reporting requirement and related provisions are found at G.S. 7A-542 through -552.

3. *Id.* § 108A-99 et seq. (Supp. 1981).

4. The duty to report suspected child abuse or neglect is repeated at N.C. GEN. STAT. § 115C-400, in the chapter concerning elementary and secondary education.

5. *Id.* § 8-53.

6. *Id.* § 8-53.2. The clergy and attorneys are two groups whose duty to report suspected child abuse or neglect is open to question despite the apparently all-inclusive language of the reporting law. The relationships between an attorney and his client and between an individual and his priest, minister, or rabbi enjoy special respect as well as some measure of constitutional protection. There are no statutory provisions for a court to compel members of the clergy or attorneys to disclose confidential communications. While some states' reporting laws specifically exempt attorneys from the duty to report, North Carolina law does not address the attorney-client privilege. The privilege is based on the attorney's ethical duty under the Code of Professional Responsibility to preserve the confidences and secrets of a client. Even the clergy and attorneys would appear to have a clear legal duty to report if their suspicions of abuse or neglect have a source other than a confidential communication.

7. *Id.* § 8-53.3.

8. *Id.* § 8-53.4.

9. *Id.* § 8-53.5.

10. *Id.* § 8-56.

however. The law specifically provides that neither the physician-patient privilege nor the husband-wife privilege may be grounds for excluding evidence of child abuse or neglect in a court proceeding.[11] A judge can compel disclosure of an otherwise privileged communication with a psychologist, school counselor, or marital or family therapist if he concludes that disclosure is necessary for the proper administration of justice.[12] Before or during criminal proceedings against an alleged child abuser, for instance, a judge could require a school counselor to disclose statements made by the child victim even though the child expected his or her statements to be kept confidential.

At what point and in what manner should a physician, psychologist, counselor, or therapist advise a client that she or he (the professional) is required to report suspected abuse or neglect? If a school counselor assures a teenage girl that their conversation is confidential and she can speak freely, how should the counselor react when the girl begins to describe the sexual abuse she is suffering at home? If students, patients, or clients are forewarned that suspected abuse or neglect must be reported, will those children and parents most in need of counseling or treatment be discouraged from seeking it? There are probably no easy answers, but affected professionals—both individually and collectively—should consider such questions.

A person who suspects that a child has been abused or neglected has no duty to conduct an investigation or inquiry before making a report. Where some personal relationship or professional involvement exists, however, some discussion or inquiry will often occur. The reporting law does not leave room for the professional, friend, or relative to make an agreement not to report in exchange for an assurance that the suspected abuser will seek help or take any other action.

What acts or conditions must be reported?

The statute defines abused and neglected juveniles to include a larger class of children than ordinary usage of those terms would suggest. The definitions also exclude some children whom almost everyone would consider to be abused or neglected. The case of any juvenile who comes within the definitions contained in the Juvenile Code must be reported. For purposes of the abuse and neglect reporting requirement, a juvenile is any person under eighteen who is not married, emancipated (that is, legally released from parental control), or a member of the armed services. Emancipation, except when it results from marriage, can be accomplished only through a judicial proceeding. Therefore juveniles who live independently or have been informally declared emancipated by their parents but are not judicially emancipated are covered by the reporting statute.

A neglected juvenile is one who:

(1) Does not receive proper care, supervision, or discipline from his parent, guardian, custodian, or caretaker;
(2) Has been abandoned;
(3) Is not provided necessary medical care or other remedial care recognized under state law;
(4) Lives in an environment injurious to his welfare; or
(5) Has been placed for care or adoption in violation of law.

This definition has withstood judicial scrutiny when challenged on the ground that it was unconstitutionally vague. The court found that the terms used in the definition were given "precise and understandable meaning by the normative standards imposed upon parents by our society."[13] The potential reporter must use common sense and generally accepted values to determine what is meant by proper care, necessary medical care, or an injurious environment.

It is not necessary that a child actually suffer physical harm or be threatened with physical harm before he can be found to be neglected. For instance, proper care and supervision include provision of a basic education, and failure to enroll a child in school can be neglect.[14] While the parameters of necessary medical or remedial care have not been precisely defined, the North Carolina Court of Appeals recently held that a child whose mother refused to allow it to receive treatment for severe hearing and speech defects was neglected.[15] Also, a baby placed for care or adoption with a nonrelative without approval from a designated public or private agency can be found to be neglected because the statute requiring such approval for placement of children under six months of age has been violated.[16]

The Juvenile Code defines an abused juvenile in terms of the conduct of his parent or whoever is responsible for the child's care (his caretaker). A caretaker may be a relative, stepparent, foster parent, house parent, cottage parent, or person who supervises a child in a child-care facility. School teachers and babysitters are generally not considered to be included in the caretaker category, but day-care workers or operators are.[17] The fact that a child has been injured or mistreated does not, by itself, bring him within the definition of abused juvenile for purposes of the reporting law. A child who is assaulted or injured by another child or by a neighbor, for instance, would not come within the reporting requirement unless there was some evidence that the parent or caretaker had allowed or contributed to the injury. Cases of mistreatment by someone other than a parent or caretaker may well be the subject of criminal investigation and prosecution. Such cases should be reported to law enforcement officials, but they do not come within the Juvenile Code provisions aimed at getting protective services to the child and his family. Until there is some indication to the contrary, it is assumed that parents will act responsibly to prevent or respond to harm that others may cause their child.

In addition to the child who is physically battered by a parent or caretaker, the reporting law covers children who are subjected to a substantial risk of physical injury, children who are sexually abused or exploited, and juveniles who commit certain criminal offenses at the direction of—or with the encouragement or approval of—a parent or caretaker. The Juvenile Code that went into effect on

11. *Id.* §§ 8-53.1 and -57.2.
12. *Id.* §§ 8-53.3, -53.4, and -53.5.
13. *In re* Biggers, 50 N.C. App. 332, 274 S.E.2d 236, 241-42 (1981).
14. *In re* McMillan, 30 N.C. App. 235, 226 S.E.2d 693 (1976).
15. *In re* Huber, 57 N.C. App. 453, 291 S.E.2d 916 (1982).
16. N.C. GEN. STAT. § 14-320.
17. *Id.* § 7A-542 was amended in 1981 to provide specifically that the Article relating to screening and reporting requirements for child abuse and neglect applies to day-care facilities and day-care plans as defined in G.S. 110-86.

January 1, 1980, expanded the definition of abused juvenile to include children who are emotionally damaged and are denied treatment. For purposes of the reporting law, a juvenile is abused when his parent or other person responsible for his care does any of the following:

(1) Inflicts or allows to be inflicted upon the juvenile by other than accidental means a physical injury that causes or creates a substantial risk of death, disfigurement, impairment of physical health, or loss or impairment of function of any bodily organ; or
(2) Creates or allows to be created by other than accidental means a substantial risk of physical injury to the juvenile that would be likely to cause death, disfigurement, impairment of physical health, or loss or impairment of the function of any bodily organ; or
(3) Commits or allows the commission of any sexual act upon a juvenile in violation of law or commits, permits, or encourages any act of prostitution with or by the juvenile; or
(4) Creates or allows to be created serious emotional damage to the juvenile and refuses to permit, provide for, or participate in treatment (serious emotional damage is evidenced by a juvenile's severe anxiety, depression, withdrawal, or aggressive behavior toward himself or others); or
(5) Encourages, directs, or approves of delinquent acts involving moral turpitude committed by the juvenile.[18]

How should a report be made?

A report of suspected abuse or neglect can be made in person, by telephone, or in writing. It must be made to the department of social services in the county where the juvenile lives or is found. The report should include any information that would be helpful in determining the need for the agency or the court to take action to protect the child, and it should include as many of the following items as the reporter knows: the name and address of the child and the name and address of his parent, guardian, or caretaker; the child's age; his whereabouts; and the nature and extent of any injury to him or condition of abuse or neglect. The reporter should give his name, address, and telephone number. But even if the person who reports refuses to identify himself, the report still must be investigated. The reporter's identity and the information reported are confidential and can be disclosed by the agency only if necessary to carry out its responsibility to provide services. A reporter's identity might not be protected, for instance, if he had information that had to be presented to a court—he could be called as a witness. But the agency would not reveal the reporter's identity to the parents or anyone else in response to a mere inquiry.

What happens after a report is made?

Investigation, protective services, and juvenile court. The social services department is required to conduct a prompt, thorough investigation of every reported instance of abuse or neglect. The investigation must include a visit to the child's home. When it receives a report of abuse, the department may notify a local law enforcement agency. That agency may investigate the report, and it is required to assist with the investigation if the department asks for help. In some cases the child may have to be removed from his home for his own protection. He can be removed with his parent's consent, or the department may file a petition requesting the court to authorize removal. Either a social services worker or a law enforcement officer may remove the child immediately, without a court order, if it appears that the child will be injured or that custody cannot be taken later if removal is delayed while a court order is being obtained. In such an instance, the department must file a petition and obtain a court order within twelve hours if the child is to be held longer than that period.

Abuse is often first identified when a child is taken to a medical facility for diagnosis or treatment. If a physican determines and certifies in writing either that he believes that a child has been abused and needs to remain for treatment or that the medical evaluation indicates that it is unsafe for the child to return to his parent or caretaker, the physician or the facility's administrator can contact a district court judge, or someone designated by the judge, to request authority to keep the child. The social services department must be notified, and it must immediately begin an investigation. Unless the parent consents to the child's treatment at the facility, a petition must be filed and a temporary court order obtained within twelve hours.

In any case in which the department's investigation reveals that a child is abused or neglected but immediate removal from the home is not necessary, casework, counseling, and other protective services must be offered or arranged. If the family refuses these services or if they do not adequately protect the child, the department may petition the court to intervene for the child's protection.

The filing of a petition begins a juvenile proceeding in the district court. Juvenile proceedings are civil (that is, not criminal) in nature and are concerned with the condition and needs of the child, not with the guilt or innocence of the parent or caretaker. In every abuse or neglect proceeding, the court appoints a special representative—a guardian ad litem—to look after the child's interest. The parents and the department are usually represented by counsel; indigent parents have a right to court-appointed counsel. The court conducts a hearing to determine whether the allegations of abuse or neglect are true. If it finds that they *are* true, it holds another hearing to determine the most appropriate plan for responding to the child's needs. An abused or neglected child is not automatically removed from his parents' custody—the law favors leaving the child in his home when that can be done without endangering him. But the court may place him in the social services department's custody or in the custody of a relative or other person or agency. If the child is removed from his home, the social services department must provide services to the child and his family that are aimed at returning him home. In severe cases, however, child abuse or neglect may be grounds (in a different court action) to terminate the parents' rights completely and free the child for adoption.[19]

Criminal prosecution. If the social services department finds evidence that a juvenile has been abused, it must immediately report its findings in writing to the district attorney. If the district attorney decides that criminal prosecution of the

18. *Id.* § 7A-517(1).

19. A parent's abuse or neglect of a child is one of six grounds for terminating parental rights under G.S. Ch. 7A, Art. 24B.

parent or caretaker is appropriate, he can request the director of social services to appear before a magistrate. Child abuse may be either a misdemeanor (punishable by a fine, imprisonment for up to two years, or both)[20] or a felony (punishable by a fine, imprisonment for up to five years, or both).[21] Felony child abuse includes the intentional infliction of serious physical injury that results in permanent disfigurement, bone fracture, substantial impairment of physical health, or substantial impairment of the function of any of the child's organs, limbs, or appendages. Misdemeanor child abuse involves inflicting or allowing the infliction of physical injury, or creating or allowing a substantial risk of physical injury, by other than accidental means. These criminal offenses apply only to the abuse of a child younger than sixteen years of age by a parent or other person who cares for or supervises him. Contributing to the neglect or abuse of a juvenile—whether by the parents or others—is also a misdemeanor.[22]

Whether a parent or caretaker is criminally prosecuted for abuse rests with the district attorney. His views may be influenced by the attitude of the social services department and the community as a whole. Professionals disagree about the appropriateness of dealing with abuse and neglect in the criminal courts. Some maintain that criminal prosecution has a deterrent effect on the defendant and others; they also contend that all criminal conduct should be punished, and they fear that law enforcement personnel will be reluctant to become involved if abusers are not prosecuted. Other professionals argue that (1) abuse and neglect are psychosocial problems for which a nonpunitive response that focuses on protecting the child and preserving the family structure is appropriate; (2) prosecution may increase existing hostility and resentment and lead to further abusive conduct; (3) prosecution and conviction may break up the family; and (4) prosecution, especially if unsuccessful, may make it difficult to involve a family in treatment and services.[23]

Mr. Allen

Mr. Allen's only income was his monthly Social Security check. Because he was disabled and could not manage his own funds, his adult daughter was appointed as representative payee to receive his checks and use them for his benefit. When Mr. Allen's sister came to visit, she found that he had many unpaid bills and a letter from his landlord threatening eviction for unpaid rent. She discovered that the daughter had withdrawn almost all of her father's savings and had not used that money or the monthly checks to pay his expenses.

Central registry. The local social services department sends each report of alleged abuse or neglect to a statewide central registry maintained by the State Department of Human Resources. Created in 1971, the registry provides data for studying the extent of abuse and neglect in North Carolina. It makes it possible to identify children and families who are involved in repeated instances of abuse or neglect. Data collected by the registry are confidential and may not be used in a court proceeding unless the court specifically orders such use.

Notification and review. If the social services department does not file a juvenile court petition within five days after it received a report of suspected abuse or neglect, the person who made the report is entitled to written notice of whether the department found that abuse or neglect occurred and, if so, what specific action the department is taking to protect the child's welfare. If the reporter is not satisfied with the department's action, he can ask the district attorney to review the department's decision not to file a petition. When the prosecutor receives such a request, he is to confer with the reporter, the social worker, the child if practicable, and anyone else who has relevant information. He then either affirms the department's decision or authorizes the filing of a petition.

Procedures for review by the prosecutor were enacted in 1979 and balance another change that provided that only the social services department may file an abuse or neglect petition. Under prior law any person could file a petition. The review procedure gives a person who knows or strongly suspects that a child is abused or neglected and feels that the department's response is inadequate more effective recourse than simply repeating the same report to the same agency.

Protection of those who report. A person who makes a report of suspected child abuse or neglect is immune from civil or criminal liability under state law if he made the report in good faith. Immunity is also guaranteed to anyone who cooperates with the social services department in its investigation, testifies in any court action resulting from the report, or participates in authorized procedures or programs for screening and responding to complaints of abuse or neglect. The law cannot prevent parents or others from suing those who report, but the likelihood of such suits is greatly lessened by this immunity, because in order to succeed the plaintiff must prove that whoever made the report or cooperated in the investigation acted in bad faith—that is, with malice.

What are the consequences of not reporting?

The most obvious and serious consequence of not reporting suspected child abuse or neglect is that a child may unnecessarily suffer. The cost to the child, the family, and ultimately to society may be immense—especially when compared with the minuscule effort involved in alerting the social services department to a need for protective services. In some cases

20. *Id.* § 14-318.2.
21. *Id.* § 14-318.4.
22. *Id.* § 14-316.1.
23. LEADER'S MANUAL—A CURRICULUM ON CHILD ABUSE AND NEGLECT, prepared by J. A. Reyes Associates, Inc., for the National Center on Child Abuse and Neglect (HEW), September 1979, reprinted in ADVOCATING FOR CHILDREN IN THE COURTS (American Bar Association National Institute, 1979), p. 338.

Mrs. Jones

Mrs. Jones is an elderly widow who lives alone in a small, dilapidated house. In response to a call from a concerned neighbor, a social services worker visited her. The house was very dirty, and Mrs. Jones was clearly undernourished. She suffers from arthritis and diabetes and can no longer shop for food, prepare meals, and keep her home as she would like. She has no family and no friends to help her.

the consequences may be insignificant the suspicion may be unfounded, or social services may already be involved, or someone else may have reported —but the law does not excuse one from the duty to report on the basis of such rationalizations.

North Carolina, unlike some other states, does not prescribe by statute any civil or criminal penalty for not reporting child abuse or neglect. In its final report to the 1979 General Assembly, the Juvenile Code Revision Committee indicated that it had considered recommending a penalty for failure to report but concluded that the threat of civil suit should be sufficient incentive for institutions and others to comply with the law.[24] In fact, the threat of civil suit is not very great. There are no reported cases in North Carolina —and very few nationally—concerning liability for failure to report child abuse or neglect. Still, under the general principles of the law of negligence, civil liability is possible. Guardians ad litem and others concerned with the welfare of children who have suffered from abuse or neglect should consider whether someone's failure to comply with the reporting law was a cause of a child's injury—and if so, whether steps should be taken to hold the person who did not report accountable.

Even though the committee that drafted much of the new Juvenile Code considered and rejected the possibility of providing a statutory penalty for failing to report suspected abuse or neglect, it can be argued that failure to report is a criminal offense. On several occasions North Carolina courts have affirmed the common law rule that when a statute in the public interest commands that an act be done and no penalty is expressly provided for its breach, any violation may be punished as for a misdemeanor.[25]

Disabled Adults Who Need Protective Services

The law then and now

The Protection of the Abused, Neglected, or Exploited Disabled Adult Act represents an attempt to assure that protective services are provided, if needed, to any adult who is physically or mentally incapacitated and is unable to obtain services for himself. As first enacted in 1973, the law applied only to abused and neglected adults aged 65 or older. In 1975 it was expanded to include all disabled adults and to address problems of exploitation as well as abuse and neglect. In 1981 the act was recodified with other social services laws. Central to its purposes is the mandatory reporting provision.

Who must report?

The act provides that any person who has reasonable cause to believe that a disabled adult is in need of protective services must report that information to the county social services department.[26] It makes no exceptions and recognizes no justifications for failing to report. As with the duty to report child abuse and neglect, the duty to report cases of disabled adults in need of protective services would generally override the otherwise confidential or privileged nature of a communication. The phrasing of the requirement to report suggests that the duty to report arises somewhere between a mere suspicion and actual knowledge that a disabled adult needs protection.

What must be reported?

Information about disabled adults in need of protective services must be reported. Recognizing who those people are requires common sense and good judgment. The act's road map of definitions[27] gives the terms more precise and sometimes special meaning. For purposes of protecting disabled adults, some key terms —abuse, neglect, protective services— mean something different from the same terms when used in connection with children and in ordinary usage.

Disabled adults are all persons in North Carolina who are 18 or older or lawfully emancipated and are physically or mentally incapacitated. Although the law describes incapacity in terms of specified causes, many of the listed causes require medical diagnosis, and it is difficult to imagine a cause of incapacity that is not covered by those enumerated in the statute. The list includes mental retardation, organic brain damage, conditions that result from accident, mental or physical illness, consumption of substances (presumably drugs, including alcohol), and other impairments.

A disabled adult is in need of protective services if he is unable to perform or obtain essential services for himself and has no relative or friend who is willing and able to obtain or perform the services for him.

Essential services include social, medical, psychiatric, psychological, or legal services necessary to protect the person's

24. *The Final Report of the Juvenile Code Revision Committee* (Raleigh, N.C., 1979).

25. State v. Bishop, 228 N.C. 371 (1947); State v. Bloodworth, 94 N.C. 918 (1886).

26. N.C. Gen. Stat. § 108A-102 (Supp. 1981).

27. *Id.* § 108A-101 (Supp. 1981).

rights and resources and to maintain his physical and mental well-being. Essential services include at least the following: medical care for physical and mental health needs, assistance in personal hygiene, food, clothing, adequately heated and ventilated shelter, protection from health and safety hazards, and protection from abuse, neglect, and exploitation.

A disabled adult is **abused** if he is unreasonably confined, if his caretaker willfully deprives him of necessary services, or if he is the victim of willfully inflicted physical pain, injury, or mental anguish.

A **caretaker** may be a relative who is responsible for the care of a disabled adult or anyone who assumes such responsibility voluntarily or by contract.

Exploitation is the illegal or improper use of a disabled adult or his resources for another's profit or advantage.

A **neglected** disabled adult is either one who lives alone and cannot provide for himself the services that are necessary for his physical or mental health or one who is not receiving services from his caretaker. A special category of disabled adults who are not receiving services from their caretakers and are thereby neglected includes any person who

(1) Is a resident of a state-owned hospital for the mentally ill, a center for the mentally retarded, or the North Carolina Special Care Center;
(2) Is, in the opinion of the professional staff, mentally incompetent to give consent to medical treatment;
(3) Needs medical treatment; and
(4) Has no court-appointed legal guardian and no guardian as defined in the statute concerning hospitals for the mentally disordered.[28]

This definitional maze, while of questionable value in making the reporting duty easy to understand, demonstrates the legislature's intention that no disabled adult in need of protective services be overlooked.

How should a report be made?

A report can be made orally or in writing to the social services department. It should include the disabled adult's name, address, and age; his caretaker's name and address; the nature and extent of any injury or condition of abuse or neglect; and other pertinent information. The reporter is not required to identify himself, but the department may be able to respond to the report better if, during the investigation, it can get in touch with the person who reported.

What happens after a report is made?

For each report the department of social services must make a prompt and thorough evaluation, including a visit with the adult and consultation with others who know of the case. Staff of local mental health clinics, health departments, and other public or private agencies are to help the department carry out its duties, including immediate or in-home evaluations when necessary. The department must make a written report stating whether the disabled adult needs protective services, and the person who made the report must be notified of the determination. Except for the requirement that the evaluation be prompt, no time limit is set for completing the evaluation or notifying the reporter. No procedure is provided for having the department's determination reviewed.

If protective services are needed, the department is to provide or arrange for them immediately if the disabled adult consents. If he has the capacity to consent but does not consent or consents and then changes his mind, the department may not impose services on him. For instance, a competent disabled adult may not be forcibly taken to a doctor for needed treatment if he does not want to go. If the disabled adult does not have the capacity to consent—if he is not able to make or communicate responsible decisions about his own needs—the department may provide protective services only after a court determines that the person lacks capacity to consent and needs the services.

The act authorizes the social services department to bring four different kinds of district court proceedings for the protection of disabled adults. First, if the adult consents to protective services and a caretaker refuses to allow the services to be provided, the department can petition the court to enjoin the caretaker from interfering.

The other three proceedings relate to adults who lack capacity to consent. (1) The department may petition the court for an order authorizing the provision of services. The disabled adult has a right to at least five days' notice of the hearing and a right to be represented at the hearing. (2) The court can authorize limited emergency services without the delay involved in the procedural requirements of the first type of hearing. (3) The department can petition for an order to make the disabled adult's financial records available for inspection and, in cases involving financial exploitation, to freeze his assets. After or instead of initiating any of these proceedings, the department can also petition the court for the appointment of a legal guardian for an incompetent disabled adult.

If the department finds that someone has abused, neglected, or exploited a disabled adult, it must notify the district attorney. Neither the act nor any other statute specifically makes abuse, neglect, or exploitation of a disabled adult a crime. General criminal law provisions—such as those regarding assault, battery, larceny—apply to many situations addressed by the act. Assault on a handicapped person is a criminal offense that carries heavier penalties than assault on others.[29] It is a misdemeanor for an adult to neglect to maintain and support his or her parents without reasonable cause, if the adult has sufficient income after providing for his own family and if the parent is sick or not able to work and has insufficient means or ability to maintain and support himself.[30] Still, especially in the area of neglect, it is possible that someone can create a condition that the act aims to address and not be subject to criminal prosecution.[31]

28. *Id.* § 122-36(n). The referenced definition of "*guardian*" includes a relative or friend whom the patient designates as "closest relative" when he is admitted, but it does not include any person who files an affidavit or testifies in favor of the patient's involuntary commitment.

29. N.C. GEN. STAT. § 14-32.1.

30. *Id.* § 14-326.1.

31. In State v. Forrest (82 CVS 34685 [Forsyth County], notice of appeal given on March 21, 1983), the North Carolina Court of Appeals will review a March 1983 conviction of involuntary manslaughter based on a finding that the defendant contributed to her 75-year-old father's death by neglect. The man was found alive but emaciated in an upstairs room of his home. The floor was covered with

Table 1

Number of Children Reported to the North Carolina Central Registry Annually, July 1971 through June 1982

Date	Abused		Neglected		Both N & A		Total		Deaths		
	Reported	Confirmed	Reported	Confirmed	Reported	Confirmed[a]	Reported	Confirmed	A	N	A/N
July 1, 1971— June 30, 1972	1,100	657	5,775	3,740			6,875	4,397	25	3	
July 1, 1972— June 30, 1973	1,602	746	8,462	5,351			10,064	6,097	10	13	
July 1, 1973— June 30, 1974	1,900	711	9,572	4,987			11,278	5,635	8	11	
July 1, 1974— June 30, 1975[a]	1,946	1,050	9,331	4,724			11,277	5,774	13	12	
July 1, 1975— June 30, 1976	2,112	1,068	10,547	4,984	1,309	221	13,968	6,273	4	9	
July 1, 1976— June 30, 1977	2,180	987	9,415	5,047	3,916	320	15,511	6,354	8	2	
July 1, 1977— June 30, 1978	3,426	1,389	13,265	5,267	1,989	780	18,686	7,438	7	5	
July 1, 1978— June 30, 1979	3,589	1,548	14,505	6,175	2,110	900	20,204	8,623	4	6	
July 1, 1979— June 30, 1980	4,831	1,910	18,452	7,855	2,711	1,126	25,994	10,891	6	7	3
July 1, 1980— June 30, 1981	5,093	1,963	19,970	8,451	2,454	1,007	27,518	11,421	6	4	2
July 1, 1981— June 30, 1982	5,301	1,956	19,417	8,141	2,263	864	26,981	10,961	4	5	4

a Category of Both Neglect and Abuse added December 1, 1975.

Protection from liability

Under state law anyone who makes a report, testifies in a court action, or participates in a required evaluation under the act is immune from civil or criminal liability—except one who acts in bad faith or with a malicious purpose.

The consequences of not reporting

As with failure to report child abuse and neglect, the most serious consequence of not reporting adult abuse or neglect is the harm that may be caused to people who need protection. The statute provides no civil or criminal penalty for not reporting. Civil liability is possible under ordinary theories of negligence, but no lawsuits on this basis have been reported in North Carolina. Under the common law rule discussed above, failure to report may be punishable as a misdemeanor despite the absence of any statutory penalty. As the state evaluates its experience after almost ten years with a mandatory reporting statute, it is worth considering whether there are some types of cases for which a specific penalty should be provided for failure to report.

How Well Do the Reporting Laws Work?

Table 1 shows the number of cases of reported and confirmed child abuse and neglect recorded with the North Carolina Central Registry each year since the registry was created and the mandatory reporting law enacted in 1971. It is difficult to draw very definite conclusions about the relationship between the figures and the actual incidence of abuse and neglect in North Carolina. The increases in reported cases soon after the law passed must be attributed in part to increased public awareness and willingness to report, expansion of the definitions of abuse

cockroaches and feces. He died nine days later. According to the assistant district attorney who prosecuted the case, many people were aware of the man's situation but did not report it. The News and Observer (Raleigh, N.C.), March 14, 1983, at 4C; conversation with Paul Weinman, Assistant District Attorney, 21st District.

and neglect, and improved accountability of the state and county programs. To some extent, the decrease in the rate of increase of reported cases probably represents a leveling-off of these same factors. The recent actual decrease in the number of confirmed cases of abuse and in the number of reported and confirmed cases in the categories of neglect and combined abuse and neglect are cause for cautious optimism at most.

The most recent Special Report on Neglect and Abuse of Children in North Carolina, prepared by the Division of Social Services in the State Department of Human Resources,[32] analyzed data from the Central Registry for fiscal year 1979-80. Reports for that year were up about 30 per cent from the preceding year; they represented 14.11 reports per 1,000 children in the population. Of the cases reported, 41.8 per cent—or 5.91 cases per 1,000 children—were confirmed. By far the most reports—over 40 per cent—were made by friends, neighbors, and relatives. School and law enforcement personnel respectively accounted for 17 per cent and 8 per cent of the reports. Fewer than 4 per cent of the reports were made by physicians, although medical personnel generally made over 10 per cent of the reports.

Among the data collected by the Central Registry are stress factors identified as being present in families in which abuse and neglect occur. In fiscal year 1979-80 the major stress factors reported were (1) continuous unrelieved responsibility for one or more children, (2) lack of parenting skills—unrealistic expectations and ignorance of what is normally expected of a child at various stages of development, and (3) inadequate income or employment problems. Other frequently reported stress factors included mental health problems, alcohol or drug dependence, family discord, social isolation, and inadequate housing. Over 90 per cent of the reported cases involved alleged abuse or neglect by the child's biological parents. Stepparents were the alleged perpetrators in 3 per cent of the cases and grandparents in 2 per cent. Fewer than 1 per cent of the allegations involved adoptive or foster parents.

There is no central registry or other comparable data base from which to get a picture of the state's experience under the reporting requirement of the Adult Protective Services Act. Figures available from the Division of Social Services for the first quarter of 1982 do provide a profile of the disabled adults who received protective services from county departments of social services during that three-month period. Of the 940 adults served, most had independent living arrangements (655) or lived in the home of a parent, guardian, or relative (187). Others lived in group homes or other residential facilities. Very few (29) had been adjudicated incompetent. Over half (526) were 65 years old or older. More women (595) than men (345) were served.

Children and disabled adults who are abused, neglected, and exploited exist in every county in North Carolina. In every North Carolina county there are social workers trained to investigate, identify, and respond to these individuals. Judicial procedures exist for those cases that require court intervention. Continued efforts are needed to increase our understanding of why abuse and neglect occur, to develop more effective means of early identification and appropriate intervention, and to provide better resources for responding to these problems. Too often, however, the connection between available resources and the children or disabled adults in need of help is made only after substantial harm or suffering has already occurred. Undoubtedly, in some cases the connection is never made or is not made until it is literally too late for the abused child or adult. In the eleven-year period ending June 30, 1982, at least 181 children in North Carolina died as a result of abuse or neglect. We will never know how often in those cases there was someone who knew or suspected that the child was being abused or neglected but did not comply with the law's requirement that a report be made. It is valid—and overwhelmingly sad—to assume that for some of those children, and for some unknown number of disabled adults, a phone call would have meant life itself. ●

32. "Neglect and Abuse of Children in North Carolina," *op. cit. supra* note 1.

Occupational Licensing: Protecting the Public or Burdening It?

Ann L. Sawyer

When we go to the doctor, or get a prescription filled, or have our hair cut, we seldom notice the document hanging on the wall—the license issued by the state that says that this professional has met certain criteria in order to engage in his occupation in North Carolina. Driver's licenses and marriage licenses we know about. But we are much less familiar with professional and occupational licensing and how licensing affects the public. The fact is that various occupational groups sometimes have conflicting interests, and it appears that licensing may not always serve the public well. This is an issue that legislators spend considerable time debating.

In North Carolina, an interesting licensing controversy began in 1981. A bill was introduced in the General Assembly that year to amend existing law to allow dental hygienists to furnish certain preventive and cleaning services to the public without being under the direct supervision of a licensed dentist. This proposal, which was opposed by the North Carolina Dental Society, never emerged from the legislative committee to which it was assigned. The following year, a dental hygienist who had established an independent practice challenged the law that prohibited her from offering services directly to the public. Last summer a United States federal district court reluctantly upheld the dental hygiene law.[1] Pointing out that the North Carolina Constitution requires that any use of the state police power that infringes on the right to pursue a lawful occupation have a real and substantial relation to the evil it purports to remedy, the court found that because only dentists are qualified to diagnose and treat dental disease, the direct-supervision requirement is a logical and efficient way to ensure more complete dental care. But it was troubled by data indicating that some people who feared dentists and steered clear of them would nevertheless visit a dental hygienist in independent practice. Moreover, the court noted that the apparent primary concern of dentists in this case was the economic implications of allowing hygienists to practice independently. The court observed that it is in dentists' financial interest to have hygienists remain their employees, not only because of the substantial income they produce from their own labors but also because their efforts leave their employers more time to engage in dental work more profitable than routine cleaning.

This past November a Wake County superior court settled a similar scope-of-practice dispute. The court issued a consent judgment to allow audiologists who are trained to prescribe hearing aids to sell them without first serving apprenticeships under licensed hearing aid dealers.[2] Audiologists, who must have a master's degree and specified clinical experience before they can be licensed by the Board of Examiners for Speech and Language Pathologists and Audiologists, are regulated separately from hearing-aid dealers, who must have a high school education, serve a one-year apprenticeship, and be licensed by the State Hearing Aid Dealers and Fitters Board. Audiologists sued the hearing aid board for unfairly using its authority to make it difficult for them to earn a license to dispense hearing aids. Under the consent judgment, the hearing aid board agreed to exempt licensed audiologists from the apprenticeship requirement. This case stands as a good example of a court's having to mediate a dispute between two groups licensed to provide closely related services.

The proliferation of occupations and professions with related permits or re-

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1. Delancy v. Garren, _____ F. Supp. _____ (E.D.N.C. 1982).

2. Audiology Council of N.C., Inc. v. N.C. Hearing Aid Dealers, Superior Ct., Wake Co. 80CUS8161 (1982).

quirements for licensure is recent.[3] Although societies of physicians, surgeons, apothecaries, lawyers, and scriveners originated in the medieval guild system, few other professions were recognized until the nineteenth century. Moreover, until the twentieth century one prepared to enter most professions through on-the-job training, and professional practice was largely uncomplicated. For example, in the United States before 1900, one prepared to practice law by reading Blackstone and apprenticing in the courtroom under an experienced lawyer. Also, in most cases, general practitioners tended to all of the public's medical needs, and surgery was not recognized as a medical specialty until around the turn of the century.

The first strong push for state regulation of the professions came after the Civil War. In urging state legislatures to enact licensing legislation, members of professional societies claimed to be unable to rid their professions of incompetents and charlatans and therefore sought statutory authority to expel unqualified members from their ranks. Simultaneously, the United States was growing into an urban, industrialized society. More specialized professions and occupations emerged in response to economic, legal, technological, and social developments, and gradually most of these professions and occupations became subject to state regulation. Fifty years ago, only a handful of occupations and professions were licensed in this country; as of 1978, close to 500 occupations and professions were licensed in at least one state,[4] and over 400 more jobs were subject to some form of regulation by a state agency.[5] This growth in regulation has led to the often-quoted cynical conclusion that "virtually the only people who remain unlicensed in . . . the United States are clergymen and university professors, presumably because they are nowhere taken seriously."[6]

Who benefits from licensing professions?

It is interesting to note that licensing is rarely imposed on an occupation against its wishes (for example, federal regulation of stockbrokers began in response to the financial scandals of the late 1920s). Usually legislation is sought by members of the profession or occupation itself. Classic justifications for licensing include the need for high-quality professional services and the layman's inability to evaluate these services competently; moreover, state governments historically have used the police power to protect ignorant buyers from unscrupulous sellers. But some writers suggest that it is not altruism that prompts occupational and professional groups to flood legislatures with proposals for state-sanctioned regulation but rather the fact that licensing restricts normal competition from newcomers. By using their power to restrict access, licensing boards can limit the supply of services and thereby raise prices, occupational incomes, and the status of licensees. Moreover, members of professions can retain this power because they are a more potent political force than citizen-consumers, who, if they are aware of the matter at all, have no special interest that moves them to organize in opposition.

Recent studies illustrate the potential harm that can occur to the public from some kinds of state-sanctioned regulations. In Tennessee researchers found that the more stringent the qualifications to obtain a particular license, the lower the quantity and quality of the service available.[7] Another study reveals that the number of accidental electrocutions is proportionately higher in states with stricter licensing requirements for electricians than in states with lower standards. The reason is that restrictions on numbers of electricians make the cost of their services higher, and some people, especially the poor, therefore do their electrical work themselves, sometimes with tragic results. Simultaneously, poorer work results when those consumers who cannot afford the high-priced services of a licensed electrician patronize less skilled, unlicensed persons instead. One can question whether the limited protection to the public in such cases is really worth the resulting economic and social costs.

Other studies suggest that while licensing boards no longer try to fix minimum prices, they still indirectly affect the fees that consumers pay. For instance, a recent research project in California indicates that dental fees are 14 per cent higher in states where licensing authorities will not recognize licenses granted in other states and where, concurrently, licensing examinations are constructed in such a way that they put out-of-state applicants at a substantial disadvantage. Similarly, laws forbidding opticians, optometrists, and ophthalmologists to advertise the prices of eyeglasses are estimated to increase fees by 25 to 40 per cent, and laws that proscribe the advertising of pharmaceutical prices raise the price of prescription drugs by an estimated 5 per cent.[8]

Concern over the growth in occupational and professional licensure is especially timely in light of a surge in proposed regulation. New professional and occupational groups request licensure from state legislatures when technological changes create the need to license occupations not previously regulated and, more frequently, when an occupational group has sought state permission to perform functions reserved for another practitioner group. In the health field, the increase in the number of licensed groups leads to overlapping areas of practice that are artificially separated by structuring health personnel into narrow functions, making it more and more difficult for the consumer to decide who can best provide a given type of care and treatment. Some health-related groups have sought licensure to enable them to qualify for reimbursement from insurance companies, Medicaid, and Medicare. Finally, groups already subject to licensure have carried scope-of-practice disputes to state legislatures and, if they do not prevail there, to the courts.

Licensing professions and occupations in North Carolina

North Carolina has over 100 licensing and regulatory agencies and programs.[9]

3. *See Professional Self-Regulation*, 29 ALA. L. REV. 679 (1978).

4. FOX, *Occupational Licensing and the Consumer*, A NEW DIRECTION IN OCCUPATIONAL LICENSING 29 (October 1979, Kentucky Legislative Research Commission).

5. Greene, *Licensing Requirements: Minimum Standards or Exclusionary Practice*, A NEW DIRECTION, *supra* note 4, at 151.

6. *Id.*

7. FOX, *supra* note 4, at 28.

8. SCHUTZ, REGULATING OCCUPATIONS IN CALIFORNIA: THE ROLE OF PUBLIC MEMBERS ON STATE BOARDS (Berkeley: Institute of Governmental Studies, University of California, 1980).

9. No reliable count of the number of professions, occupations, businesses, and other activi-

This figure includes thirty-three autonomous licensing boards that collect their own fees from which they finance their operations, adopt their own standards for licensure and discipline (subject to the terms of the laws under which they are established and operate), hire their own staff, and independently perform other functions and duties. Membership on these boards is generally drawn from the profession or occupation being regulated; most appointments are made by the Governor, sometimes subject to statutory limitations. Moreover, most state departments license certain individuals or activities. For example, the Department of Agriculture licenses pesticide applicators; the Labor Department licenses boiler and elevator inspectors; the Commerce Department licenses river pilots to serve the Morehead City and Wilmington ports; the Insurance Department licenses lightning rod salesman, and the Justice Department licenses private detectives and guard-dog services. In licensing individuals or companies, state departments sometimes operate through specialized agencies or boards (such as Agriculture's Pesticide Board and the Justice Department's Private Protective Services Board); in other cases, the statutes assign the licensing function to department staff along with other duties.

Some North Carolinians have worried about the growth in licensing boards since the 1930s.[10] By 1937[11] the state already had a number of licensing agencies, and the General Assembly has spent a great deal of time studying the state boards that regulate the practice of various trades and professions. For example, the 1947 General Assembly authorized the Governor to appoint three members of the House and two senators to investigate the activities and practices of twenty-two state boards governing occupations and professions. Other studies followed, and a 1974 legislative inquiry disclosed that thirty-two licensing boards had developed "questionable practices." According to a Durham newspaper, the three women who constituted the State Board of Cosmetic Art Examiners paid themselves salaries from $8,277 to $8,913, plus expenses, for meeting "every month for about three days." Moreover, the Governor's appointments secretary recalled that some 150 barbers lobbied to be appointed to fill a vacancy in the Board of Barber Examiners; examiners received approximately $14,000 yearly plus expenses.[12] This concern over rampant, piecemeal growth in occupational and professional licensing culminated in the North Carolina "sunset" law in 1977. This law, which automatically repealed over 100 licensing boards and programs if the General Assembly could not be convinced to enact legislation extending their tenure, will be discussed later.

Entry requirements: appropriate or anticompetitive?

One of the liveliest topics concerning occupational and professional licensing is the qualifications established by law and board rules for potential practitioners. Current entry standards have been criticized for being overly restrictive and not directly related to an applicant's competence. Requirements that have been questioned include "good moral character," formal education and practical experience criteria, residency in the state in which one is seeking licensure, and passage of an examination administered by the board.

Good moral character. Like all states, North Carolina requires a showing of good good moral character to enter many professions—including law, dentistry, nursing, medicine and veterinary practice. One commentator remarked that "[in] some states, virtually the only 'profession' open to a once-convicted felon is that of burglar."[13] The applicant is barred from other activities because he is presumed to be of bad moral character, regardless of the nature of his felony or its relevance to his intended occupation. The good-moral-character requirement can frustrate the intent of current rehabilitation programs to provide gainful employment for ex-offenders. One salutary effort in this regard is being made by the American Bar Association in publishing model standards for boards to follow in making determinations of good moral character. As a result, some states are now examining their statutory restrictions on licensing ex-convicts, administering licensing examinations in prisons, and permitting ex-offenders to obtain gainful employment in certain licensed jobs.

Other factors can also call an applicant's good moral character into question. The increase in the number of graduates who declare bankruptcy to avoid having to repay student loans has prompted litigation in some states to determine whether bankruptcy is sufficent evidence of bad moral character to disqualify an applicant from entering a profession. This inquiry is complicated by the "fresh start" policy of the federal bankruptcy law. So far, courts have skirted a potential conflict by stating that the mere fact of declaring bankruptcy will not by itself render an applicant unfit to practice law; however, the court will closely examine the circumstances of the bankruptcy to determine whether there was an intent to defraud creditors.[14]

In general, a determination of character is largely discretionary, and specific criteria of fitness seldom appear. In 1975 the North Carolina Supreme Court upheld the constitutionality of the good-moral-character standard, saying that this standard, although broad, has been so extensively applied that its "long usage and the case law surrounding that usage have given the term well defined controls which make it a constitutionally appropriate standard."[15]

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ties for which a license or permit is required is available. The sunset law, G.S. 143-32.10 *et seq.*, listed slightly over 100 licensing laws and programs for review, but many of the boards on that list issue more than one kind of license, and a good many licensing laws and programs were not included in the sunset list. Revenue licenses are also required for a vast number of occupations and businesses; any discussion of them is beyond the scope of this article.

10. *See*, Gardner, *What about the Commissions?* 16 POPULAR GOVERNMENT (January 1938).

11. *Id.* These agencies included the Board of Examiners of Electrical Contractors, the Real Estate Commission, and the Dry Cleaners' Commission. This last board was later declared unconstitutional in State v. Harris, 216 N.C. 746 (1939).

12. Gellhorn, *The Abuse of Occupational Licensing*, 44 U. CHI. L. REV. 6, 25 (1976).

13. *Id* at 13.

14. *See, generally*, Adams, *Admission to the Bar: A Constitutional Analysis*, 34 VAND. L. REV. 655, 680-708 (1981).

15. *In re* Willis, 288 N.C. 1 (1975), *appeal dismissed*, 423 U.S. 976 (1975). In some decisions during the 1950s, the United States Supreme Court addressed the good-moral-character requirement as it relates to ability to practice law. The Court ruled that any evidence of lack of moral character must nave a rational connection with the applicant's fitness or capacity to practice law, and it established guidelines in that regard. The North Carolina Supreme Court applied these guidelines in the 1980 case of *In re Moore*.

Education and experience. Academic knowledge, educational background, and experience are prerequisites to entering many professions and occupations. All would agree that minimum educational standards are necessary for those who practice medicine, law, pharmacy, and similar professions.[16] For other professions however, one may question whether the statutory requirements for entry are unnecessarily restrictive. One common example is barbering. To become a barber in North Carolina, the applicant must have completed at least 1,528 hours of instruction at a school approved by the State Board of Barber Examiners.

Practical-experience requirements further increase the cost of entering an occupation or profession. For example, in North Carolina and many other states, aspiring barbers must serve a twelve-month apprenticeship before they may be licensed. Apprenticeships are further subject to criticism because the supervising practitioner has generally unlimited control over the apprentice's wages and employment terms. Of course, experience requirements are necessary for selected occupations and professions, but perhaps such requirements should be limited to situations in which practitioners must exercise independent judgment in a complex field, in which societal consequences of error could be great, and in which applicants have not received enough practical training through educational prerequisites.[17]

Residency requirements. Many licensing laws require the applicant to be a resident of the state where he seeks licensure for a specified time before the license is granted. Residency requirements date back to the late 1930s, when European refugees were arriving in this country in large numbers.[18] Although requirements that an applicant be a United States citizen have generally been abandoned, local resi-

17. Greene, *supra* note 5, at 132.
18. Gellhorn, *supra* note 12, at 15.

Moore, an applicant for the North Carolina bar, was denied permission to take the 1978 bar examination. He had been convicted fourteen years earlier of second-degree murder of his former wife's boyfriend. While in prison, Moore graduated from college, and he later received a law degree. In 1975 his parole was unconditionally terminated and his citizenship restored. Accusations were made, which he denied, that since his release from prison he had threatened to kill someone who was upsetting his second wife and that he purposely withheld information from the Board of Law Examiners about his assault conviction. The Court, in remanding the case to the Board for further fact-finding, stated that after an applicant meets his burden of initially showing good moral character, the burden falls on the board to establish certain specific acts of misconduct that are sufficient to rebut the applicant's showing of good character. Moreover, the relevant inquiry is the applicant's *present* moral fitness to practice law and whether, if he has formerly been convicted, there is sufficient evidence to show that he has been fully rehabilitated.

16. Even when educational requirements are clearly related to practicing a profession or occupation, potential practitioners can be priced out of the field by limited access to the required training. For example, the number of applicants to North Carolina's five law schools far exceeds their capacity. Thus many potential lawyers must either attend an out-of-state law school, probably with higher costs, or not go to law school. Despite the fact that law schools cannot accommodate all applicants, thereby reducing the number of persons who would otherwise be entering the profession, at least one practicing attorney has suggested that law school capacity in North Carolina be reduced in order to decrease the supply of new attorneys. [*See* NEWS AND OBSERVER (Raleigh, N.C.), Sept. 12, 1982, p. 35A.] Is it appropriate to try to limit the number of new practitioners and thereby restrict competition for licensed professionals by manipulating or reducing enrollment capacity in schools that offer professionals training?

Many Occupations Require Licenses

These are some of the people required to be licensed under North Carolina law. Not all occupations and professions for which a license is required are listed, nor are occupations with certification or registration boards included. North Carolina statutes also require licensure of a number of facilities, but none of those laws are included in this list.

- aerial duster/pesticide sprayer
- ambulance attendant
- auctioneer
- audiologist
- bail bondsman
- barber
- boiler inspector
- bus driver
- chicken dealer
- chiropractor
- collection agency operator
- cosmetologist
- dental hygienist
- dentist
- electrician
- elevator inspector
- employment agency operator
- engineer
- funeral home operator
- general building contractor
- grain dealer
- hearing aid dealer
- housemover
- insurance agent
- land surveyor
- landscape architect
- lawyer
- lightning rod salesman
- livestock dealer
- manufactured housing salesman
- midwife
- motor vehicle dealer
- nurse
- nursing home administrator
- optician
- optometrist
- osteopath
- pharmacist
- physical therapist
- physician
- plumbing contractor
- podiatrist
- polygraph (lie detector) examiner
- private detective
- private patrol agency operator
- psychologist
- real estate salesman
- refrigeration examiner
- river pilot
- sanitarian
- securities dealer
- speech pathologist
- veterinarian
- water treatment facility operator
- weighmaster

dency requirements remain. The result, intended or not, is to keep outsiders out. Requirements of one year or more of in-state residence have been successfully challenged under the equal protection clause of the United States Constitution.[19] But residency requirements of up to one year have generally been upheld, mainly because courts have viewed lesser residency requirements as providing adequate time to investigate an applicant's qualifications and moral character.

States differ in their standards for licensing the same occupation or profession. Recent studies show that licensing can restrict mobility and increase incomes of licensed persons in states with the most restrictive policies.[20] As long as variations exist in entry standards, one state can refuse another state's practitioners on the ground that the two states' licensing requirements are not equivalent. Even more restrictive is the refusal of some states, especially those in desirable areas of the country, to recognize any other state's licensees, thereby requiring already-licensed persons who wish to move to a restrictive-licensing state to pass another examination and satisfy another long residency requirement. As North Carolina legislators have become aware of this problem, they have amended a number of licensing laws to require boards to license out-of-state practitioners without examination if they meet specific criteria set out in the law, including having practiced in good standing for the past three out of five years and not having any complaint or disciplinary action pending against them in their home state.[21] National efforts are also under way, especially in the health care area, to develop a uniform system for issuing credentials, thereby reducing the role of individual state criteria and promoting greater mobility for practitioners.

Examinations. All licensing laws require applicants to take an examination—written, oral, or both—to measure knowledge acquired during educational or practical training. Often, exams are developed by a licensing board, which may be composed of persons who are not skilled in constructing examinations and are not familiar with the newest methods of practicing the profession or occupation. One way to achieve more standard performance testing is to use exams prepared by national associations or educational institutions. This reduces the individual board's costs (conservatively estimated at $100,000 for developing a moderately short basic test)[22] and helps to ensure that the examination is related to the proficiencies needed to practice a profession competently. Studies have also shown that some licensing boards view examinations as a way to regulate the supply of practitioners in the marketplace.[23] When employment is plentiful, passing rates on exams are high, but when jobs are scarce, licensing boards tend to fail higher percentages of applicants.

Written examinations can present special problems for the less educated, for the less formally trained, and for minorities.[24] Courts have held that if the examination is neutral on its face, it is not invalid even if it disproportionately affects minority groups. A recent North Carolina case challenging the content and grading of the state bar examination was dismissed on similar grounds.[25] But our courts have recognized that there are situations in which a written test is not a reliable gauge of skill and have accordingly invalidated exams that discriminate against applicants.[26]

Board activity as it affects licensees

Licensed practitioners continue to be monitored to varying degrees. Unfortunately, boards are generally reluctant to take strong disciplinary action against practitioners who violate statutory or board-established practice standards[27]—perhaps because they see their function as the detection and prosecution of those who practice without a license. Moreover, board members hesitate to take away a fellow professional's means of livelihood. On the other hand, persons summoned before a board may not always be treated fairly. Often the same board members investigate a case, decide that there is probable cause to hear the complaint, participate in the administrative hearing concerning the complaint, and render a final decision.[28]

Boards frequently adopt codes of ethics as standards for conduct by licensees. These codes often protect the public, and many North Carolina licensing boards use them—including those that regulate doctors, lawyers, optometrists, veterinarians, speech and language pathologists, and audiologists.[29] But these codes, especially as they relate to advertising by practitioners and office locations, can drive up the cost of services with no benefit to the consumer. A series of U.S. Supreme Court cases have construed the appropriate ethical constraints on professional advertising. The most recent such case, *In re*

19. One such challenge occurred in North Carolina in 1970. In Keenan v. Board of Law Examiners, 317 F. Supp. 1350 (E.D.N.C., 1970), a federal district court overturned a requirement that an applicant reside in North Carolina at least 12 months before taking the bar exam. The court found that since the bar exam was offered only once a year, the effect of the residency requirement was to force some applicants to reside in North Carolina for up to 24 months. The court found that there was no rational connection between the 12-month requirement and the state's interest in admitting only morally and professionally fit persons to the bar.

20. *See*, Greene, *supra* note 5, at 133-35; *accord*, Pashigian, *Occupational Licensing and the Interstate Mobility of Professionals*, 22 J. LAW & ECON. 1 (1979).

21. *See, e.g.*, laws governing pharmacists (N.C. Gen. Stat. Ch. 90, Art. 4), chiropractors (Ch. 90, Art. 8), and optometrists (Ch. 90, Art. 6), all ratified in 1981.

22. Halstead, *Licensing Examinations: Examining the Examiner*, A NEW DIRECTION, *supra* note 4, at 110.

23. Shimberg, *A New Direction in Occupational Licensing*, A NEW DIRECTION, *supra* note 4, at 76.

24. *See* Gellhorn, *supra* note 12, at 18.

25. Bowens v. Board of Law Examiners, 57 N.C. App. 78 (1982).

26. Roller v. Allen, 245 N.C. 516 (1957). This occurred in a case in which an immigrant was denied a tile contractor's license because he failed a written examination. Other writers have expressed concern about an applicant's due process rights, if any, if he fails an examination. In 1973, G.S. 93B-8 was adopted to establish minimum rights for such applicants. It requires that (a) each applicant be informed in writing of the required grade for passing an examination before he takes it, and (b) applicants who fail an examination be given an opportunity to review it before the board.

27. *See, e.g.*, Baron, *Licensing: The Myth of Governmental Protection*, 8 BARRISTER 46 (Winter 1981).

28. Disciplinary standards also must be more relevant to the practice of the profession or occupation being regulated. For a discussion of a proposed Uniform Disciplinary Statute, *see* 1 DISCIPLINE 6 (June 1982). This subject, though important, is beyond the scope of this article.

29. For a discussion of codes of conduct, *see* Sawyer, *A Code of Professional Conduct That Will Stand Up in Court*, 52 HEALTH L. BULL. (Institute of Government, The University of North Carolina at Chapel Hill, April 1979).

R.M.J.,[30] decided in January 1982, overturned rigid rules adopted by the Missouri Supreme Court that defined the areas of practice about which a lawyer could advertise and stated other related restrictions. The Court stressed that states can restrict advertising that can be false, deceptive, or misleading—especially in areas in which the public lacks the knowledge to assess the information being conveyed independently. But in the *R.M.J.* case, the state did not argue that the ad that violated the state court's standards was—or could be—misleading. Although its cases have mostly concerned advertising by lawyers, the Court's pronouncements in this area should apply to all advertising by licensed professionals.

Another subject of controversy concerns statutory or board-ordered continuing-education requirements. The movement for mandatory continuing education has grown substantially in the last few years as state legislatures have responded to the public demand for some way to ensure that professionals are competent. But for continuing education to achieve its intended function, the education must be good, and it must be available to all practitioners. So far in North Carolina, continuing-education requirements appear in few statutes, and proposals to establish such requirements are always controversial.[31]

Board membership. Licensing boards have always consisted primarily of members of the profession being regulated. It is natural that professionals should want to police their own profession. But it is always possible that when board members are drawn from the profession being regulated, they will seek to advance the interest of their profession at the expense of others, either consumers or competitors.[32] The courts have usually recognized the need for board members to be knowledgeable and experienced in the profession they are regulating.[33] But if a board member has an actual financial interest in the outcome of a particular matter, his interest should be sufficient to disqualify him from board proceedings.

The possibility of bias in board proceedings has produced a movement to add more public members to licensing boards.[34] Proponents of public representation argue that it is needed to ensure that board decisions do not favor the profession over the public in such matters as discipline of licensees and advertising. Opponents argue that public members dilute a board's expertise, thereby allowing technical knowledge to be concentrated among fewer licensee members (this argument works only if the board remains the same size and public members replace practitioner members), and that public members, being intimidated by their lack of expertise, tend to defer to practitioner members. Some of these objections can be overcome by giving public members adequate training and staff support. The debate over the effectiveness of public members has not yet been settled. North Carolina has added public members to a number of licensing boards, including those that regulate nurses, dentists, physicians, and lawyers. And to prevent the same members from dominating a board—and entry to the profession—for long periods of time, it has added a provision limiting board members to two consecutive terms to a number of licensing laws.

Efforts to limit licensing

The courts have long been concerned with abuses in occupational and professional licensing. More recently, many legislatures, recognizing that licensing programs must be examined periodically, have enacted "sunset" laws to phase out boards that no longer serve the public interest and "sunrise" laws to evaluate systematically the need for proposed new boards. Other reforms, like umbrella boards to oversee activities of professional and occupational licensing agencies and statutory requirements for openness in agency meetings and procedures, have made boards more accountable to the public. And finally, the Federal Trade Commission has actively challenged board rules it considers anticompetitive; Congress is now debating whether the FTC should be allowed to continue its jurisdiction over professional boards. In an era of regulatory reform, recognition of a need for improvement in occupational and professional licensing has come surprisingly late—largely because licensing boards have low visibility and the public is not aware of the pervasive effect of licensing laws on the quality, cost, and availability of many services.

Court rejection of licensing boards that are beyond the state's police power. The State Supreme Court has rejected licensure of three occupations that it did not consider sufficiently related to the public health, safety, or welfare—dry cleaning,[35] tile contracting,[36] and photography.[37] In the case that invalidated state licensure of tile contractors, the Court said: "The right to work and earn a livelihood is a property right that cannot be taken away except under the police power of the State in the paramount public interest for reasons of health, safety, morals, or public welfare."[38] It added, "[T]he more skilled and experienced the workman, the more satisfactory will be his work. The same can be said of any other trade in which human beings engage—even to shining shoes. Usually, the greater the skill, the higher the charge . . . . An average man with an average purse has a right to employ a workman of ordinary skill to perform an ordinary task."[39] Perhaps other occupations still licensed under state

30. _____ U.S. _____, 71 L.Ed 2d 64, 102 S.Ct. _____ (1982).

31. For example, several years ago the State Board of Examiners for Nursing Home Administrators adopted a rule requiring that all licensees complete continuing-education programs as a condition of license renewal. The 1981 General Assembly took the unusual step of amending the nursing home law to repeal this rule. However, the board plans to ask the 1983 General Assembly to reinstate this authority.

32. Statutes that allow private professional societies to select members of licensing boards directly may be unconstitutional. *See* Sawyer, *Some Legal Considerations Regarding Membership of Professional Licensing Boards*, 54 HEALTH L. BULL. (Institute of Government, The University of North Carolina at Chapel Hill, December 1979).

33. *See, generally*, 97 A.L.R.2d 1210 (1964) and other sources cited in *id.*

34. Fox, *supra* note 4, at 32.

35. State v. Harris, 216 N.C. 746 (1939).

36. Roller v. Allen, 245 N.C. 516 (1957).

37. State v. Ballance, 229 N.C. 764 (1948).

38. Roller v. Allen, 245 N.C. at 528. The Court found that personal rights guaranteed by the North Carolina Constitution, Article I, Sections 1 (all persons are created equal and are endowed with unalienable rights, including life, liberty and enjoyment of the fruits of their labor), 7 (no exclusive emoluments or privileges), 17 (no one may be deprived of life, liberty or property but by the law of the land), and 31 (perpetuities and monopolies forbidden) were violated by the licensing law.

39. 245 N.C. at 522.

auspices violate these standards. But they will remain on the books until challenged.

The "sunset" process. Much has been written about sunset laws, legislation passed in approximately 35 states to terminate automatically those boards and programs that are not shown to serve the public interest.[40] The North Carolina Sunset Law, passed in 1977, required (1) an evaluation of over 100 regulatory programs and agencies by a Governmental Evaluation ("Sunset") Commission, half of whose members were legislators and the other half citizens; and (2) termination of programs and agencies. In 1981 the General Assembly, unhappy with the cost and results of the process, abolished the Sunset Commission and transferred review of the remaining sixty programs to an all-legislator Committee on Agency Review. The rewritten law also abandoned the automatic-termination provision, making North Carolina the first state to do so.[41] The Committee is required to present recommended changes in the laws and programs under its study to the 1983 General Assembly, and its authority terminates on June 30, 1983.

Although only two active licensing boards were terminated under the North Carolina "sunset" process—those regulating watchmakers and water well contractors—the success or failure of the "sunset" process should not be judged solely on this factor. Sunset Commission recommendations helped to add public members to many boards, limit board members' tenure, increase board enforcement powers and disciplinary standards where needed, require boards to inform the public better about their programs, and make other improvements. Boards examined by the Sunset Commission and its successor committee have developed legislation to eliminate obsolete and occasionally unconstitutional language from their enabling laws. The process has also fostered legislative experience and interest in agency oversight. One universal disappointment in the sunset concept, both in North Carolina and elsewhere, is the low participation by the public in the hearings on the laws and programs under review.

Assessing the need for new licensing boards or programs. The proliferation of occupations and professions licensed by the state has been haphazard. An interest group that wants to be regulated and is persistent enough probably will eventually be regulated. Moreover, busy legislators can give little thought to whether regulation is necessary at all—and if so, what kind is best. One response to this situation has been to establish an orderly process by which a legislative or independent commission reviews requests for the establishment of new licensing boards or programs and applies uniform criteria in determining whether to recommend licensure. This procedure delegates the extensive fact-finding and evaluation involved to people who can expertly judge the merits of licensing proposals while helping remove controversial decisions from the political arena.[42] Several states, including Virginia, have recently initiated this procedure, and a legislative study commission will recommend it to the 1983 General Assembly.[43]

In deciding whether to begin licensing professions or occupations, the following questions are generally considered relevant:

1. Whether the unlicensed practice of the profession poses a serious risk to the consumer's life, health, safety, or economic well-being;

2. Whether the potential users of a professional service will likely know enough to evaluate the qualifications of those who offer services; and

3. Whether potential benefits to the public from licensure outweigh its potential harmful effects, such as a decrease in the availability of practitioners, higher costs, and restrictions that prevent the best use of personnel.[44]

Administrative reorganization of licensure. In the past, occupational licensing was usually administered by autonomous boards. But over the past five years states have begun to centralize at least some board administrative functions; 31 states have established a central agency or administrative unit for some or all licensing agencies.[45] The central agency's authority varies.

North Carolina, like 18 other states, has no centralized administrative structure for occupational and professional licensing boards. At the other end of the spectrum, central agencies in Illinois and New York have complete licensing authority, and boards are advisory only.[46] The Sunset Commission staff briefly considered whether to recommend some kind of centralization for North Carolina, but it was unable to develop the idea fully before the Commission died. Like most topics, centralization has its proponents and detractors. Advantages include greater administrative efficiency through consolidation of under-used staff and support services, easier access to consumers through

40. THE STATUS OF SUNSET IN THE STATES: A COMMON CAUSE REPORT 21 (Common Cause 1982).

41. *Id.* at 29.

42. One study indicates that politics also affects the number of licensing laws. States with intense interparty competition have lower overall legislative output but a higher than average percentage of licensing laws. It appears that legislators use licensing bills to carve out support from groups of their constituents. Smith, *Production of Licensing Legislation: An Economic Analysis of Interstate Differences*, 11 J. LEGAL STUDIES 117 (January 1982).

43. The resolution was prompted by proposals in the 1981 General Assembly to license medical radiation technologists, social workers, athletic trainers, occupational therapists, and counselors. The 1981 General Assembly did not act on any of these bills.

44. Berry, *The States' Occupational Licensing Debate: Sunset Review Means a Closer Look at the Need for State Regulation*, STATE GOVERNMENT NEWS 10 (May 1982).

45. *Id.* at 11.

46. The New York system is worthy of notice. The centralized program is administered by the Board of Regents of the University of New York with help from the state education department and professional advisory boards. Board members are appointed by the regents from nominations received from various sources, including professional associations, consumer groups, individual practitioners, and prospective board members themselves. Each board is served by an executive secretary also chosen by the regents; this person serves more than one profession and is frequently not a member of the profession being regulated. License fees go into the state's general fund; they are not credited to individual boards. Besides providing centralized administrative services such as testing, data processing, and so on, the education department contains a centralized conduct division, including a staff of attorneys and investigators. The department staff presents results of investigations to peer-group panels selected from board members, including public members. If the panel recommends disciplinary action, the recommendation is referred to the Board of Regents, which makes the final decision. The board also has final rulemaking authority; rules are adopted only after consultation with a variety of groups, and it is clear that no particular group's views prevails. The department maintains toll-free telephone lines for consumers who wish to contact it directly to file complaints or to determine quickly whether an individual is licensed to practice. *See* Salman, *Centralized Licensing: The New York Model*, A NEW DIRECTION, *supra* note 4, at 85-88.

one contact point for registering complaints, greater individual board accountability through review of disciplinary and rulemaking activities by a central director who is not personally practicing the profession, and the ability to offer coordinated activities, such as training of new board members. Disadvantages include the possible loss of expertise about specific professions by investigators and decisionmakers, the addition of another layer of bureaucracy, and the possible loss of some control over individual boards by the legislature. The relevance of these views varies according to the degree and kind of centralization under consideration.[47]

Licensing is not always the best answer

Occupational licensing represents many things to many people. Members of the licensed profession see it as a way to ensure that standards are met. Consumers see it as a way to ensure quality in areas in which their ability to judge a practitioner's skill and competence is limited. Economists tend to see it as a way to restrict entry into a profession or occupation, leading to higher prices. Finally, antitrust lawyers may see it as a means to restrict competition among professionals. All of these perceptions should be considered in debating the benefits and costs of occupational licensing.

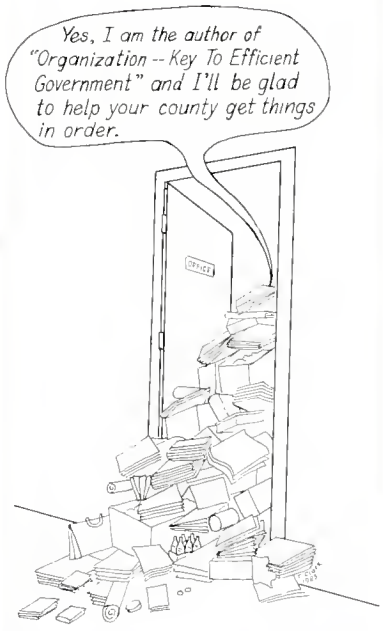
It is generally accepted that some kind of regulation, often including licensure, is needed for activities that, if unregulated, can harm the public health, safety, or welfare. The difficult task is designing a system that protects against the unfit and dishonest without also creating artificial limitations to career choices and work opportunities. One frequent proposal for accomplishing this goal is to give the public assurance of some practitioners' qualifications without wholly excluding others who may be less qualified or talented but can still perform competently. Voluntary registration with a state agency or voluntary certification by a recognized professional organization can accomplish this purpose. Unlike licensure, registration and certification do not forbid activity unless the practitioner has met certain standards; instead they allow persons to demonstrate voluntarily that they have attained a particular level of skill. Thus the public can differentiate between self-styled experts and those whose qualifications have been acknowledged by an outside source. Another proposed alternative to licensure is to require providers of certain services to disclose their backgrounds, training, treatment philosophy, charges, and other matters relevant to their practice in a statewide directory distributed to libraries and courthouses. These kinds of proposals help the public to evaluate the quality of a practitioner's services without excluding persons who wish to engage in that profession or occupation. Of course, some professions so directly affect the public's well-being that licensure is necessary and a lesser alternative would not do. But less restrictive alternatives to licensure should be considered and used when appropriate.

Ideally, both consumers and professionals benefit when the state and conscientious members of the profession share the responsibility for meeting the public's needs for acceptable and affordable service. The government should impose minimum standards in cases in which free enterprise will not work. Then the profession should be responsible for working toward the highest possible level of excellence in that particular area. A legislator endorsed this philosophy in this way: "I don't think a license is a guarantee of professionalism. In effect that license says, 'We need to regulate you because the public is in danger, not because we want to elevate the reputation of your particular occupation in the community.'"[48] But for this attitude to prevail, members of the public must understand the detrimental effect on services that results from unnecessary regulation of professions and occupations. It appears that the public may soon recognize that fact. ●

47. For further details, including descriptions of seven state plans, *see* A. SAWYER, AN UMBRELLA AGENCY TO SUPERVISE OCCUPATIONAL LICENSING BOARDS (Institute of Government, The University of North Carolina at Chapel Hill, January 10, 1980).

48. Sheldon, *The Role of State Legislatures in Occupational Licensing: Reform in Florida*, A NEW DIRECTION, *supra* note 4, at 17.

Life at the Institute



Poverty in North Carolina

Joel Schwartz

In North Carolina, indigent aged and disabled persons receive three times as much monthly cash assistance as do indigent single-parent families. This difference in amount of assistance suggests that some poverty groups are considered more deserving than others.

As the nation's longest postwar recession drags on, the number of Americans officially classified as poor continues to rise. By the end of 1981, nearly 32,000,000 persons had incomes that placed them below the poverty line. The Census Bureau, which reported this figure, also noted that the poverty rate had increased during each of the last three years and now encompasses 14 per cent of the population.[1] Figures for 1982 have not yet been released, but all evidence points to a worsening situation.[2]

What does it mean to be counted as officially impoverished? Being in poverty means to have an income less than that determined by the Bureau of the Census to be necessary to provide the minimum requirements of subsistence. The formula used to draw the line between minimally adequate income and inadequate income dates from the early 1960s. At that time the Social Security Administration proposed that any determination of minimally adequate income be based on the cost of minimal food requirements. The U.S. Department of Agriculture drew up the basic nutritional requirements and calculated the cost of the necessary food. Consumer studies had already indicated that low-income families typically spend two-thirds of their resources on *nonfood* items. Accordingly, the Social Security Administration multiplied the cost of the USDA's economy food plan by a factor of three and arrived at an income figure (the poverty index) considered to be necessary for a family to avoid the debilitations of poverty.

This basic poverty index was further refined to reflect differences in family size, age of family members, farm or nonfarm residence, and sex of the head of household. Using these few variables, the Social Security Administration identified 124 different family types and meticulously calculated an appropriate poverty budget for each one. Since then the Census Bureau, which adopted this index, has annually revised the original estimate of a poverty budget to account for rising prices. In 1963 the formula stated that an average nonfarm family of two adults and two children needed an income of $3,130 to avoid poverty. After eighteen years of inflation, that same family required $9,287 to purchase an equivalent amount of goods and services.

In defining poverty, it is important to bear in mind what the official index leaves out. The increased dollar amount of the index over time does not imply in any way an increased standard of living for the poor. A poverty line adjusted only for inflation keeps the standard of living of the poor unchanged. But the living standards of the rest of the population will continue to improve as the economy grows and as *real incomes* (i.e., corrected for inflation) rise. Hence the poverty formula will depict a growing gap between the economic status of the poor and the status of everyone else.

On the other hand, the actual disparity between living standards of the poor and the nonpoor may be considerably less than the poverty index suggests. This is the consequence of two acts of omission on the part of the Census Bureau. The Census Bureau estimation of poverty calculates only the amount of *cash income* available to households. It excludes the value of in-kind transfers such as food stamps, nutritional programs, housing subsidies, Medicaid vouchers, and direct health care services. In-kind transfers grew exponentially during the seventies, and these benefits now represent a significant proportion of the budgetary resources of low-income households.[3] Similarly, the Bureau's index also omits any consideration of regional cost-of-living differences. A nonfarm low-

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1. *Washington Post*, July 20, 1982, p. 1.

2. The major causes of increased poverty in 1982 are higher unemployment rates and the cuts in social programs made by the Reagan administration. Most of those cuts did not go into effect until September 30, 1981, at the earliest and so would affect the poverty rate only during the last quarter of 1981.

3. Federal expenditures on food stamps, housing subsidies, and Medicaid in fiscal 1981 amounted to $58 billion. *Budget of the United States Government, Fiscal Year 1983* (Washington, D.C.: U.S. Government Printing Office, 1982).

income family who live in Durham, N.C., on $9,287 can live better than their counterparts who live in New York or San Francisco.

Given these and other problems associated with the poverty index formula, it is not surprising that the Bureau's estimates of the poverty population have come under frequent and severe attack. Critics have variously charged that the official figures on poverty either grossly overestimate or grossly underestimate the true size of the impoverished group in America and the seriousness of the problem.[4] While each criticism may have some merit, one suspects that correcting all the biases built into the formula would not appreciably alter the size of the poverty population. Alleged overestimates and alleged underestimates would essentially cancel each other out.[5] Despite the controversy that surrounds the official poverty index, this index is the estimate I shall use in this article because it is the only one for which there are systematic, comprehensive, and longitudinal data.

Since poverty is defined as the state of having insufficient income, it logically follows that a person's relationship to the labor force will critically influence how likely he or she is to be impoverished. Most Americans derive all or most of their income from wages. If a person's wages are low or nonexistent, he probably lives in poverty. Nearly a million households are headed by people who work full time all year round, yet their wages are so low relative to their needs that they are officially classified as poor.[6] Such families are often referred to as the *working poor*.

For a second subgroup of the population, the underemployed, adequate employment opportunity rather than adequate wage levels is the critical problem. In recent months 12,000,000 Americans have been actively but unsuccessfully seeking jobs. Millions more give up on the search because of discouragement, and they are therefore no longer counted among the officially unemployed. Another large but unestimated number of individuals have had to accept part-time employment even though they want full-time work. And an unknown multitude are working at jobs below their skill level because of a slack labor market. Not all of these people are poor even though they are not optimally employed, but many of them are in severe economic distress. One observer suggests that these *underemployed poor* constitute 30 per cent of the poverty population.[7]

But most of today's poor are neither the underpaid nor the underemployed. They are people whose lives are no longer intertwined with the labor force at all. They include single parents (almost always the mother) who are at home because of child-care responsibilities, the 65-or-older population who have retired from their jobs, or other adults whose physical or mental disabilities make them unemployable. Many single-parent families and disabled or elderly people depend on public assistance for all or most of their economic support. We may therefore designate these people as the *dependent poor*.

How responsive has our welfare system been to the needs of the dependent poor? Clearly, the condition of being economically needy in the United States has qualitatively changed over the decades. Human services have vastly expanded and improved. In addition to cash benefits through Social Security, Supplementary Security Income, and Aid to Families with Dependent Children, these households also receive many in-kind transfers like Medicare, Medicaid, food stamps, housing subsidies, and fuel allowances. These welfare expenditures lift millions of people out of poverty and alleviate the economic distress of millions more who remain in poverty. The Congressional Budget Office estimates that the poverty population would *double* if all Social Security benefits, public assistance payments, and other government transfers were cut off.[8]

But equally needy households do not necessarily receive equal governmental assistance. In North Carolina, the indigent aged and disabled receive *three times as much monthly cash assistance* as do indigent single-parent families.[9] This difference in amount of assistance suggests that some poverty groups are considered more deserving than others. Furthermore, the context in which assistance is granted reinforces the discriminatory treatment of single-parent families. Beginning in 1973, aid for all categories of public assistance except AFDC (Aid to Families with Dependent Children) has come directly from the federal government. In that year recipients of aid in these categories became the responsibility of the Social Security Administration under the Supplementary Security Income (SSI) program. Since then benefit levels have been consolidated and set in accordance with uniform national standards. Thus, except for AFDC recipients, persons with comparable economic need for comparable reasons no longer receive assistance payments that vary widely solely as a result of geographic residence.

Moreover, by placing assistance to the aged, blind, and disabled within the Social Security program, we have created a presumption that the benefits that accrue to these persons are "entitlements" rather than "welfare." This difference has great symbolic value in a society that traditionally regards welfare recipients with distrust and resentment. Also, assistance benefits tend to become more unequal over time because of differences in how payments are adjusted for the impact of inflation. Social Security and SSI benefits are *indexed* and therefore are inflation-proof. But no such protection exists for AFDC recipients. Federal guidelines re-

4. Martin Anderson, a long-time critic of federal welfare programs, claims that calculating the value of in-kind transfers and taking into account the underreporting of income by the poor would halve the official poverty rate. In 1977 such a procedure would have removed 12 million persons from the poverty rolls. Martin Anderson, *Welfare* (Stamford, Conn., 1978), pp. 23-25.

5. In contrast to Anderson's position (see note 4), others have claimed that the economy food plan on which the poverty index rests is unrealistic because it was designed to meet only short-term needs in an *emergency situation*, whereas the poverty experienced by millions of Americans is long term and therefore requires a food plan that reflects this fact. It has also been alleged that more comprehensive and refined consumer expenditure surveys reveal that low-income households spend a much lower proportion of their funds (approximately 20 per cent) on food than the poverty index assumes. Thus a higher multiplier factor should be used in deriving the poverty line. When this alternative formula is used, the number of persons officially classified as poor increases by 12 to 15 million. See W. P. O'Hare, "Measuring Poverty," *Clearing House Review* (December 1981), 648-52.

6. Bradley Schiller, *The Economics of Poverty and Discrimination* (Englewood, N.J., 1980), pp. 65-66.

7. *Ibid.*, p. 53.

8. *Ibid.*, p. 26.

9. *North Carolina Statistical Abstract* (Raleigh, 1979), pp. 66, 72, 74.

Historically, North Carolina has had the lowest industrial wage structure in the nation.

quire only that states periodically review their standards of minimum need and adjust them to reflect increases in the cost of living. There is no statutory obligation to increase benefit payments accordingly. A state may simply choose to keep payment levels constant and fund a declining percentage of new need standards. Where such choices have been made, or where benefit adjustments reflect only part of the rise in the Consumer Price Index, the purchasing power of the AFDC recipient steadily deteriorates.[10]

The term Sun Belt immediately evokes the image of a growing, economically vital region with an expanding industrial base and a prosperous future. Have these regional benefits also devolved upon North Carolina? The evidence suggests that the Tar Heel state has indeed shared in the Sun Belt's good fortune. Between 1970 and 1980 the state's growth rates for population and per capita income exceeded the national average.[11] But still, the change in per capita income only *barely* exceeded the national average, and North Carolina registered the smallest percentage gain of any southern state except Florida.[12] North Carolina has also attracted considerable new capital investment. The State Secretary of Commerce recently noted that "more than eleven billion dollars in new industry has moved into the state recently, more than in any other state of comparable size."[13]

Given these economic trends, one would expect a declining rate of poverty, and that is what the data show. In 1970, 20.3 per cent of North Carolina's population was classified as poor. Ten years later that figure had dropped to 14.6 per cent.[14] Such a decline represents substantial progress. But the nature and duration of this progress must be kept in perspective. The drop in the state's poverty rate took place in the first half of the decade. Since 1976 no further improvement has occurred.[15] Moreover, figures from the last year for which we have data (1981) indicate increased poverty as the state's economy suffers from the recession that afflicts the nation as a whole.[16] While future trends remain uncertain, it may be instructive to consider those factors that did contribute to whatever progress North Carolina made against poverty in the first half of the 1970s.

One important cause of economic improvement has been the dramatic rise in the number of married women who have entered the paid labor force. By 1980, 54.7 per cent of all married North Carolina women were working outside the home. Among women with children under school age, the percentage is 58.8 per cent. And among women whose youngest child is of school age, 71.8 per cent have jobs.[17] These labor force participation rates not only exceed the national average but also are higher than for any other southern state.[18]

The two-earner family of course is not unique to North Carolina. It became a common national pattern during the seventies. This state's experience differs only in that this development has gone faster and further than in most other parts of the country. A main force behind the rise of two-earner families has been the growing concern about economic security. As inflation raged and as the primary earners' real wages fell, wives increasingly felt the need to supplement their husband's income in order to preserve the household's standard of living. Thus the working wife has become an important hedge against economic hardship throughout the United States. But her earnings contribution is likely to be more important in North Carolina than in many other regions.

Historically, North Carolina has had the lowest industrial wage structure in the nation. At the beginning of the 1970s it ranked last among the fifty states in terms of hourly average wages paid to workers in manufacturing industries,[19] and it retained that dubious distinction throughout the decade. If most families headed by a male industrial worker in North Carolina had to depend solely on his wages, their economic position would be precarious indeed.[20] Had married women in this state not entered the labor force at a faster rate than their counterparts elsewhere, it is doubtful that the percentage of North Carolina population that was impoverished would have declined as much as it did.

For married women to enter the labor force in increasing numbers, opportunity incentives as well as economic motivation must be present. A wife's decision to seek employment, particularly a woman with school-age children still at home, usually results from a complicated push-pull pro-

10. Between 1969 and 1980 AFDC benefits fell by 20 per cent in real terms. *Christian Science Monitor*, December 29, 1982, p. 23.

11. "The Southern Growth Experience," Conference Report of the Southern Growth Policies Board (June 1982), Tables 1, 18A.

12. *Ibid.*, Table 18A.

13. *Chapel Hill Newspaper*, November 19, 1982, p. 6A.

14. *Provisional Estimates of Social, Economic, and Housing Characteristics, N.C. and U.S.*, Technical Report No. 1 (Raleigh: N.C. State Data Center, June 1972), p. 4.

15. "The Southern Growth Experience," Table 19.

16. Rising unemployment rates and social budget cuts are having the same adverse effect on poverty in North Carolina as elsewhere.

17. *Provisional Estimates*, pp. 3-4.

18. "The Southern Growth Experience," Table 15.

19. "North Carolina in Comparative Perspective," *University of North Carolina Newsletter* (December 1972), p. 3.

20. In 1977 the official poverty line was set at $6,191. That year 65 per cent of all North Carolina industrial workers earned an average hourly wage of $3.89 or less. If such workers labored 40 hours a week for fifty weeks a year, they would have earned $7,781 per annum *before taxes*. After statutory deductions, their *net salary* would have been very close to the poverty line. If the worker's family was larger than four persons, or if the individual could not, for whatever reason, work 40 hours a week year-round, it is very probable that his net income would have been at the poverty line or slightly below it. Low wages, as a contributing factor to poverty in North Carolina, take on added importance because our state *ranks first nationally* in the percentage of total nonagricultural employment represented by manufacturing employees. See *North Carolina Economic Development*, Research Report, Vol. 3, no. 1 (Raleigh: N.C. Department of Commerce, June 1980).

cess. Perceived economic need may provide a motivational *push*, and favorable employment prospects act as an inducing *pull*. Though North Carolina's economy was not immune to the recessionary cycles of the seventies, its unemployment rates were often lower than the national average.[21] Because prospects for employment were relatively more favorable in North Carolina than elsewhere, married women had more incentive to look for a job. The state's lower than average unemployment rates have also meant that primary wage earners in North Carolina have been less likely than their counterparts elsewhere to be laid off, and therefore their often marginal income (because of low wages) has been protected.

Rates of participation in the labor force, wage levels, and employment opportunities have little bearing on the economic status for many households in North Carolina. As previously mentioned, the factors of age, disability, and single-parenthood may entirely exclude the heads of some households from the work force. Whatever economic progress these households might have made during the last decade has resulted from improved public assistance programs. Among these economically vulnerable households, those headed by the indigent aged and disabled have fared best. Changes in Social Security benefits and the introduction of SSI provided a cash income that enabled many who might otherwise have been poor to live at a standard of living above the poverty threshold.[22] The favorable effect of federal assistance programs on the aged and disabled is reflected in the fact that the percentage of such households among the officially impoverished is holding steady or declining even as their percentage in the population as a whole continues to increase.[23]

Single-parent families that are dependent on public assistance have been far less fortunate. In 1981 the maximum AFDC cash benefit available to a North Carolina family of four was $2,520. That same year the Census Bureau set the poverty level for such a family at $9,287. Access to in-kind benefits allowed such families to stretch their cash resources, but these benefits do not reach all eligible families. The gap between the eligible population and the recipient population can be wide, and in this state it will vary from one county to another.[24] Even in a best-possible-case situation in which a single-parent family does manage to tap into all of the available in-kind benefits, the value of the total benefits received (cash plus in-kind transfers) will still fall considerably short of the official poverty line.

The plight of single-parent families will have to be a central policy issue of the eighties. Their numbers, as a percentage of all household units in the United States and North Carolina, have dramatically increased. In 1970 they represented over 12.5 per cent of all North Carolina households. By 1980 they constituted 19.2 per cent of all such units.[25] They are more vulnerable to poverty than any other subgroup in society. The likelihood that a single-parent family headed by a woman will be poor is one in three; for a single-parent family headed by a male the likelihood is one in ten, and for a two-parent family headed by a man it is one in nineteen.[26] The main reasons for the formation of households headed by women are divorce and illegitimacy. Half of all first marriages end in divorce, and in 1981 one of every six live births was illegitimate.[27] Such causal factors can only exacerbate the public's resentment toward "welfare families." It is hardly surprising that such families have borne the brunt of social budget cuts to date. If the pattern established during the first two years of the Reagan Administration continues, there is every reason to assume that these families will receive even less aid.

What, if anything, can North Carolina state government do to promote further progress against poverty? Prospects for the immediate future appear very dim. So long as the national economy remains mired in deep recession, poverty will persist and expand. Spreading unemployment not only imposes economic hardship on individual households but also constrains the growth in state revenues that is needed to cope with the human distress that economic stagnation creates. We must therefore look toward the time when (we may hope) the economy rebounds and the political inclination and fiscal capacity of state government to address the poverty problem is more propitious.

Certainly high on the list of policy priorities must be the economic plight of impoverished single-parent families. As Washington makes deep cuts in AFDC, Medicaid, and other cost-sharing programs, state officials will have to decide how to deal with the reduced flow of federal funds. This problem has already presented itself. North Carolina legislators met in a special session in October 1981 to deal with federal budget cuts. The legislature decided to reduce the funding levels for federal-state supported programs at the same rate that Congress and the Reagan Administration reduced federal support.[28] If more federal cuts are made and

21. Comparative U.S. and N.C. Unemployment Rates, 1972-1980:

Year	N.C.	U.S.
1972	4.0	5.6
1973	3.5	4.9
1974	4.5	5.6
1975	8.7	8.5
1976	6.2	7.7
1977	5.9	7.0
1978	4.3	6.0
1979	4.8	5.8
1980	6.5	7.1

Sources: *Statistical Abstract of United States* (Washington, 1981) p. 380, North Carolina Labor Force Estimates (Raleigh, N.C. Department of Labor, 1982), p. 246

22. Schiller, *Economics of Poverty*, pp. 186-87.

23. A Census Bureau report entitled *Characteristics of the Population Below the Poverty Level: 1980* comments: "Despite recent increases in poverty, there were substantially fewer poor persons over 65 in 1980 (3.9 million) than in 1970 (4.7 million). Part of this improvement can be attributed to increases in Social Security benefit levels, including the indexing of benefits which began in 1972." *Current Population Reports*, Publication 60, no. 133 (Washington, 1982), p. 1.

24. The participation rates of AFDC recipients in the food stamp program illustrates this considerable variation. In fiscal year 1977-78 the participation rate ranged from 24.9 per cent in Currituck County to 68.3 per cent in Madison County. *North Carolina Statistical Abstract*, p. 78.

25. *Provisional Estimates*, p. 2.

26. "About one half of all families below the poverty level in 1980 were maintained by women with no husband present. The poverty rate for such families was 32.7 per cent compared with 6.2 per cent for married-couple families and 11.0 per cent for families with a male householder, no wife present." *Current Population Reports*, Publication 60, no. 133, p. 2. The percentage figures for North Carolina were virtually identical. *North Carolina Census Data Release* (Raleigh, N.C.: North Carolina Data Center, May 1982), p. 1.

27. *Washington Post*, June 20, 1982, p. 4.

28. Bill Finger, "North Carolina Copes with Cuts," *N.C. Insight* 5, no. 1 (May, 1982), 48-49

the General Assembly does not want to pass the cuts on, it will have to allocate more state revenues to these programs. The unattractive choices are to siphon off funds from other state programs or to impose new taxes. Neither solution is politically feasible at the moment. But when economic growth resumes, North Carolina legislators will have to muster considerable political courage to shore up the resources of that poverty population most in need of increased benefits. Many interest groups will have accumulated large backlogs of unmet needs during the period of recession and will probably ask for a larger share of new state spending. In the competition for access and influence, single-parent welfare families are not a powerful political constituency.

It would be comforting to think that government might somehow arrest and reverse those trends of divorce, separation, and illegitimacy that underlie the explosive growth in single-parent families. Given the high risks that such households will be impoverished, one of the most effective antipoverty strategies would be to prevent the formation of such families in the first place. No government at any level can *preserve* family stability, but government may be able to *promote* such stability.

To begin, federal and state governments might adopt the following principle: Every proposed new policy and program that might affect the family must be accompanied by a family-impact statement, much like the current required environmental impact statements. This requirement would at least make governmental officials more sensitive to the possible consequences of their actions on family stability. In North Carolina this principle might be begun by assessing our existing policies in regard to aid to families with dependent children. This state is among a minority that still withhold financial assistance to needy two-parent families even when the father has been unemployed for a long time. Only by abandoning his family can he make them eligible for public assistance. There is no conclusive evidence that such a nonassistance policy causes the dissolution of two-parent households,[29] but the policy is inequitable and irrational and should be changed on those grounds alone.

When two-parent families do dissolve, the state still has a role to play in dealing with consequent economic hardship. When parents separate or divorce, the state has an interest in the economic welfare of the children. It first exercises that interest in court-ordered child-support payments. Unfortunately these payments often become little more than paper decrees. The default rate is enormous. One student of the problem estimates that 40 per cent of divorced women receive no child-support funds whatever. A substantial percentage of the remaining women receive less than the amount awarded by the courts.[30] We cannot criticize the judiciary for this sorry state of affairs, for the courts lack enforcement powers. Enforcement rests with the administrative branch of government. I do not minimize the difficulties that hamper effective enforcement, but every effort should be made to see that fathers help to support their children.

Another issue that, in my opinion, state government should address concerns North Carolina's low industrial wages. State officials have long stressed the need to attract high-wage industries. North Carolina's constant ranking near the bottom in hourly industrial earnings highlights the importance of such recruiting efforts. But whatever success the state has achieved so far has not pulled it out of the industrial wage cellar. The problem does not appear to be lack of new capital investment and job growth. As previously mentioned, North Carolina's track record on obtaining new capital investment has been better these last few years than the record for any other state of comparable size. We therefore must consider the *kind of industry* being attracted to the state. Are we simply adding more low-wage industries to an economy that already has the largest concentration of low-wage industry in the nation?[31] Are the state's economic development policies congruent with the stated goal of altering the industrial mix? Should it review and substantially revise the thrust of those economic development policies? Such questions need to be answered.

Changing the industrial mix from low-wage to higher-wage employment does not depend, of course, exclusively on economic development policy. Higher-wage industry requires a better educated and better trained labor force. A well-qualified labor force is precisely what North Carolina lacked for many years. In 1962 a report on the quality of our labor force made the following observation:

> Wages are low in North Carolina in part because a large share of the labor force is inadequately prepared for higher paying jobs. At the time of the 1960 Census 43 per cent of our families were headed by individuals who had completed less than eight years of school. The North Carolina percentage was twice the national percentage and was greater than that of every other state in the Union except South Carolina.
>
> This fact helps to explain the related fact that in North Carolina a smaller proportion of persons employed were professional or technical workers than in any other state.[32]

Twenty years later, the state has made impressive absolute gains in educational achievement levels. By 1980 over 60 per cent of all persons 24 years and older had completed four years of high school and almost 20 per cent of this same group had completed four years of college. A decade earlier only 38 per cent of the population

(continued on page 45)

29. See Isabel Sawhill, *Income Transfers and Family Structure* (Springfield, Va: Urban Institute, 1975). The author asserts that the available evidence does nevertheless suggest a lower family-disintegration rate in states that provide economic assistance to needy two-parent families.

30. *The Christian Science Monitor*, September 13, 1982, p. 18.

31. Carol Van Alstyne, *The State We're In* (Durham, N.C.: The North Carolina Fund, 1967), pp. 18-20.

32. *Ibid.*, p. 21.

Federal and state governments might adopt the following principle: Every proposed new policy and program that might affect the family must be accompanied by a family-impact statement, much like the current required environmental impact statements.

A New Approach to Reduction of Errors in the Food Stamp Program

Charles L. Usher and Dean F. Duncan

Early in 1982 the United States Department of Agriculture (USDA) notified officials in North Carolina that the state was liable for a $3.5 million penalty because the error rate in its food stamp program exceeded the national standard. According to routine case investigations conducted by quality-control reviewers working in the North Carolina Department of Human Resources (DHR), more than 15 per cent of the food stamp allotments awarded in late 1980 and early 1981 were in error.[1] As a result USDA, which oversees the program nationally, could have required the state to reimburse the federal government for the costs of those allotments. Fortunately the Food and Nutrition Service of USDA accepted a plan developed by DHR to undertake a number of corrective measures, and the threatened sanction was waived.

Although a critical phase passed with this waiver, food stamp administrators in DHR and in each North Carolina county now must implement the plan to reduce errors in the program.[2] Part of that plan involves identifying so-called "error prone" cases and directing administrative resources toward them. Working under a grant from USDA and in cooperation with DHR, we and other staff of the Research Triangle Institute developed an "error prone profile" that classifies households that receive food stamps according to the probability that the allotment received by the household was incorrect. As the following discussion will indicate, this profile may provide a cost-effective approach to error reduction in North Carolina's food stamp program.

The purpose of an error profile is to spot the distinguishing characteristics of public assistance cases that involve errors in determination of eligiblity. Knowing these characteristics provides a basis for allocating staff resources to the investigation of a particular case on the basis of the likelihood that the case contained an error. Marc Bendick of the Urban Institute illustrated this approach in his testimony before the House of Representatives' Government Operations Committee in regard to the Aid to Families with Dependent Children (AFDC) program.

> For example, cases involving earned income are likely to have frequent changes in income and therefore might be asked to update their case information monthly, while cases without earned income would be asked to update only once every six months. Cases with the father reported absent with a legal separation or divorce might be given an investigatory home visit, while other cases might not. Cases with extra complexity might be assigned to an "elite" team of eligibility workers who have been given special training and reduced workloads. The general pattern is to vary the intensity of verification, the frequency of recertification, and other allocation of administrative resources so that "error prone" cases are given all the resources they require but administrative money is not wasted on overly elaborate handling of routine cases.[3]

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1. Federal regulations require all state welfare agencies to conduct quality-control reviews on a sample of cases, which is called a quality-control sample. The results of these reviews are used to determine the amount of incorrect payments being made statewide.

2. The threat of further sanctions remains very real for subsequent reporting periods. In fact, recent federal legislation calls for increasingly stringent error-tolerance levels to be implemented over the next three years.

3. U.S. Congress, House Committee on Government Operations, *Administration of the AFDC Program*, Hearings, 95th Congress, 1st Sess., September-October 1977 (Washington: Government Printing Office, 1977), pp. 584-85 [hereafter, *AFDC Program*].

Several approaches have been used in the development of error profiles in the AFDC program. For example, the South Carolina Department of Social Services staff used discriminant-function analysis in the mid-1970s to identify the set of characteristics that was most strongly predictive of whether an AFDC case contained an error.[4] A field test of the profiles confirmed their validity. Further refinement of the approach ultimately led to a computerized system to identify households whose credentials are likely to contain errors.[5] The basic purpose of this automated system in South Carolina is to schedule AFDC cases for redeterminations of eligibility. Federal regulations require that redeterminations be done every six months for all AFDC cases; but since the system was developed under a federal research and demonstration grant, South Carolina was permitted to vary the period between redeterminations. The basis for these variations was the varying proneness to error exhibited by different kinds of cases. The eligibility of cases whose characteristics indicated that they were likely to contain errors was redetermined more frequently than every six months, while the continuing eligibility of the other cases was redetermined less often.

The requirement of periodic redeterminations of eligibility in the Supplemental Security Income (SSI) program also led Social Security Administration officials to use error profiles in that program. On the basis of household characteristics, Social Security analysts determine the average dollar error in allocating benefits to ten or more types of SSI households. Redetermination procedures at three levels of administrative intensity and cost are then applied according to the expected dollar loss. For example, if an error of less than $5 per month is anticipated for a certain type of household, that type has to complete an eleven-item mail questionnaire only every three years. Households in which an error in the range of $5-to-$10 per month is expected will have to complete this questionnaire more frequently; however, savings are realized by screening the returned survey instruments at Social Security Administration headquarters in Washington rather than at the district office (only those cases that appear to involve a significant change in circumstances are referred to the district office). Finally, for households that are likely to involve errors greater than $10, a full-scale redetermination of eligibility is done by staff in the district offices. In essence, then, Social Security performs redeterminations only if the cost of that action is likely to be offset by the savings realized by uncovering a relatively costly error.[6]

West Virginia, New Hampshire, and Texas also undertook to develop and apply error profiles. The Urban Institute's assessment of these efforts indicated that these states were able to "persistently outperform what other states were able to achieve at the same cost."[7] However, in responding to this claim, administrators of the federal Department of Health and Human Services emphasized that differences among the states' AFDC programs made it very difficult to transfer error-prevention methods from one state to another.[8]

Despite their cautious attitude toward error profiles, federal administrators and Congress have formally recognized profiles as a valid means for reducing errors. For example, in granting state food stamp agencies greater discretion in requiring verification of the information reported on applications, 1980 amendments to the Food Stamp Act specifically identified error profiles as an appropriate mechanism for identifying areas in which extensive verification is warranted. Yet, recognizing the costs associated with verification, USDA officials urged state administrators to use profiles in a way that enhanced the efficiency of the certification process and did not bog it down:

> An error prone profile should . . . provide sufficient information to establish priority in addressing corrective actions to . . . error-prone groups. Primary factors when setting priorities may include, but are not limited to the dollar loss involved, the probability of error, the geographic extent of the deficiency, and the number of households involved.[9]

Although federal policymakers were optimistic about the prospects of reducing food stamp errors through the use of error profiles, relatively little testing had been done to determine the degree to which this technique, derived from the administration of the AFDC program, could be applied to the food stamp program. As a result, USDA undertook a research, demonstration, and evalution program in 1981 to encourage state and local agencies to explore the use of profiles to reduce the number of errors in the allocation of food stamps. The following material describes how we developed an error profile for North Carolina's food stamp program.

Our error-prone profiling process involved three steps. The first step was to select the most appropriate measure of error. A variety of measures were available in the quality-control data, but some were more appropriate and useful than others. Then, once a measure had been chosen, the relationships between errors and various case characteristics were examined. For example, are recipients of AFDC more likely than others to receive incorrect allotments? Or are large families more often found to be ineligible for their allotments than smaller families? Finally, case characteristics were combined to determine whether certain identifiable types of households are error prone. These steps can be illustrated using DHR quality-control data for the period from October 1981 through March 1982 in North Carolina.

Measuring error. Three types of errors can occur in the food stamp program: (1) overissuances (households receive a larger allotment of food stamps than they are entitled to receive); (2) underissuances (households receive fewer food stamps than they are entitled to receive);[10] and (3) allotments to ineligible households. Another measure of error rates is the percentage of quality-control sample cases that involve an allotment error of more

4. J. Samuel Griswold and Pamela G. Spurrier, "Identification of Error Prone Cases in AFDC Quality-Control Corrective Action," *Social Service Review* 49 (September 1975), 421-29.

5. South Carolina Department of Social Services, *The Automated Redetermination Notification System and On-Line Quality Control (ARNS/OQC): A Description*, Technical Report Series Technical Report #79-003, April, 1979.

6. This description of the SSI profiling process was provided by Don Waugh of the Social Security Administration's Office of Payment and Eligibility Quality.

7. *AFDC Program*, p. 585.

8. *Ibid.*, p. 626.

9. 46 *Fed. Reg.* 3197.

10. The Omnibus Budget and Reconciliation Act of 1982 eliminated this type of error in measuring allotment error rates for states.

Table 1

Food Stamp Error Rates in North Carolina, October 1981-March 1982

	% of cases in QC sample	% of allotment in QC sample	Ave. amt. of error per case
Correct	70.1	86.9	—
Overissued	14.1	5.6	$ 37
Underissued	11.6	3.9	$ 32
Paid to Ineligibles	4.2	3.6	$ 94
	100.0%	100.0%	
	no. (1,141)	amt. ($121,416)	

than $5 in coupons per month. Cases in which the actual allotment is within $5 of the correct amount a household should receive in a given month are deemed to be not in error.[11] A measure of greater importance to USDA, however, is the percentage of allotment dollars provided in error to households in the quality-control sample. This error percentage is the basis for the fiscal sanctions and incentives that the federal government imposes on state food stamp agencies.

The sample data indicate that during the six months from October 1981 through March 1982, 29.9 per cent of North Carolina food stamp cases reviewed contained an error (see Table 1). Also, 13.1 per cent of the food stamps issued were issued in error; this error rate is slightly less than the national average and is down from 15.3 per cent for the same period a year earlier—the error rate that had caused USDA to threaten to impose a $3.5 million penalty on North Carolina.

Table 1 shows how "errors" can be defined. For example, there are the four categories of cases—those that are correct, those that involve an overissuance, those that involve an underissuance, and those that involve payments to ineligible households that were described above. Note, however, that a dollar figure is associated with each type of error—an average payment of $94 to ineligibles, an average of $32 for underissuances, and so on. These figures suggest that the greatest reduction in dollar loss may be realized by directing efforts to reduce errors toward allotments to ineligible households because they tend to involve the greatest dollar loss per case. Further analysis shows, though, that other alternatives may be at least as useful as this measure.

The data in Table 2 are based on a categorization of quality-control cases by the dollar amount of the error in each case. Again, 70.1 per cent of the food stamp cases in North Carolina did not contain an error. More important, however, is the fact that the small proportion of the food stamp caseload (9.8 per cent) that had large errors (more than $50 per month during the six-month period studied) accounted for more than two-thirds of the dollar loss (68.1 per cent of the allotment error). This suggests that an effective approach to the relatively few cases that are likely to involve large dollar losses could achieve the greatest reduction in the error rate in regard to size of allotment. At the same time, it may make sense to tolerate those errors in which the dollar loss is less than the cost of eliminating them. To illustrate, if all large losses were eliminated but all small losses were tolerated, the error rate for cases would remain at 20.1 per cent but the allotment error rate would be only 4.2 per cent, approximately one-third the national average for the October 1981-March 1982 reporting period.

We decided to use three categories to define errors in North Carolina food stamp cases—no error, small error ($6-$50), and large error (more than $50). Our premise was that such an approach would permit food stamp directors and supervisors to direct their limited administrative resources in a way that would achieve the greatest reduction in error at the least cost and in the shortest possible time.

Case characteristics and patterns of error. In addition to the errors in the cases they review, DHR quality-control analysts record information about sample households that is found in the case records. The sources of this information are reports of household circumstances made by the food stamp recipient plus other documentation obtained by the county agency. Each characteristic recorded was analyzed to determine whether it was linked to the presence of error. Although very few relationships were found, some interesting patterns did emerge from this analysis. For example, whereas one-person households accounted for 29.9 per cent of the quality-control sample, they accounted for only 7.6 per cent of the coupons issued in error. In contrast, large households (those with five or more members) represented only 17.8 per cent of the sample cases but more than one-third (33.4 per cent) of the allotment errors. Also, those households that reported having some earned income were responsible for 45.9 per cent of the allotment error, but only 29.8 per cent of the households that received food stamps during this period had earned income. Thus it was apparent that among some

Table 2

Distribution of Quality-Control Errors by Size of Error

Amt. of error	% of QC sample	% of allotment error
No error	70.1	—
$ 6-$10	5.1	2.9
$11-$25	7.5	9.1
$26-$50	7.5	19.9
More than $50	9.8	68.1
	100.0%	100.0%
	no. (1,141)	amt. ($15,866)

11. A food stamp case is the same as a food stamp household. A food stamp household generally includes all persons who live together under one roof.

Table 3

Error Proneness by Household Type

Type of household		Percentage of each household type by size of error					
Number of persons	Earned income?	No error	$6-$50 error	Error of over $50	Totals[a]	Mean error[b]	(n)
1	No	85.7	11.8	2.6	100.1%	$ 4	(314)
1	Yes	88.9	11.1	--	100.0%	$ 1	(27)
2-4	No	71.3	17.7	11.0	100.0%	$14	(401)
2-4	Yes	55.6	30.6	13.8	100.0%	$19	(196)
5 or more	No	65.1	23.3	11.6	100.0%	$20	(86)
5 or more	Yes	47.9	32.5	19.7	100.1%	$31	(117)

a. Some row percentages do not sum to 100 per cent because of rounding.
b. Rounded to the nearest dollar

types of cases the error rates were disproportionately high, and it might be possible to develop a profile or scoring system to identify cases that were likely to involve errors in the amount of coupons they received.

Household profiles. After examining the individual case characteristics, we decided to combine those characteristics in order to develop household profiles that could be used to compare the rates of error for different types of households. Two characteristics—family size and whether the family had any earned income—seemed to be most important. Six types of households emerged on the basis of these characteristics: one-person households that receive earned income; one-person households that do not receive earned income; two- to four-person households that receive earned income; two- to four-person households that do not receive earned income; households with five or more persons that receive earned income; and households with five or more persons that do not receive earned income. Every household may be classified into one, and only one, of these categories.

As Table 3 shows, grouping case characteristics into six types helps in analyzing the relationship between household characteristics and patterns of error. The table makes it clear that large households are more likely than others to involve errors, and it is equally apparent that households with earned income are (except probably for the few one-person households) more likely to involve an error than other households of the same size. Furthermore, the data pertaining to the mean size of the allotment error for each type of household indicate that the dollar loss per case increases with both family size and whether the family received any earned income.[12] The clearest evidence of this pattern can be drawn from a comparison between one-person households without earned income and large households that have such income. Whereas very few of the smaller households involved even small dollar losses, more than half of the larger households' cases contained errors—large errors for one in five of these cases (19.7 per cent).

The ultimate purpose of error profiling is to provide a means of assessing the risk associated with various types of households that an error will be made in the allocation of food stamps to a given household. This assessment can be made by computing a "risk ratio" for each type of household: its percentage share of total allotment errors divided by its percentage share of the total quality-control sample.

The risk ratios reported in Table 4 are consistent with our previous conclusions regarding the error proneness of the six types of households. Households with five or more members that have earned income have the highest risk ratio (2.21:1), and one-person households without such income have the lowest (.27:1). Generally, a risk ratio greater than 1 indicates a type of case that involves a high risk of error. The risk ratio of 1.03:1 for medium-sized households without earned income suggests that such households contribute as much to the allotment error as one would expect, considering the proportion of the caseload for which they account. Thus this single figure—the risk ratio—provides a basis for food stamp administrators to establish priorities in allocating administrative resources to reduce errors.

12. A technical discussion of the application of the statistical procedure used to develop the error-prone profile can be found in *The Development and Application of Error Prone Profiles in the Food Stamp Programs* by Charles L. Usher, Donna L. Watts, and Dean F. Duncan (Research Triangle Park, N.C.: Research Triangle Institute, 1982).

Table 4

Relative Distribution of Different Types of Households and Allotment Errors

Type of household		(A) % of allotment error	(B) % of QC sample	Risk ratio (A/B)
Number of persons	Earned income?			
1	No	7.4%	27.5%	.27 : 1
1	Yes	.2	2.4	.08 : 1
2-4	No	36.2	35.1	1.03 : 1
2-4	Yes	22.9	17.2	1.33 : 1
5 or more	No	10.6	7.5	1.41 : 1
5 or more	Yes	22.8	10.3	2.21 : 1
		100.1%[a]	100.0%	
	(n)	($15,866)	(1,141)	

a. Because of rounding, column percentages do not sum to 100.0 per cent

Our analysis of DHR quality-control data from North Carolina's food stamp caseload demonstrates a clear pattern of error in food stamp cases, and a very similar pattern in four successive reporting periods reinforces this conclusion.[13] Furthermore, similar findings from our surveys conducted independently in Mecklenburg and Brunswick counties convince us that these findings can be applied reliably at the county level.

Recognizing the potential usefulness of this analysis, DHR has incorporated this information into the plan for corrective action that it submitted to USDA after the state was threatened with having to reimburse the federal government for the amounts lost through errors in the allocation of food stamps. Funded by a grant from USDA, the Brunswick and Mecklenburg county social services departments identified error-prone cases for special handling on the basis of the techniques described above. The counties then assigned the error-prone cases to special caseworkers called verification specialists. The Brunswick social services department, because of its small food stamp caseload, needed only one of these special workers, while the Mecklenburg department, which handles the largest food stamp caseload of any department in the state, employed five verification specialists, a supervisor, and a clerical worker in investigating possible errors in determinations of eligibility. These verification specialists carried a smaller caseload than regular food stamp caseworkers (who are officially called food stamp eligibility specialists). Since they carried a smaller caseload, the verification specialists could spend more time interviewing representatives of these error-prone households when they applied or reapplied for benefits. This additional time for interviews permitted the verification specialist to discuss with the household representative certain aspects of eligibility for food stamps that had been associated with errors among error prone households.

One error frequently found among error-prone cases involved the size of the household. Quality-control reviewers found a number of households that were either larger or smaller than the case record indicated. This error would occur, for instance, when children left their parents' home to live with grandparents. The parents' household then became smaller than reported. Conversely, a household became larger than indicated if, for example, a relative or friend moved in with the household. Food stamp households are required to report these changes to their caseworker. Frequently, however, these changes are not reported either when they occur or when the household is recertified. Household composition is an important factor in determining the amount of coupons a household should receive, since food stamp allotments are based on the size of the household.

In order to reduce errors of this type among the error prone cases, the verification specialists asked parents which schools their children attended. The parents' address was checked against school attendance maps to determine whether the school the parents said the children attended was the correct one for the parents' neighborhood.

Another error that quality-control reviews often found among error-prone households involved differences in income between what the household actually received and the amount reported in the case record. These errors generally result from one of two factors. First, fluctuations in the amount of income the household received were not anticipated by the food stamp caseworker or not reported by the household. Second, and much less frequently, a household was working or receiving some type of benefit payment, such as a retirement pension or worker's compensation, and had not reported this income to the caseworker.

To reduce these types of errors, the verification specialists discussed with the household representative the family's expenses for such items as rent, clothing, and loan payments. These estimates of monthly expenses were compared with the amount of income the household received. If the household reported paying out more each month than it received in income, it was asked to explain how this was possible. The longer interview also allowed the verification specialist a chance to remind the household representative of the importance of reporting, as the law requires, certain matters like changes in income or household size.

Preliminary data suggest that the verification specialists had a substantial success in cutting the food stamp error rate. These estimates are based on a sample of food stamp cases that received a modified quality-control review by field interviewers in our study. Not all of the cases in the sample have been processed, and the estimates of the verification specialists' impact may be affected by the remaining cases. But initial analysis indicates that the error rate in Mecklenburg County decreased by 10 to 15 per cent.

DHR has encouraged other counties to reallocate their administrative resources to give special attention to error-prone cases. It should be noted, however, that such an approach is not without risk. Given their limited resources, county agencies must reduce their efforts on low-risk cases in order to devote more time to error-prone cases. Nevertheless, despite this tradeoff, food stamp administrators now have a stronger basis for effective assignment of staff time in their agencies. ●

13. *Ibid.*; Charles L. Usher, "Integrating Analysis and Management: Approaches to Error Reduction in the Food Stamp Program," presented at the Twenty-second National Workshop on Welfare Research and Statistics, July 25-28, 1982, San Antonio, Texas.

Questions I'm Most Often Asked . . . .

As space permits, *Popular Government* will present a new column in which Institute of Government faculty members answer the questions most often asked of them in their work with local and state governmental officials. This first column concerns driver license revocations and vehicle insurance points. It is written by Ben Loeb, whose fields include motor vehicle law.

What Are the Consequences of a Motor Vehicle Violation for a Driver's License and Auto Insurance?

Ben F. Loeb, Jr.

A driver who is convicted of a traffic law violation is subject to a fine. For a serious offense, he may even receive a jail sentence. In the typical case, however, the fine and court costs come to under $100. What really concerns most convicted drivers is not the criminal penalty but the effect of the conviction on their driver's license and automobile insurance cost.

What happens to a driver's license?

The North Carolina Division of Motor Vehicles (DMV) is authorized to suspend the license of any driver who accumulates as many as twelve points in a period of three years. A first suspension can be for up to sixty days, a second for six months, and a third for as long as a year. The "schedule of point values" is set out in G.S. 20-16 as follows:

Passing stopped school bus, 5
Reckless driving, 4
Hit and run, property damage only, 4
Following too close, 4
Driving on wrong side of road, 4
Illegal passing, 4
Running through stop sign, 3
Speeding in excess of 55 miles per hour, 3
Failing to yield right-of-way, 3
Running through red light, 3
No driver's license or license expired more than one year, 3
Failure to stop for siren, 3
Driving through safety zone, 3
No liability insurance, 3

Failure to report accident where such report is required, 3
Speeding in a school zone in excess of the posted school zone speed limit, 3
All other moving violations, 2

For the more serious offenses, driver license points are not assigned; rather, the license is revoked as soon as the DMV receives notice of the conviction. G.S. 20-17 requires revocation for certain enumerated offenses, including the following: manslaughter, driving under the influence of alcoholic beverages or drugs, driving with a blood-alcoholic level of 0.10 per cent or more, any felony in the commission of which a motor vehicle was used, hit-and-run involving personal injury, two convictions of reckless driving, death by vehicle, speeding to elude arrest, and assault with a motor vehicle.

Furthermore, a mandatory thirty-day revocation is required for any driver convicted of exceeding the speed limit by more than 15 miles per hour if he was also driving in excess of 55 mph at the time (G.S. 20-16.1). Also, DMV is authorized (but not required) to suspend a license for two or more convictions of speeding in excess of 55 mph or one conviction of exceeding 75 mph (G.S. 20-16).

What about insurance?

Insurance points, as well as driver's license points, are assigned when a driver is convicted of a motor vehicle offense. But the two point systems are completely different. A person who passes a stopped school bus, for instance, will receive five driver license points but only four insurance points. Driver's license law and insurance law also define "conviction" differently. For example, a person who is found guilty of speeding in excess of 75 mph and receives a "prayer for judgment continued" in court will not be assessed *any* driver license points but will receive four insurance points. In other words, a "PJC" is a conviction so far as the vehicle insurance rate system is concerned. Insurance points remain on a driver's record for three years.

The rules concerning insurance for private passenger vehicles are set out in North Carolina's *Safe Driver Insurance Plan*. (Table 1 shows the percentage increase for each insurance point assigned, assuming that there is no multi-car discount or driver with less than two years of driving experience).

The *Safe Driver Insurance Plan* provides for the assignment of points as follows:

1. **Twelve points** for a conviction of:
(a) manslaughter (or negligent homicide) resulting from the operation of a motor vehicle;
(b) *prearranged* highway racing or knowingly lending a motor vehicle to be used in a prearranged highway race;
(c) failing to stop and render aid when involved in an accident resulting in bodily injury or death (hit-and-run driving).

2. **Ten points** for a conviction of:
(a) driving a motor vehicle while under the influence of alcholic beverages or narcotic drugs;
(b) driving a motor vehicle with a blood-alcohol level of 0.10 per cent or more;
(c) transportation of alcoholic beverages for the purpose of sale; or
(d) highway racing or knowingly lending a motor vehicle to be used in a highway race (that is not prearranged).

3. **Eight points** for a conviction of driving while either the driver's license or vehicle registration is revoked.

4. **Four points** for a conviction of:
(a) failing to stop and report when involved in a motor vehicle accident resulting in property damage only (hit-and-run driving);
(b) driving a motor vehicle in a reckless manner;
(c) passing a stopped school bus; or
(d) speeding in excess of 75 miles per hour.

5. **Two points** for a conviction of:
(a) illegal passing;
(b) speeding in excess of 55 but not in excess of 75 miles per hour;
(c) following two closely; or
(d) driving on wrong side of the road.

6. **One point** for any other moving violation. ●

Table 1

	Number of Insurance Points											
	1	2	3	4	5	6	7	8	9	10	11	12
% Increase in Insurance Rates	10%	40%	70%	100%	130%	170%	210%	250%	300%	350%	400%	450%

An Update on North Carolina's Pistol Permit Law

Carolin Bakewell

In 1982, the North Carolina General Assembly amended the state pistol permit law. The amendments were generally consistent with some recommendations by Philip J. Cook and Karen Hawley in an article in the Spring 1981 issue of *Popular Government*.

The pistol permit law prohibits the sale, transfer, purchase, or receipt of a pistol in North Carolina without a permit issued by the proper official in the purchaser's or receiver's county of residence. (In 87 counties, the issuing official is the sheriff; elsewhere it is the clerk of superior court.[1]) Provisions of the law that had been in effect with little change since 1919 (until the 1982 amendments) provided that the sheriff or clerk could issue the permit if he satisfied himself "as to the good moral character of the applicant" and that the applicant "require[d] the possession of the weapon . . . for protection of the home."[2] The vagueness of the "good moral character" requirement, without any more specific criteria for issuance of a permit, left much discretion to the issuing official. Also, there was always a temptation for otherwise law-abiding people to fib regarding the requirement that the pistol be needed "for protection of the home," when it was in fact wanted for target shooting or collecting. The result was that the way pistol permit applications were handled varied considerably among the counties, as the study by Cook and Hawley showed. Some counties allowed only one pistol permit per household, while others set no limit. Most counties routinely checked applicants' criminal records, but some did not. The majority did not routinely check the Police Information Network (PIN) criminal history files. Most counties denied permits to applicants who had been arrested for violent crimes, and most also denied them to applicants with a history of public drunkenness or drunken driving. Some of the sheriffs, in responding to the questionnaire sent by Cook and Hawley, commented that the state law should contain stronger and clearer restrictions—they felt that they had too much discretion. The survey also showed that, although the law then in effect limited the pistol permit fee to 50 cents, counties imposed fees of up to $10.

Effective June 23, 1982, a sheriff or clerk of superior court must issue a pistol permit if the applicant is a resident of the county, has "good moral character," and wants the permit for certain purposes. The allowable purposes have been expanded to include protection of a business or property as well as the home, target shooting, collecting, and hunting. Nonresidents can also obtain a permit, but only for collecting purposes, if they meet the "good moral character" test.

The amended pistol permit law also provides more specific standards for screening applicants. A permit may not be issued to anyone who (1) is under indictment for or has been convicted of a felony (except for certain unfair trade practices) and has not been pardoned; (2) is a fugitive from justice; (3) is an unlawful user of marijuana or other narcotic drugs; or (4) has been either adjudicated incompetent because of mental illness or committed to a mental institution. These exclusions conform to the provisions of the federal Gun Control Act of 1968.[3] (The broader federal act, which covers *all* firearms, also prohibits acquisition or possession by aliens and persons dishonorably discharged from the military and forbids sale of handguns to anyone under 21.) The amended North Carolina law still does not make a check of PIN criminal history files mandatory, although issuing officials will presumably want to take advantage of PIN's facilities.

The amended law requires a uniform fee of $5 for permit issuance. The issuing official must act on a permit application within 30 days (formerly, there was no such time limit). If the issuing official is not "fully satisfied" of the applicant's qualifications, he may "for good cause shown" refuse to issue the pistol permit. Within seven days of the refusal, the official must give the applicant a written statement of his reasons for refusal. The denial of a permit is reviewable by petitioning the chief judge of the local district court, and the district court's decision is final. These new provisions limiting delay in processing the application, requiring a prompt statement of reasons for denial, and allowing district court review—like the new provisions on ineligibility for permits—evidently are aimed at the problem of overbroad discretion identified by Cook and Hawley. ●

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1. N.C. GEN. STAT. §§ 14-402, -409.1.
2. *Id.* §§ 14-404, -409.3 (1981 Rep. Vol. 1B).
3. 18 U.S.C., Appendix §§ 1201, 1202, 1203.

Involuntary Commitment of the Mentally Ill in North Carolina: A Physician's View

Robert D. Miller

Previous issues of *Popular Government* have featured articles on involuntary civil commitment by a sociologist, by a North Carolina district court judge, and by a legal scholar.[1] In this article I would like to present the viewpoint of a psychiatrist with nine years of clinical and research experience in North Carolina's public mental health system. Some of my views are based on my direct contact with respondents in involuntary commitment proceedings as a psychiatric resident, staff psychiatrist, and then Director of the Adult Admissions Unit at John Umstead Hospital, one of North Carolina's four state mental hospitals. Other views and opinions are based on empirical research done by a group directed by me at Umstead while I was Director of Residency Training and Clinical Research there.

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He wishes to thank the attorneys, judges, and legal secretaries at John Umstead Hospital for their cooperation and to acknowledge Small Grant No. 81A03 from the North Carolina Department of Human Resources, Division of Mental Health—Mental Retardation and Substance Abuse Services

1. Virginia A. Hiday, "The North Carolina Involuntary Commitment Law in Practice—a Courtroom Study," *Popular Government* 47 (Spring 1982), 38-43; Edward J. Crotty, "Reconsidering the Insanity Defense an Involuntary Commitment in North Carolina," *Popular Government* 48 (Winter 1983), 7-14; Stevens H. Clarke, "Mental Hospital Population Trends During a Decade of Legislative Change," *Popular Government* 47 (Spring 1982), 46.

The first study: Before and after the changes in the involuntary commitment laws

The changes. Although sanctioned by statute, before 1973 involuntary commitment in North Carolina was essentially a clinical procedure. The judicial hearings were dominated by medical input,[2] and patients who could not afford private counsel (the great majority of those committed[3] had little or no effective representation). During 1973-77, the statutes were amended to (1) require a showing that the respondent was *imminently* dangerous before he could be committed; and (2) establish full-time attorneys for patients at the four state hospitals, without providing representation for the state. As a result, the commitment rates at court hearings dropped precipitously, and clinicians and communities alike called for the easing of standards for commitment. In 1979 the General Assembly made several changes to make commitment easier: The requirement that "dangerousness" be "imminent" was dropped, a full-time associate attorney general was added at each of the four state mental hospitals to represent the state's interests, and "danger to self" was redefined to include patients who showed severely impaired insight or judgment in order to allow more clinical input into the decision whether to commit.[4] Changes were also made in the mechanism of outpatient commitment; these changes will be discussed later.

2. Robert D. Miller and Paul Fiddleman, "Involuntary Civil Commitment in North Carolina: The Results of the 1979 Statutory Changes," *North Carolina Law Review* 60 (June 1982), 985-1026.

3. *Ibid.*

4. *Ibid.*

Results of the changes. Our group studied the effect of the legislative changes on the commitment of adults (confidentiality and consent difficulties prevented studying minors, the majority of whom are admitted by their parents or guardians rather than committed) at John Umstead Hospital. First, we examined the court files on all initial commitment hearings for adults for six months before and after the new statutes went into effect on October 1, 1979—that is, from April 1, 1979, through March 31, 1980. From this population of 1,735 cases (some patients were committed more than once during that period), we further studied two groups in depth—those who were committed to outpatient treatment,[5] and those who had been admitted under the provisions for emergency commitment.[6] We then undertook a prospective study by means of an observer in the courtroom for all hearings between November 1981 and July 1982.[7]

It is often said that judges generally defer to physicians' opinions as they decide whether to commit or release. One measure of this alleged deference is the extent to which judges' decisions do agree with physicians' recommendations at the court hearings—the concurrence rate. It has always been assumed that a high concurrence rate indicates undue clinical influence and a lower rate indicates judicial independence. But a number of other factors also must be considered[8]—length of hearings; activity levels and attitudes of judges, attorneys, and physicians; and patient preferences. We considered all of those elements as well as the effect of statutory changes in standards and definitions.

Before the respondents' advocates (called special counsel) were established at the four state hospitals, hearings were held in local district courts; the respondents had court-appointed attorneys much as indigent defendants charged with crimes have court-appointed attorneys. Neither the judges nor the attorneys accumulated enough experience to be able to deal with mental health cases knowledgeably, and there was no question that courts relied almost exclusively on physicians' opinions for their decisions; the concurrence rates were nearly 100 per cent.[9]

During the first half of our first study period (the six months before the new statutes went into effect on October 1, 1979), court concurrence with physicians' recommendations in regard to inpatient commitment fell to 67 per cent, while concurrence with recommendations in regard to release was still 94 per cent. In the six months after the statutory changes, those results were reversed: Concurrence with inpatient commitment recommendations rose to over 90 per cent while concurrence with release recommendations fell to 70 per cent—a situation never reported before.[10] During the second study period, which began approximately a year after the first study ended, the concurrence rates changed again: judges agreed with physicians' recommendations in regard to both inpatient commitment and release at nearly a 90 per cent rate (Table 1). Between these two study periods, the four judges who presided at the hearings had not changed, little turnover had occurred among the physicians at John Umstead Hospital, and the patient population remained essentially constant (most patients are readmissions; the average patient has had five previous admissions[11]). In addition, physicians recommended commitment for the same number (and same percentage) of patients before and after the change in the laws. Therefore, the only sources of variation were the changes in the statutory definitions and the differences among the attorneys involved in the hearings.

Because the first study was a retrospective analysis of physician recommendations and court dispositions, we could not directly assess the effect of changes in the definition of danger to self or of eliminating the qualifier "imminently" before "dangerous," but our clinical impressions from observing a number of hearings and from interviews with all four judges and all four attorneys who participated in hearings during the study periods was that statutory language was not significant in the different concurrence rates.[12]

The role of attorneys. But major changes occurred in the roles of the attorneys involved. During the first half of the first study period, patients were represented by a full-time attorney who strongly argued for release (sometimes even when the respondent wanted to be committed!) and had time enough to become knowledgeable about case law and to prepare cases for the hearings. She appealed a number of commitments and often objected to evidence for mental illness and/or dangerousness as well as to procedural matters during hearings. Many of her efforts succeeded—over half the court releases were based on procedural irregularities, not on the substantive issues of illness or dangerousness. She was opposed by a part-time attorney (called a special advocate for the state) hired only for the court hearing day. He therefore had essentially no time to prepare cases or even to become familiar with the relevant case law in the area. The first special advocate called virtually no witnesses and rarely

5. Robert Miller and Paul Fiddleman, "Outpatient Commitment: Treatment in the Least Restrictive Environment?" forthcoming in *Hospital & Community Psychiatry* 34, no. 3 (1983), 249-58.

6. Robert Miller and Paul Fiddleman, "Emergency Involuntary Commitment: Misuse of a Necessary Process," forthcoming in *Hospital & Community Psychiatry*.

7. Robert D. Miller, R. Inoescu-Pioggia, and Paul Fiddleman, "The Effects of Witnesses, Attorneys, and Judges Upon Civil Commitment in North Carolina – A Prospective Study." Forthcoming in the *Journal of Forensic Sciences* 1983.

8. Virginia Hiday, "Independence or Deference to Psychiatry: Has Reform Made a Difference in Civil Commitment?" Presented at the Fifth International Congress of Law and Psychiatry, Banff, Canada, January 1981.

9. Robert D. Miller and Paul Fiddleman, "Changes in North Carolina Civil Commitment Statutes—The Impact of Attorneys," *Bulletin of the American Academy of Psychiatry and the Law*, 11, (1983), 43-50.

10. All other studies that have reported concurrence rates between physicians' recommendations and court decisions have pointed out that when physicians recommend release, judges almost invariably order release. See C. Johnson, "Due Process in Involuntary Civil Commitment and Incompetency Adjudication Proceedings: Where Does Colorado Stand?" *Denver Law Journal* 46 (1969), 516-78; R. Maisel, "Decision-Making in a Commitment Court," *Psychiatry* 33 (1970), 352-61; and Virginia Hiday, "Reformed Commitment Procedures—An Empirical Study in the Courtroom," *Law and Society Review* 11 (1977), 651-65.

11. Data from the North Carolina Division of Mental Health, Mental Retardation, and Substance Abuse Services, Division of Mental Health Statistics.

12. Courtroom observation revealed that the specific statutory definitions of dangerousness and the lack of the word "imminently" were neither brought up as issues by any of the attorneys nor commented on by any of the judges. These observations were confirmed in interviews with the attorneys and judges, all of whom agreed that the language changes had had relatively little effect on actual courtroom practice.

responded to the special counsel's challenges. Since the special counsel argued for release in virtually every case, it is not surprising that the court usually accepted physicians' recommendations for release and rejected their recommendations for commitment over a third of the time.

In the second half of the initial study period, the attorneys were different. The part-time special advocate was replaced by a full-time associate attorney general, who was much more active than his predecessor and had sufficient time to call witnesses and to prepare cases before trial. The first special counsel was replaced by an attorney who operated on a "best interest" basis, gauging her activity in part on whether she felt the patient would benefit from continued hospitalization.

The associate attorney general's role is defined by statute as "representing the state's interests."[13] The North Carolina Division of Mental Health, Mental Retardation, and Substance Abuse Services task force (on which I served) had visualized this role as representing the views of the hospital physicians. But as defined by the North Carolina Attorney General's office after the law became effective,[14] the associate attorney general represents the views of *both* the physician and the original petitioner, whose views frequently differ from the physician's (especially if the physician recommends release after a brief hospitalization). As a result, it is left up to each individual associate attorney general to decide how to balance these often competing interests of his clients.

The first associate attorney general advised petitioners to come and testify only if their wishes were contrary to the position taken by the physician who was treating the patient (whose report was made available two days before the hearing to both attorneys). As a result, most lay witnesses (that is, witnesses other than the treating physicians) testified for continued commitment in situations in which the physicians had recommended release.[15]

The second special counsel in the study appealed no cases, raised no procedural challenges, and rarely challenged evidence for mental illness or dangerousness. She rarely called physicians to testify, even when they were recommending release.[16] Physicians routinely execute for submission to the court notarized affidavits indicating their recommendations and the evidence on which those recommendations are based; such affidavits are admissible unless the special counsel objects on the basis that an affidavit cannot be cross-examined and the respondent's right to the protection afforded by cross-examination is therefore denied. Because of the actions and philosophies of this second special counsel, physicians' recommendations for commitment were rarely challenged and the judges sometimes had little choice but to commit. But physicians' recommendations for release were often challenged by lay witnesses who described the behavior of the respondent just before hospitalization (often less than a week before the hearing) and often persuaded the judge to commit over the physician's recommendations.

During the second study period, yet another set of two attorneys was serving at John Umstead Hospital (from 1977 through the spring of 1982, a total of five special counsel and three attorneys for the state were assigned at Umstead). The third special counsel took a course intermediate between the approaches of the first two; while he felt strongly that many of his clients needed to be hospitalized (and did not raise any procedural objections, argue strongly for their release, or appeal any cases), he did raise procedural or substantive objections to evidence in about 20 per cent of the cases. The third special advocate (the second associate attorney general) was also less active than the previous one—he took positions for disposition in only one-fourth of his cases and called witnesses in only a fifth. Therefore, judges had little information other than the physicians' recommendations on which to base their decisions, and their concurrence rate rose nearly to the levels reached before the statutory changes in 1973. Since the only source of variation between the two study periods was the change in attorneys, the change in concurrence rates probably is due to the differences in philosophy and practices of the attorneys.

Judges. During the second study period, the study group collected information on all aspects of the hearing procedures and interviewed all four judges at length. The judges varied considerably in their individual styles and preferences (such as how long hearings lasted, how many witnesses testified on the average, how active each judge was in questioning witnesses and attorneys, and how likely each was to sustain objections), but they were more similar than different. Three of the four indicated that they clearly considered physicians' testimony as the most significant, but all four said that information from family members and other lay witnesses was important because it provided information not available directly from hospital staff. This last expression is inconsistent with the judges' actions. Of the lay witnesses who came to court, only a third actually testified. The other two-thirds did not take the stand, either because the judge refused to hear them or because he indicated to the attorneys that he preferred not to hear further testimony in the case.[17]

Our second study corresponded with a number of previous studies in finding that judges nearly always agreed with the physician's recommendation. The conclusion from the earlier studies had always been that judges are unduly influenced by clinical testimony. However, no previous study had used statistical methods to analyze the data gathered or to compare the influence of physicians with the influence of lay witnesses, attorneys, or the respondents themselves. When we performed analyses of variance, we found that there was *no* statistically significant relationship between the judges' disposition decisions and the recommendations of *any* of the participants in the hearings, lay witnesses, attorneys, and the respondents themselves. Therefore, claims that physicians have been duly influencing judges' decisions cannot be supported by current evidence, at least not at John Umstead Hospital, despite the high concurrence rates.[18]

13. N.C. GEN. STAT. § 122-58.24.

14. William O'Connell, North Carolina Attorney General for Mental Health, personal communication.

15. Miller and Fiddleman, "Involuntary Civil Commitment in North Carolina." Although no records were kept concerning witnesses during this study period, the associate attorney general confirmed this clinical impression.

16. Based on selected observations in court by the author, corroborated in interviews with the special counsel.

17. Miller et al., "The Effects of Witnesses, Attorneys, and Judges."

18. When statistical analysis was done on a case-by-case basis and judges' decisions were compared with the recommendations of patients, lay witnesses, attorneys, and physicians, there was *no* significant correlation between those recommendations and the judges' decisions.

The second study: Outpatient and emergency commitment

Outpatient commitment. For a number of years North Carolina law has given judges at involuntary commitment hearings the option of committing respondents to outpatient treatment.[19] Before 1979, the statutes did not specify satisfactory enforcement procedures to be followed when respondents did not comply with court-ordered outpatient treatment. They provided for rehearings to be scheduled for noncompliant respondents, but local law enforcement officers refused to take custody, contending that the judge who committed the respondent had no jurisdiction outside the county in which he was sitting. Also, despite statutory requirements, the court rarely notified the outpatient treatment facility to which the respondent was committed that the commitment had been ordered; therefore, in many cases of failed outpatient commitment, the clinics were simply unaware that the respondent was supposed to attend, and there was no one to initiate the rehearing process. In addition, clinicians at both state mental hospitals and the community mental health centers (to which the vast majority of outpatient commitments are made) felt that most of these commitments were not appropriate—ordered by the judges without input from clinicians, and in some cases even against their explicit advice.[20]

Therefore the Division of Mental Health, Mental Retardation, and Substance Abuse Services task force recommended two major changes in the existing provisions for outpatient commitment, which were included in the 1979 statutory changes. (1) A mechanism was created to permit enforcement of outpatient treatment orders. (2) Judges were required, before ordering outpatient treatment, to make "findings of facts" that outpatient treatment was available and appropriate.[21]

The enforcement provisions provided that (a) the committing court must notify the receiving facility of the commitment; (b) the respondent must be given a copy of his treatment plan before he is discharged to the outpatient facility; (c) if the respondent does not comply with the treatment plan, the director of the outpatient facility must notify the associate attorney general at the hospital from which the respondent was committed; (d) the associate attorney general who receives such a notification is to notify the clerk of court in the county where the respondent had been committed for outpatient treatment and schedule a rehearing; and (e) the clerk of court is to issue a custody order on the authority of the original outpatient commitment order to return the respondent to the inpatient facility from which he had been released to outpatient treatment.[22]

Our study group examined the results of these changes by tracking all respondents committed to outpatient treatment during the two parts of the first study period, six months before and six months after the statutory changes went into effect.[23] We looked at the court records and the patients' medical records from the hospital and sent questionnaires covering overall attitudes about outpatient commitment to the director and all clinical staff—psychiatrists, psychologists, nurses, and social workers—at each of the 16 centers and to the staff at John Umstead Hospital. In addition, a specific questionnaire concerning each patient committed to outpatient treatment was sent to the mental health center to which the patient had been committed. Over half of the staff at each center and a majority of the hospital staff responded to the general questionnaire, and all 67 of the specific questionnaires were returned.

The 67 respondents committed to outpatient treatment during the year of the study represented only 5 per cent of respondents who had hearings during the two halves of the first study period. In more than half of those 67 cases, the judge had ordered outpatient treatment against the express recommendations of clinicians. There was some evidence that the statutory changes had had an effect—mental health centers reported that they were informed more often when respondents were committed to them (but still often were *not* informed). When respondents failed to observe the requirements of their commitments and the new statutory procedure was followed, every respondent who was reported was returned quickly to the hospital according to provisions of the new laws. But this procedure was *not* followed in most of the cases in which respondents failed to comply. Patient compliance with outpatient treatment did not increase significantly after the laws were changed, and as often they had before the changes, judges ordered outpatient commitment without first finding (as the law required) that the treatment was appropriate and available. The questionnaires indicated that the majority of staff at both the mental health centers and the hospital felt that the changes had had little effect and that outpatient commitment was of little use for most patients. Except for a few who can be treated largely with long-acting medication, most patients do not benefit from being required to attend an outpatient treatment program against their will, and for judges to order them to outpatient treatment against clinical advice violates the spirit of the new statutes. It is not clear to clinicians how a judge can make findings of fact that outpatient treatment is both appropriate and available when *no* evidence (as documented by both the courtroom observer during the second study period and by the records from the hospital and the mental health centers during the first study period) is presented at the hearing that such treatment is indeed either available or appropriate, particularly when the clinicians testify or aver that such treatment is *not* appropriate. Although the judges said in interviews that they did not wish to make clinical decisions, making clinical decisions is exactly what they are doing when they disregard clinicians' assessments of the appropriateness of outpatient treatment. As a result, it is reinforced in clinicians' minds (especially at the mental health centers) that the whole concept of outpatient commitment is futile. Consequently, mental health center staff are short on enthusiasm for outpatient treatment, which may explain their reluctance to use the new enforcement provisions of the law.

Another problem in practice that has increased the hospital staff's resistance to outpatient commitment is the interpretation by the Attorney General's Office that the statutes require that the patient be presented with a treatment plan for such treatment at the time of his hearing. Hospital staff were told that a respondent cannot be recommitted at a rehearing even if he does not go to the mental health

19. N.C. GEN. STAT. § 122-58.8 (b), (c).

20. Miller and Fiddleman, "Outpatient Commitment." Outpatient commitment was most often ordered in cases in which clinicians at neither the hospital nor the mental health center had recommended outpatient treatment at that point.

21. N.C. GEN. STAT. § 122-58.8 (b) (rev. 1979)

22. *Id.* § 122-58.8 (c).

23. Miller and Fiddleman, "The Effects of Witnesses, Attorneys, and Judges."

center unless it can be demonstrated that he has violated his treatment plan. Therefore, after hearings in which the respondent has been committed to outpatient treatment, the associate attorney general routinely tries to get hospital physicians to write an outpatient treatment plan for the respondent even when they felt that such treatment was completely inappropriate (and had so stated in their affidavits). Such behavior, while understandable as a legal tactic, does not encourage clinicians to cooperate with the legal system.

One major reason that judges order outpatient commitment against the advice and recommendations of clinicians is that it represents a compromise between physicians' recommendation for continued inpatient commitment and patients' desire for release. This situation will be discussed in more detail later in this article.

Emergency commitment. In North Carolina emergency hospitalization is a procedure by which law enforcement officers may take custody of an apparently mentally disordered person and transport him or her directly to an inpatient treatment facility, bypassing the otherwise-required evaluation by a local physician. It is to be used only when the officer feels that the prospective patient is "violent and requiring restraint" and when "delay in taking the respondent to a qualified physician for an examination would endanger life and property."[24]

We studied 72 of the 78 patients who were admitted under emergency provisions during the first study period by examining both the court records and the hospital records for each patient (six of the records were not available to us). Emergency patients and all other committed patients did not differ significantly in age, gender, race, marital status, diagnosis, or lengths of hospitalization. Physicians recommended continued commitment for emergency respondents just about as often as they did for those committed under the nonemergency procedure, and judges concurred with physicians' recommendations with respect to emergency respondents as often as they did with respect to other respondents.

Our study group examined each of the written petitions for emergency commitment to rate how well the three criteria required for emergency commitment had been met—evidence of mental disorder, evidence of dangerousness (these two were the same as for all commitments), and evidence of risk in delay. We found that the emergency commitments were often unsupported by evidence. Our analysis indicated that there was adequate evidence for all three criteria in only 17 per cent of the petitions. Evidence for dangerousness was adequate in 88 per cent of the emergency petitions, for mental disorder in 60 per cent, and for risk in delay in only 38 per cent.[25]

We also found that (a) rural counties (defined for the purposes of the study as those that have under 35,000 population) sent nine times as many patients per capita to John Umstead Hospital under emergency commitment as did urban counties, and (b) counties from the hospital's western catchment area (located farther from the hospital) sent 24 times more patients per capita under emergency provisions than did the counties in the eastern catchment area. It appears that emergency commitment is used in certain rural areas of North Carolina more for the convenience of local officials than for the needs of the respondents. The major reason is that many rural counties have no psychiatrists and few other physicians who are willing to become involved in the commitment process as evaluators during the times (outside the regular working day) when many commitment procedures are initiated. Emergency commitment becomes seen as necessary to commit respondents who satisfy the regular criteria for commitment; still, it should not be used to bypass these criteria.

Compromise dispositions

Many procedures from the criminal justice system have been added to involuntary civil commitment over the past two decades. Much has been said about what has been called the "criminalization" of the commitment process.[26] One aspect of this blending of the clinical and criminal justice systems that has received relatively little attention but is of growing significance is the process of prehearing negotiation and compromise, analogous to plea bargaining in criminal court.[27] Such a process is used in several ways in North Carolina:

1. Physicians at the state hospitals learn what a given court (including the attorneys practicing at the time) will accept and tailor their recommendations not to clinical judgment but to legal realities.[28]

2. The data from our second study showed that during the study period the special counsel recommended a disposition more restrictive than that desired by his client in over 50 per cent of the cases in which both the respondent and special counsel expressed opinions. When interviewed, the special counsel said that he had done this in an effort to arrive at the most favorable disposition for his client; he felt that representing his client's expressed wishes in those cases would have resulted in an even more restrictive disposition than necessary. Unlike the situation in plea bargaining, however, this pro-

24. N.C. GEN. STAT. § 122-58.18.

25. Miller and Fiddleman, "Emergency Involuntary Commitment." Examples of various categories are as follows (actual complete petitions examined during the study):

—"Patient wanted to sign in voluntarily, but too drunk." [Evidence of mental disorder (inebriacy) but no evidence of dangerousness, violence, or risk in delaying admission.]

—"Patient at rest home where he beat a fellow patient severely about the head—also struck at another patient—uncontrollable." [Evidence of dangerousness, violence, and risk of delay; but no evidence of mental disorder.]

—"Respondent passed out and hurt himself; he lives alone and there is no one to care for him." [No evidence of mental disorder, violence, or risk of delay.]

—"Respondent is violent and talking all kinds of nonsense; she struck a deputy by kicking him in the leg and striking him in the face with her fist. Will not take advice." [Sufficient evidence of all required criteria.]

26. For example, see M. Abramson, "The Criminalization of Mentally Disordered Behavior," *Hospital and Community Psychiatry* 23 (1972), 101-03.

27. See Robert D. Miller, R. Inoescu-Pioggia, and Paul Fiddleman, "The Use of Plea Bargaining in the Civil Commitment of the Mentally Ill," to be presented in October 1983.

28. See Miller and Fiddleman, "The Effects of Witnesses, Attorneys, and Judges." Physicians at North Carolina's four state hospitals vary widely—from 32 per cent to 80 per cent—in the proportions of commitments and releases they recommend, even though there is no evidence to suggest significant differences in patient populations, admission patterns, or practices among physicians. Information from clinicians and attorneys at the other three hospitals indicates that the difference in recommendations stem from differences in the physicians' expectations of court disposition. That these expectations were accurate is indicated by the fact that the concurrence between physicians' recommendations and court dispositions was between 89 per cent and 94 per cent at all four hospitals.

cess of compromise took place during the hearing itself between the special counsel and the presiding judge—not before the hearing, when both attorneys and the respondent could have participated.

3. By far the most frequent use of compromise was by the judges themselves, without active involvement from any other parties. In the majority of cases in which outpatient commitment was ordered, it had not been proposed by any of the other participants in the hearing; in interviews, all four judges acknowledged that they often decided to order outpatient commitment without recommendations from any of the parties and without any evidence that such treatment was either available or appropriate, simply because they felt that there was not quite enough evidence to support the recommendation for inpatient commitment from the physician and they saw outpatient treatment as a less restrictive alternative to inpatient commitment. Such compromises end up satisfying no one, since treatment that is clinically inappropriate is rarely effective and the patient typically ends up back in the hospital for even longer than would have been required if inpatient commitment had been ordered in the first place (as demonstrated by the rehospitalization rates shown in our study of outpatient commitment).

Another way in which judges unilaterally compromised between recommendations for inpatient commitment and release was by ordering inpatient commitment but for a shorter time than the physician asked for, often as a result of partially successful challenges to evidence.[29] Such a process is analogous to plea-bargained sentences in the criminal justice system but is perhaps less appropriate in a clinical setting. While in the criminal justice system the length of a prison sentence can be regarded as representing the severity of the offense, physicians' recommendations are not arbitrary but rather reflect clinical estimates of the length of time *necessary for effective treatment*. By reducing the time of inpatient treatment, judges are again involving themselves in clinical, not judicial, decision-making.

Recommendations

On the basis of clinical experience and systematic research over nine years, I have several recommendations for improving the commitment system for those for whom it is intended—the patient-respondents.

1. Judges should impose dispositions of commitment or release only—and for the maximum time permitted by statute (90 days for initial commitments, and 180 days after rehearings). The length of treatment as well as the site (inpatient or outpatient) should be left up to clinical judgment, as it already is in many other states.

2. If the criminal justice model of adversarial representation is to be retained, then the roles of the attorneys should be consistent—the special counsel should represent the respondent's wishes, while the associate attorney general should represent the pro-commitment position. This practice would clarify the situation for the attorneys as well as the other participants in the process. For example, patients who want to be committed (and there are quite a few of them) could be assured that their attorney will not try to get them released. Petitioners who favor commitment will be assured of having someone to represent their positions. Counsel for the respondent should not refuse to work with clinicians, who often can provide evidence that supports the respondent's wishes.

3. Compromise can be an effective decision-making procedure if it involves all participants in the proceeding and is negotiated *before* the hearing. In several other states—New York and Wisconsin, for example—attorneys are charged not only with representing respondents at hearings but also with developing practical alternatives to hospitalization in state facilities.[30] In these jurisdictions, negotiation can present meaningful choices and result in clinical as well as legal benefits for patients.

4. A more radical departure from present practice (which may be expensive for North Carolina now but is being effectively used in a number of states) is to have independent clinicians examine respondents before the hearings and testify or provide affidavits to the court, thus relieving the clinical staff from having to treat patients who perceive them as adversaries. In this arrangement the examining clinicians could have access to the hospital records generated during the admission, but neither they nor their patients would experience the conflict of interests generated by the present system.

5. Emergency commitment is a necessary procedure and should be retained as it is. The current problems are not with the statutes but with present application. The abuses largely result from the unavailability of physicians in rural communities; they could be prevented by expanding the number of qualified examiners through authorizing licensed psychologists to perform local commitment evaluations. Most mental health centers (and the statutes clearly express a preference that such local evaluations be done at the mental health centers if possible) have psychologists even if they have no psychiatrists. Furthermore, licensed psychologists who work regularly with mentally disordered patients should be able to evaluate them more effectively than general physicians, who seldom see such patients and are not trained to diagnose or evaluate mental disorders.

North Carolina is fortunate to have a deliberative body like the General Assembly's Mental Health Study Commission, which has become very knowledgeable in mental health issues, to develop new legislation. The problem has often been that the various professional groups that are involved in commitment (judges, attorneys, sheriffs, police, district attorneys, clerks of court and magistrates, clinicians, and patients) have not cooperated effectively in the process of change. In my experience as a member of numerous state-level task forces concerned with generating new legislation or regulations, far too often the various groups have been more concerned with their own convenience than with the legitimate needs of either patients or the state. If these groups began to work together, and especially if there were more input from the members of each profession who work *directly* with patients rather than from administrative personnel, more effective procedures could be developed. ●

29. See Miller and Fiddleman, "The Effects of Witness, Attorneys, and Judges," Case-by-case examination revealed that in 39 per cent of cases in which length of commitment ordered by judges was less than that recommended by physicians, there had been challenges to evidence or procedure that the observer deemed to be instrumental in the judge's decision.

30. For examples of involvement of patients' attorneys in finding alternate treatment options for their clients, see R. Gupta, "New York's Mental Health Information Service: An Experiment in Due Process," *Rutgers Law Review* 25 (1971), 405-50. See also Miller et al., "The Use of Plea Bargaining in Civil Commitment of the Mentally Ill."

Psychiatric Testimony: Objectivity Versus Advocacy

Robert Rollins

These days psychiatrists are being much criticized as expert medical witnesses in trials. In this article, I want to describe the present system of psychiatric testimony and also to offer some suggestions for improving it that are based on my experience as a forensic psychiatrist in North Carolina.

The critics suggest that psychiatric testimony is unreliable and that criminal defendants often are inappropriately found either incompetent to stand trial or not guilty by reason of insanity. Some of this criticism reflects the view of those who think psychiatric testimony goes beyond the expertise of psychiatry. These critics contend that psychiatrists should not express opinions on legal or moral issues but instead should confine their testimony to clinical findings. The cynics assert that psychiatric testimony is sometimes for sale and that affluent defendants can shop about to find an expert who will favor them. The public is particularly alarmed by conflicting psychiatric testimony. The expectation, apparently, is that all experts should come to the same opinion.

The apparent disparity of opinions between psychiatrists called by the defense and those called by the prosecution does not necessarily suggest unreliability. Rather, it may result from differences in the information from which the assessments were made and from the process by which those opinions were presented during testimony and cross-examination. Critics find the contesting of psychiatric testimony and the attacks on the experts via cross-examination very distasteful, but these events are the expected result of our adversary system of trial. The "battle of experts" occurs in almost every trial involving expert testimony by any discipline. The adversarial system is the jurisprudential network of laws, rules, and procedures characterized by opposing parties who contend against each other for a result favorable to themselves. In contrast to this is the European, or inquisitorial, system in which the judge acts as an independent magistrate who gathers evidence, questions witnesses, and develops the case for or against the defendant. In our adversary system, the judge monitors the process and insures fairness but does not take an active role in developing evidence. This role of advocacy is assigned to opposing attorneys, and each side sets out to develop and present all favorable evidence and keep out all unfavorable evidence. If unfavorable evidence cannot be kept out, the attorney may attempt to cast doubt on its validity. The theory is that this struggle of opposing advocates will result in justice.

What must follow in cases that involve questions of mental health, then, is that each side tries to present favorable psychiatric testimony, keep out unfavorable testimony, and attack unfavorable psychiatric testimony by cross-examination. The attorney searches for the expert whose opinion is most favorable to his side. It is therefore impossible to eliminate conflicting psychiatric testimony without eliminating the adversary system. That system demands

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It is impossible to eliminate conflicting psychiatric testimony without eliminating the adversarial system. In that system each side seeks a psychiatrist who can support its contention and then presents his opinion in the light most favorable to itself.

that each side seek a psychiatrist who can support its contention and that this opinion be presented in the light most favorable to the side that presented the psychiatrist.

Medical opinions about psychiatric issues are often needed in order for the jury to reach a just verdict. Expert medical witnesses—in contrast to lay witnesses who testify only as to facts that they have observed—offer opinion on matters beyond the jury's knowledge. Was the person influenced by delusions when the will was written? Was he mentally competent when the contract was made? Does mental illness prevent the defendant from cooperating with his attorney? Did the defendant know that the act was wrong? For example, an old man who put an item in his pocket while in a store and did not pay for it may be charged with shoplifting. If the psychiatric evaluation revealed impaired memory and judgment as a result of organic brain disease (advanced senility), this information may lead the jury to conclude that the defendant did not intend to conceal the object but simply forgot to pay for it because of his confused mental state.

It is important to note in this example and in all cases that the decision about blameworthiness or responsibility is made not by the psychiatrists but by the jury.

In my experience, there are two major reasons for the disparity of opinions between psychiatrists called by the defense and those called by the prosecution. The first is the incompleteness of the information available to the two psychiatrists. The examining psychiatrist, on the basis of the information he has, reconstructs the situation of the crime and tries to determine the defendant's state of mind at that time. He rarely has access to all relevant information and must reach an opinion on less than complete data. Some desired information may be unknown or unavailable, and some may be inaccurate. Most defendants tend to present their story in the light most favorable to themselves, and sometimes they intentionally misrepresent their situation. The psychiatrist's opinion about a person's mental state at the time of the act may be based on accounts of others who know the defendant's past history, on previous medical or school records, on information from the victim or witnesses who observed the event, on statements made by the defendant, on information from the arresting officer, and on the defendant's response to psychiatric treatment. In view of the incomplete and conflicting information with which the psychiatrist must work, it is probably inevitable that though they try to be objective, different psychiatrists reach somewhat different conclusions. But psychiatry is not the only medical specialty in which honest men may come to different opinions. Surgeons differ as to whether an immediate operation or continued conservative treatment is indicated. Radiologists differ as to whether the density in a chest x-ray suggests tumor or infection. In the legal field, Supreme Court decisions are seldom unanimous. It is no more realistic to expect that all psychiatrists will have precisely the same opinion than to expect that other groups of experts will always agree.

The second and more important reason for the discrepancies in psychiatric testimony has to do with how opinions are presented in court. No matter how objective the psychiatrist's opinion may be, lawyers will use and present it to their tactical advantage. In any psychiatric evaluation some findings will be favorable to the defendant and some will be adverse. Each attorney will phrase the direct examination of the psychiatrist who appears for his side so as to highlight the helpful aspects of that testimony and ignore the unfavorable parts. Unless the opposing attorney brings out the unfavorable information on cross-examination, it will not be heard. While on the witness stand, the expert witness is obliged to answer each question truthfully, and he may respond only to the questions asked. If the attorney for whatever reason does not ask the salient questions, the witness can do nothing to present an objective and complete picture. For this reason, the same opinion can be presented quite differently by opposing sides. The defendant's attorney will dwell at length on the favorable portion of the opinions and ignore the unfavorable. A thorough and objective psychiatric assessment that is largely unfavorable to the defendant may be submerged or presented in an entirely contrary light. In such a situation, the jury and the public never know the full extent of the psychiatrist's findings. Usually, the public learns only what the media report and thus knows only a fraction of what goes on at a trial, which results in inaccurate conclusions about a very complex situation.

Equally important in the process of presenting opinions is the psychiatrist's objectivity. Psychiatrists, like everyone else, find total objectivity difficult to achieve. Medical opinions are just that—opinions, the experts' best judgments. The concept of impartial expert has been suggested

It is no more realistic to expect that psychiatrists will always agree than to expect that surgeons or any other group of experts will always agree.

as a way to avoid "the battle of the experts." It requires that the *judge* appoint an impartial expert, who would give an unbiased opinion. Most psychiatrists probably would support such a concept. But in my view, appointing an impartial witness is not the answer to eliminating bias. Whether the psychatrist is appointed by the judge or retained by an attorney, his opinion necessarily favors one side, and more than likely he will believe that that opinion should prevail. The legal system recognizes this possible bias, and it is the opposing attorney's duty to cross-examine the psychiatrist to reveal any biases. In our adversary system it is entirely proper to impeach testimony by attacking the witness directly. The attorney may try to show that the witness is not qualified as an expert, that the clinical information on which the witness's opinion is based was incomplete or inaccurate, that the examination was not thorough, or that the analysis of the data was faulty. It is difficult for the expert to remain neutral under such attack.

We must not expect the expert medical witness to make decisions about guilt or responsibility—that task is assigned to the jury.

Our adversarial system of calling witnesses for each side and then examining the witness by both direct examination and cross-examination has been evolved for just the purpose of exposing any shortcomings and biases. I agree with Dr. Bernard Diamond, a noted forensic psychiatrist, who says: "I contend that there is no such thing as an impartial witness; that the objectivity of the expert is largely a myth and that the solution is to drop all pretense of impartiality and allow the trier of the fact to clearly see the biases and values of the witness."[1]

When I testify, generally I have been appointed by the court rather than privately retained. Although I consider myself an impartial expert, the side that is adversely affected by my testimony invariably views me as favoring the other side. As an expert medical witness, I know from experience that my testimony will displease one side and sometimes both. I deal with this by trying to be as objective as possible, concentrating on providing information in response to whatever question is asked and realizing that my role is to provide information, not make the decision. The system is working as designed. So long as we have the adversary system, we will continue to have psychiatrists called by opposing sides, and their opinions will be presented in the light most favorable to the side that called them. The expert medical witness's role is to perform an objective evaluation. The advocate then presents his opinion in the way most favorable to the advocate's side. The opposing advocate by cross-examination tries to put the expert's testimony in another perspective. The jury evaluates the various experts' testimony and comes to a decision. We can expect of the expert only that he evaluate the defendant and respond to the attorneys' questions objectively. We must not expect him to make the decision as to guilt or responsibility—that task is assigned to the jury.

It is difficult to find psychiatrists who are willing to testify in court. Many psychiatrists are unfamiliar with legal standards and therefore have difficulty in to applying their psychiatric knowledge to legal issues. The greatest problem, however, is that most clinical psychiatrists find the adversary system alien and uncomfortable.

Psychiatrists who testify in court need some specific training and special guidelines. Forensic psychiatry—the application of psychiatric knowledge to legal issues—is in many ways different from clinical psychiatry, which is the diagnosis and treatment of disease of the mind. In clinical psychiatry the allegiance is to the patient, while in forensic psychiatry the allegiance must be to the court. In clinical psychiatry, the physician places great importance on understanding the world from the patient's point of view, while the forensic psychiatrist must be alert to the possibilities of deception and malingering and must gather as much information as possible from sources beyond the patient. Lectures, publications, and organizations are available to those interested in forensic psychiatry, and the American Board of Forensic Psychiatry offers certification. Perhaps the North Carolina Neuro-psychiatric Association's Committee on Psychiatry and the Law, the Administrative Office of the Courts, the Institute of Government, the Conference of Superior Court Judges, and the Division of Mental Health, Mental Retardation, and Substance Abuse together could develop guidelines for qualifications of psychiatrists who testify in court in this state and specific instructions to aid psychiatrists while presenting their opinions.

With all the controversy about psychiatric testimony, it must be understood that psychiatrists provide opinions relevant to established legal standards. These standards are established by the legal system, and the decisions are made by the jury. The psychiatrist studies the patient and gives his best judgment about the issue, but he does not and should not make the decision.●

1. *Archives of Criminal Psychodynamics* 3, no. 2 (1959), 221-36.

The Advisory Commission on Intergovernmental Relations:

A Resource for State and Local Governments

Stephanie Becker

Of all the changes in American government over the past twenty-five years, perhaps the most far reaching is the entrance of the federal government into virtually every state and local government activity. The Advisory Commission on Intergovermental Relations has spent much of its twenty-four years monitoring the growth of government, keeping track of the shifting relationships among the three levels, and recommending ways to preserve the integrity of each.

Intergovernmental relations have changed dramatically in the twenty-four years since the Advisory Commission on Intergovernmental Relations (ACIR) was created. In 1959, when President Eisenhower signed the law establishing the Commission there were only about 132 federal grant programs for state and local governments, and those programs cost approximately $7 billion. In 1980, more than 500 intergovernmental programs provided some $91.5 billion in aid. Then, too, in the late 1950s the welfare "explosion" had not begun in earnest, and many people thought that a major federal role in such fields as education and health was a legislative impossibility. Furthermore, the three Es—energy, environment, and the economy—had yet to become national issues.

So it may seem surprising that the need for a permanent commission to monitor federal-state-local trends and recommend improvements was perceived that long ago—during the 1950s, when intergovernmental relations generally conformed to the mold of "cooperative federalism."[1] Indeed, the statute that created ACIR was farsighted; it recognized that

> [B]ecause the complexity of modern life intensifies the need in a federal form of government for the fullest cooperation and coordination of activities between the levels of government, and because population growth and scientific developments portend an increasingly complex society in future years, it is essential that an appropriate agency be established to give continuing attention to intergovernmental problems.[2]

Charged with the task of keeping watch over intergovernmental relations, ACIR has found much to do and to recommend over the years. Now that our federal system is again at a crossroads, it is appropriate to examine the Commission's work and see whether we can glimpse what the future holds for federalism.

The ACIR, after more than two decades of monitoring change unprecedented in our intergovernmental system, has remained remarkably constant in its mission, philosophy, and basic character. First, it is a national body. Its twenty-six members are drawn from all parts of the country, from both political

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1. The expression "cooperative federalism" is frequently used to describe the period from roughly 1930 to 1960 during which a number of governmental functions were jointly funded by the national and state levels on a cooperative basis. The period was distinct from the preceding era of "dual federalism," when only a very few functions were shared. It also was markedly different from the post-1960 time frame, when the number of federal intergovernmental grants increased dramatically in both scope and dollar amounts and a rising proportion went directly to local governments, bypassing the states.

2. P.L. 86-380.

ACIR: The North Carolina Connection

The history of the Advisory Commission on Intergovernmental Relations shows that the Commission might well not have come into being except for the work of North Carolina's Congressman L. H. Fountain (who represented the Second District nearly thirty years). Shortly after the Commission on Intergovernmental Relations (a temporary advisory body popularly known as the Kestnbaum Commission, for its chairman) recommended in 1955 that a permanent center be established to study intergovernmental relations, Congressman Fountain began hearings. In 1959 the House Intergovernmental Relations Subcommittee, which Congressman Fountain chaired, issued a report based on these hearings and called for the establishment of the ACIR.

Mr. Fountain and Representative Florence Dwyer of New Jersey introduced legislation setting up the Commission in the House, and Senator Edmund Muskie of Maine did so in the Senate. Joint hearings were held and the measure passed. President Eisenhower signed it on September 24, 1959.

Congressman Fountain became an original member of ACIR and served continuously until his retirement from Congress in January 1983. Other North Carolinians who served on the Commission include Juanita M. Kreps, former Secretary of Commerce, from 1977 to 1979; Adelaide Walters of Chapel Hill, a private citizen member, from 1964 to 1966; former Senator Sam J. Ervin, Jr., from 1959 to 1973; and former Governor Terry Sanford in 1963. Also, ACIR Executive Director S. Kenneth Howard, appointed in May 1982, was once a professor of political science and assistant director of the Institute of Government of the University of North Carolina at Chapel Hill.

parties, from all levels of government, from both executive and legislative branches, and from the public. It strives to maintain a balanced point of view—not just the perspective of Washington-based officials. This aim is based on the belief that federalism works best when all three levels of government are strong. Because the federal government has tended to be the "powerhouse" of the federal system in recent years, much of the Commission's work has been devoted to strengthening states and localities—and encouraging both federal restraint in areas that inhibit state and local development and federal aid in appropriate forms.

The Commission's unique legislative mandate gave it a good start, one that was farsighted and flexible enough to enable it to remain steadfast in its mission. The public law that created ACIR recognized that federalism is not a static system of government but one that changes over time. It therefore made the Commission permanent. Unlike some commissions that advise and self-destruct, ACIR was meant to monitor and advise on a continuing basis. It was also meant to be independent. Even though ACIR relies primarily on an annual congressional appropriation for its funding, it is not an arm of Congress. It can set its own agenda and make the recommendations it feels are most appropriate, even if those positions differ from the preferences of the Administration and the congressional majority. This is not to say that the President and the Congress have not made significant requests of ACIR. For example, in 1972 the Commission monitored General Revenue Sharing at the President's request, and in 1976, as a result of a congressional mandate, it studied the federal role in the federal system.

But as constant as these themes and mission may be, it would be misleading to say that the Commission's position has not changed. In its early years, for example, ACIR gave more attention to rather narrow "squeaky joint" problems—including such issues as federal inheritance, estate, and gift taxes; investment of cash balances by state and local governments; and transferability of public employment retirement credits among units of government.

For roughly a decade, from the late 1960s to the mid-1970s, much of the Commission's attention was devoted to examining the managerial and fiscal problems of the burgeoning grant-in-aid system. In the wake of the Great Society, many governors and mayors—and indeed many federal officials—were concerned about problems of red tape, duplication, and poor program coordination. The Commission responded (in 1967) by urging that the number of categorical aid programs be reduced by half and that new, more flexible forms of federal aid—block grants and general revenue sharing—be adopted.

During the same period, the Commission also examined state and local revenue systems and recommended ways in which they could be diversified, strengthened, and made more equitable. Specifically, it urged states to adopt broad-based income and sales taxes that could sustain major state-financed programs. The Commission also recommended (1967) that states enact "circuit-breakers" to help localities finance the cost of relieving any undue property tax burden on low-income families, and in 1976 it urged that both state and federal income taxes be indexed to compensate for inflation-induced "bracket creep."[3]

The Commission's recent work has been more far-reaching, focusing on very broad issues and recommending a major overhaul of our federal system of government, as described below. Also, in its role as intergovernmental watchdog, it has become increasingly aggressive in identifying and publicizing the intergovernmental consequences of important public policy actions.

By 1980, following a three-year study of the federal role in the federal system, Commission members were convinced that major reform in the federal system was necessary. Governor Richard Snelling, ACIR member from Vermont, stated the problem succinctly:

> The federal system has reached a crossroad. The role of the states has been

3. A "circuit-breaker" is a form of property tax relief in which benefits depend on both income and property tax payments. As of the late 1970s, thirty-one states had adopted circuit-breaker programs to relieve the property tax burden on the poor. See the article on the circuit-breaker in North Carolina by Charles D. Liner in *Popular Government* 43, no. 2 (Fall 1977), 28-31. For an explanation of "bracket creep," see the article by Paul Zipin in *Popular Government* 48, no. 2 (Fall 1982), 24-29. By the end of 1982, ten states had indexed their taxes to compensate for inflation.

> eroded to the point that the authors of the Constitution would not recognize the intergovernmental relationships they crafted so carefully in 1789.[4]

Mayor Tom Moody of Columbus, Ohio, a former Commission member, expressed the public's discontent with "a system where the federal government continually pours out millions and millions of dollars and they see so few results."[5]

At the root of the problem was the federal government's role—too many domestic functions had been "intergovernmentalized," and in the process a sense of which level of government was responsible for what had been lost. What was needed, the Commission urged, was a "sorting out" of roles and responsibilities among the three levels of government.[6] In ACIR's view, the federal government should be involved in those domestic activities that have (1) a clear and essential national purpose, (2) a program history in which national initiatives and involvement have been concerted and predominant, and (3) heavy national funding relative to state-local funding.

The federal government, the Commission said, should assume financial responsibility for income-redistribution programs (such as welfare) and Medicaid. The Commission has long felt that the federal government is the only level that can redistribute income without driving people away from particular jurisdictions or attracting them to others. The states, in turn, should move toward greater financial responsibility for those functions that are primarily a state concern, including such fields as law enforcement and education. An integral part of this "sorting out" process is drastic steamlining of the federal grant system by substantially reducing the number of programs—particularly the numerous small, narrowly defined categorical grants—through consolidation, termination, or devolution.

President Reagan shared the Commission's assessment that, because of the growth in federal programs, "contemporary intergovernmental relations . . . have become more pervasive, more intrusive, more unmanageable, more ineffective, and more unaccountable."[7] The President's New Federalism initiative, unveiled in his State of the Union Address in January 1982, opened another chapter in the debate over the proper balance of power and responsibility between the national and subnational levels that was launched 200 years ago in the *Federalist Papers*. For the first time a national administration went on record in favor of a fundamental realignment of federal responsibilities and resources.

Regardless of how the New Federalism proposals evolve, they opened a national debate on many issues basic to how our federal system works and created a sense of urgency about them. Many of the issues raised by the New Federalism have been studied by ACIR, as the following examples show.

Sorting out roles and responsibilities within the federal system is probably the most important step toward a more balanced form of federalism, but it is not enough. The Commission also advocates restraining the federal role where it is not appropriate. For example, it has recommended a "hands off" federal policy toward the regulation of state and local pension systems and interstate tax competition.

Last year the Commission decided that it was time to establish broader guidelines for determining when the federal government should—and should not—step into state and local affairs. It found that the dramatic growth of federal intergovernmental grants over the past two decades was accompanied by an equally dramatic but less well publicized increase in federal rules and regulations affecting state and local governments.[8] To halt this trend, the Commission urged that "the federal government strive to confine its regulation of state and local governments . . . to the minimum level consistent with compelling national interests." Federal intergovernmental regulation may be warranted for certain purposes—to protect basic political and civil rights, to ensure national defense, to establish uniform or minimum standards, to prevent particularly adverse state and local actions, and to assure essential integrity in the use of federal grant moneys. But even when one of these purposes is served by federal regulatory intervention, the Commission warned, before the federal government steps in, it should be clearly and convincingly demonstrated that federal action is necessary and that state and local governments cannot cope with the problem at hand.

Because of the predominance of the federal role in the federal system, the Commission has carefully considered how to strengthen the states and localities. Well over fifty ACIR reports,[9] often accompanied by recommendations or model legislation, deal with state and local relationships and how to improve them. The states in particular have long been the objects of Commission attention. In the early 1960s, when ACIR began studying intergovernmental trends, many feared that the states were federalism's "fallen arches" and wondered whether they could fulfill their constitutional roles. By 1980 ACIR research showed that most states had spent the preceding twenty years instituting reforms advocated by the Commission and others—to the point that now they are sometimes called the system's "arch supports."[10]

The Commission also found in 1980 that local governments have become so dependent fiscally on state and national governments, particularly the latter, that their traditional independence is threatened. As architects of local governments, the states bear a major responsibility for restoring cities, counties, towns, and townships to fiscal health and independence. To accomplish this, each state—in ACIR's view—should grant its local units broader discretionary authority, facilitate institutional modernization and interlocal coordination, reimburse those governments for expenses incurred in state-mandated programs, and create a state-local body to identify differences between the two levels of goverment and to develop solutions to problems. The states can

(continued on page 44)

4. David S. Broder, "The Governors, Feeling Burned," *Washington Post*, August 2, 1980.

5. "Evaluating the Federal Aid Reform: Municipal Reactions," *National Tax Journal* (September 1981), 336.

6. For more information, see Advisory Commission on Intergovernmental Relations, *The Federal Role in the Federal System: The Dynamics of Growth*, eleven volumes issued in 1980 and 1981.

7. President Ronald Reagan, "State of the Union Address," January 1982.

8. "Regulatory Federalism: Policy, Process, Impact, and Reform," ACIR, draft.

9. For a listing of ACIR reports, write Advisory Commission on Intergovernmental Relations, 1117 20th Street, NW, Washington, D.C. 20575.

10. For more information, see ACIR, *State and Local Roles in the Federal System*, A-88 (1982).

An ACIR Retrospective: Congressman L. H. Fountain Looks at the Commission's Record

Editor's note: Former Congressman Fountain responds to questions from Stephanie Becker, ACIR's Information Officer.

S. B.: In its twenty-three years of operation, has the ACIR met your original expectations?

Fountain: In answering your question, it is important to keep in mind that the Commission came into existence at the beginning of a twenty-year period of enormous and sustained growth of the public sector at all governmental levels. During its early years, ACIR tended to focus its attention on fairly narrow program areas that provided targets of opportunity for achieving practical results. Some of those problems had been identified earlier by the Kestnbaum Commission, while others—the metropolitan area studies in particular—were new areas of research emphasis. I think it is accurate to say that the Commission gave increased attention in later years to broader policy issues in keeping with the increasing complexity of intergovernmental relations as the federal government expanded its grant programs and regulatory activities.

S. B.: How has the Commission changed since it was founded in 1959?

Fountain: Aside from the changing focus of its problem-solving efforts, I think the Commission has remained relatively unchanged. As Congress intended, the size of the staff has grown very little despite ACIR's heavy and more complex workload; the quality of the staff and its leadership has remained very high. And the Commission continues to attract as members many truly outstanding people in public life. It has always been an inspiration to me to see the dedication and diligence with which members involve themselves in many of the unglamorous issues—the so-called nuts and bolts problems—that must be resolved if our federal system is to operate effectively and efficiently. Furthermore, the Commission recognized at its very first meeting the importance of follow-through in the implemention of its recommendations. It did not want to be just another study group. As you know, implementing those recommendations has remained a major ACIR concern.

S. B.: What has been ACIR's most important contribution, in your opinion, to improving intergovernmental relations?

Fountain: It is difficult to select any single contribution as the most important. Certainly the Commission has made an extremely valuable contribution in raising the visibility and importance of intergovernmental relations, not only in governmental circles but also in our colleges and universities, where ACIR publications serve as course texts, and for the press and public generally. This is no small accomplishment, considering the unglamorous nature of much of the subject matter involved. The Commission, through its reports and technical assistance, has also helped to strengthen our state and local governments' ability to manage their programs and problems effectively. And we should not overlook the Commission's contribution to bringing state and local governments closer together, both by providing a forum for discussing their differences and mutual interests and by encouraging the states to assume greater responsibility for dealing with local needs and problems. Our federal system is unquestionably strengthened, and there is less centralization of government in Washington when state and local officials cooperate to develop a strong partnership.

S. B.: What do you see as the Commission's most important future challenges?

Fountain: One thing we can be certain of is that the Commission will never run out of problems. Among those already with us or on the horizon are such thorny issues as how to meet public service needs in an era of scarcer resources and devising practical approaches for bridging the gap in fiscal capacity between our energy-rich and energy-poor states. Another difficult problem involves sorting out the roles of the various levels of government in the very costly task of maintaining and rebuilding our roads, bridges, water and sewer sysems, and other major public facilities. I am confident that ACIR will meet these and other future challenges if it remains true to its origins as an independent, objective, and bipartisan monitor of our federal system.

further help localities regain or retain their fiscal independence by encouraging reform in their governmental structure. Mismatches between needs and resources occur too often at the local level because of structural problems. In many instances consolidating governmental units and reviewing the status of special districts and their relationship to general-purpose units are important steps toward reform.

An inherent problem in restoring balance to federalism and strengthening state and local governments is the fiscal disparities among the states. Last year the Commission found that these differences in the wealth from which revenue may be derived are not adequately revealed by measuring variations in per capita income, now the most commonly used gauge of a state's fiscal health. It therefore recommended that the federal government consider using a broader measure of fiscal capacity, such as the Representative Tax System, that takes into account all of the tax sources available to a state.[11]

The Representative Tax System (RTS) measures the states' ability to raise taxes by applying in each state a uniform set of tax rates against 24 types of tax base. Because the same set of tax rates is used for every state, the estimated tax yields vary only with the resources against which the taxes are levied. The calculations thus provide a measurement of each state's "tax capacity"—that is, the amount of revenue that is *possible* for each state to raise through taxation. The range of tax capacity as measured by the RTS is extreme: Alaska's tax capacity, for example, is more than three times greater than Mississippi's.

But clearly tax capacity is only part of the picture. The more relevant issue is how the states use that capacity. One indication of that use is "tax effort," a measure that compares tax capacity with actual tax collections. Again, the variations are great—from Texas, which is some 37 per cent below the national norm for tax effort, to New York, which is 72 per cent above average.

The Reagan Administration's proposal to shift program responsibilities to the states and localities has highlighted the issue of states' capacity to assume those programs. Whether the states can take up the "fiscal slack" necessary to carry out these programs is a question frequently raised in Washington and elsewhere. Adjustments in programs to compensate for the states' fiscal disparities, as revealed by the Representative Tax System, have become part of the federalism policies of the public-interest groups that represent elected state and local officials in Washington.

Yet no matter how thorough the ACIR's studies may be or how worthy its recommendations, the Commission's success over the years can be measured only by how frequently its advice is taken. The Commission is credited with being among the first—if not *the* first—to advocate creative approaches to a variety of governmental problems. Good examples at the national level are:

—Enactment of General Revenue Sharing and block grants that provide states and localities with more flexible forms of federal aid;

—Creation of a state-local legal defense organization to monitor and institute legal action to oppose overly intrusive federal actions. The veritable explosion in grant litigation and other actions in federal court that affect state and local governments means that state and local governments must be more vigilant and sophisticated in their dealings with the judicial branch. A state-local legal defense center was created and funded in 1982.

—Passage of the Uniform Relocation Act of 1970 (requiring standardized rules for federal compensation to people and businesses that are displaced by federal actions).

—Enactment of Supplemental Security Income (nationalizing welfare aid to the aged, blind, and disabled).

—Passage of the Intergovernmental Cooperation Act of 1968, which provided for intergovernmental consultation on federal actions and grants;

At the state and local levels, the list of widely adopted ACIR recommendations includes:

—Institution of equitable, diversified, and productive state tax systems, including broad-based sales and income taxes that can sustain major state-financed programs.

—Passage of property tax circuit-breakers in many states.

—Reimbursement to local governments for expenses incurred in pursuit of state-mandated programs.

—Enactment of legislation authorizing interlocal cooperation and contracting statutes.

—Indexing of state income taxes.

—Legislative appropriation of federal funds.

—State assumption of a primary role in financing public education. As of 1981, more than half (26) of the states financed at least half of the cost of public education, and all but one state provided at least one-fourth.

At the local level, the Commission has promoted interlocal contracts, provided guidance in functional assignments among governments, encouraged county modernization, urged full implementation of home rule, and supported diversification of local revenue systems to relieve the traditional reliance on the property tax.

ACIR has also helped to mold the thinking of decision-makers in such broad areas as designing the tripartite federal grant system (revenue sharing, block grants, and categorical programs for special purposes) and in re-evaluating what the roles and responsibilities of various levels of government should be. The Commission has also worked on questions like these: What are long-term taxing and spending trends? How can balanced urban growth be achieved? How can the states be restored to their constitutional and pivotal roles as middlemen in the federal system?

In summary, then, the Commission has served as a source of ideas, information, and technical assistance and as an intergovernmental forum. It has frequently advocated the state and local position in Washington and has provided model legislation and information to interested officials and members of the public so that reform can be instituted at both the national and the state and local levels.

Intergovernmental relations do not exist in a vacuum. They are part and parcel of broad economic and political trends. For this reason, the ACIR not only examines the relationships among the three levels of government but also tries to place these relationships within the context of changes in society. Any attempt to look into the near future must, in regard

11. For more information, see ACIR, *Tax Capacity of the Fifty States*, M-134 (1982).

to intergovernmental relations, also venture into the larger world.

Our crystal ball is cloudy, but the recent past may yield some clues. John Shannon, ACIR Assistant Director for Taxation and Finance, makes this comment. "When we examine state-local fiscal behavior and federal aid flows since 1959, two very different eras come sharply into view: the era of affluent federalism from 1950 to 1975, and the era of austerity federalism from 1976 to the present." In Shannon's view, austerity will be with us for some time, reflecting both the citizens' wishes that public spending keep pace with private spending and the rather stringent fiscal constraints on the federal budget.

For ACIR, having spent part of the 1960s and much of the 1970s studying the growth of government, the task of the 1980s may well be studying federalism in an era of limits and recommending ways in which government at all levels can deliver public services more equitably and efficiently, with a greater sense of accountability but at less cost. Fiscal austerity would be an ill wind indeed if it did not bring some good; certainly it will impose a measure of discipline, and public officials will have to allocate tax dollars to needs of highest priority. We may hope that they will look for new ways to cooperate, rather than compete for diminished public resources.

ACIR remains committed to seeking solutions to both perennial and new problems of federalism. The Commission and its staff welcome suggestions from state and local officials in North Carolina on areas of intergovernmental relations that could benefit from Commission attention. ●

Poverty

24 years and older had finished high school and only 8 per cent were college educated.[33] While this accomplishment is noteworthy, our relative educational position still leaves great room for improvement. The 1980 Census revealed that North Carolina ranked *forty-seventh* in the percentage of its population that had completed high school.[34] This is a gain over our relative position in 1960, but very marginally. Our slow progress cannot be blamed on weak fiscal effort. Per capita spending on public education increased more in North Carolina from 1970 to 1980 than in all but two states in the South.[35] Thus we need to examine carefully how we spend the considerable resources already devoted to enhancing the educational levels of our population. The critical requirement may not be to spend more but to allocate what we do spend differently.[36]

Finally, the state's political leadership ought to reflect on the new needs that will arise out of the increased presence in the labor force of women with children. Government has not been the primary force behind a dramatic increase in women's work role. Changing social norms, economic pressures, and heightened career aspirations have been far more important factors. The decision of a mother to enter the labor force is highly personal. The state should neither encourage nor discourage this choice. But once she makes it, state government can help her assume the new burden. For example, the state government can insure that standards of quality prevail in day-care centers. It can explore more aggressively how the public schools can provide useful and constructive after-school activities for an ever growing number of "latch key" children. And the state government can take the lead in its own employment practices by offering working mothers greater opportunities for part-time jobs, flex-time work schedules, and personal leaves when the needs of children conflict with the needs of the workplace. All of these measures can ease the tensions that inevitably confront women as they attempt to combine the roles of mother and economic earner. By setting these kinds of examples for the private sector, North Carolina government can help both two-parent and single-parent families escape poverty. ●

33. *North Carolina Census Data Release*, p. 1.

34. *Provisional Estimates*, p. 13. As it did with reduction of poverty, North Carolina concentrated its advancements in educational achievement during the first half of the time period under review. The state ranked forty-seventh in percentage of high school graduates by 1970 and held the same rank in 1980. See Kenneth Simon and Vance Grant, *Digest of Educational Statistics* (Washington, D.C.: 1973), p. 15.

35. "Southern Growth Experience," Table 9.

36. This seems to be the policy recommendation of the Select Committee on Education, which has urged the North Carolina General Assembly to take a more comprehensive approach to educational spending. See *The News and Observer* (Raleigh, N.C.), December 18, 1982, p. 1.

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