POPULAR GOVERNMENT

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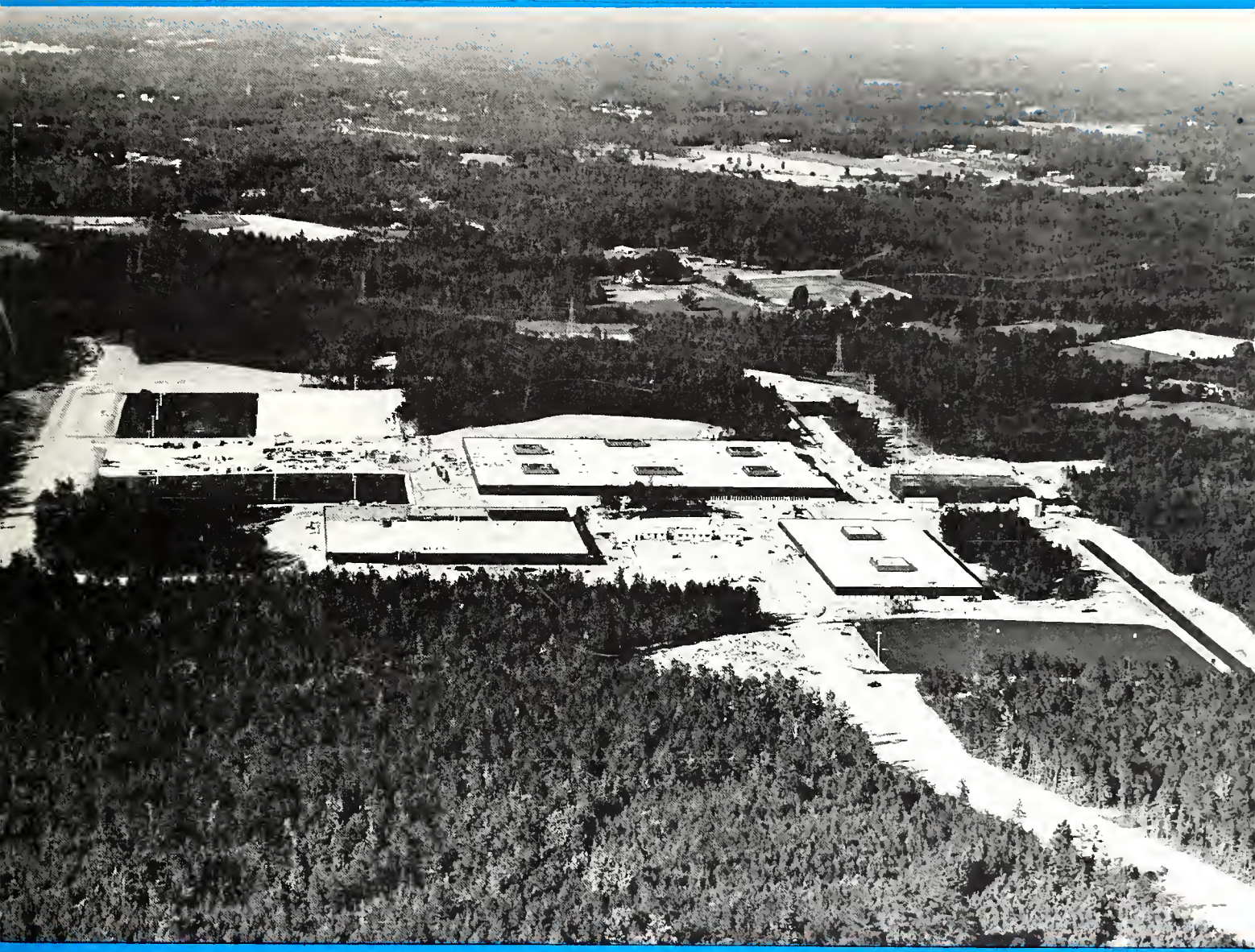

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This recent aerial view of the new IBM plant (see cover) illustrates the growth and development of the North Carolina Research Triangle. Covering 5,200 acres, the Triangle "offers building sites for research and for research-oriented industries" and access to the faculty and administrative assistance of three universities—Duke University at Durham, the University of North Carolina at Chapel Hill, and North Carolina State University at Raleigh.

Taxes: North Carolina and the Nation

A COMPARISON OF STATE AND LOCAL TAXES IN NORTH CAROLINA WITH NATIONAL PATTERNS

by S. Kenneth Howard

The author is an assistant director of the Institute of Government whose fields include public administration and finance.

The release of the *Report of the Tax Study Commission* invites obvious questions about how taxes in North Carolina compare with those in other states. Unfortunately the obvious questions do not have obvious answers, and meaningful comparisons are not easily made.

The characteristics of state and local finance in any state are peculiar to it; the state and local tax system is one unit and it should be treated as such. To analyze state finances separately from those of local governments does violence to the essential unity of the structure. The state-local financial picture reflects the different decisions each state has made about what is a state function and what a local one. In North Carolina, for example, highways and schools are primarily state functions, and they are principally supported by state revenues. In other states, counties bear initial responsibility for so-called county roads which comprise the bulk of the secondary road network, although the state usually provides financial support for these activities. Local schools in other states are much less dependent upon state grants than is true in North Carolina. In order to avoid inconsistencies stemming from these differences, state and local finances must be dealt with as a single unit when making interstate comparisons.

Another difficulty in making comparisons is determining the factors to be compared. It is not possible here to compare North Carolina with every other state on various measures of taxation. However, it is appropriate to note national averages or patterns which show how these various taxes and fiscal relationships are employed nationally. At the same time, national averages are nothing but averages. States which are above or below any given national figure are not necessarily right or wrong, better or worse; the figures simply show, on that particular factor, the extent to which any given state is different from the typical practice nationally.

It can be helpful, however, to see how North Carolina compares with certain, if not all, other states. The immediate geographic neighbors should be included in any comparison if only because they provide the most obvious competitive locations for businesses and residents. In the material that follows, therefore, data on Georgia, South Carolina, and Virginia will be provided when appropriate. In addition, information on a few states that have quite different economic systems and widely different tax structures will also offer some insights useful in evaluating the state-local tax situation of North Carolina.

Intergovernmental Payments

Intergovernmental payments play a very important role in state-local finance. The federal government provides money for many state and local programs, and the states provide a great deal of aid to their local units, particularly for highways and education. Table 1 shows which levels of government in 1964-65 actually provided various proportions of state-local general revenues before intergovernmental transfers were made.

North Carolina receives a greater proportion of its state-local revenues from the federal government (15.8%) than is true of the nation as a whole. However, if the states are ranked on this basis, North Carolina stands thirtieth, so that over half of the states place greater reliance upon federal grants than does this state. The highest state in the rankings for this factor is Alaska, with 52.7%; the two lowest in the nation are New York and New Jersey, with 8.6% and 9.1% respectively.

If we look next at the use of state sources, the table shows that North Carolina is well above the national average and stands second only to South Carolina among the states listed. In ranking, South

Carolina and North Carolina stand third and fourth highest in the nation in the reliance they place upon state revenues in the production of total state-local revenues. Only Delaware, with 64.1%, and Hawaii, at 57.7%, are higher. West Virginia (27.6%), New Jersey (29.2%), and Nebraska (29.5%) rely the least upon state sources.

In view of this high reliance upon state sources, it is not surprising that North Carolina is well below the national average in the percentage of total state and local general revenues provided from local sources. Exceeding only South Carolina of the states shown on the table, North Carolina ranks forty-fourth in the nation on this factor. New Jersey, with 61.7% from local sources, is the highest on the table and also the highest in the nation. New York (54.1%) is third nationally, while Nebraska ranks second with 55.2%. The states that utilize local sources the least are Alaska (15.5%), New Mexico (21.0%), Louisiana (21.8%), Delaware (22.4%), and Hawaii (23.2%).

In summary, North Carolina is typical in its reliance upon federal funds, but in distributing taxes between state and local sources, this state has placed much greater emphasis upon state taxes and has utilized local taxes much less than is typical nationally.

Table 1

Percentage Distribution of State and Local General Revenues by Originating Level of Government (before transfers among governments), 1964-65. National Average, North Carolina, and Selected States.

State	Federal	State	Local
United States	14.8%	41.2%	44.0%
North Carolina	15.8	57.4	26.8
Georgia	18.7	45.8	35.6
South Carolina	16.8	57.6	25.6
Virginia	20.2	44.0	35.8
New Jersey	9.1	29.2	61.7
New York	8.6	37.2	54.1
Ohio	12.5	36.9	50.5
Pennsylvania	12.1	45.1	42.8

Source: U.S. Bureau of Census, *Governmental Finances in 1964-65*, Table 23, p. 49.
Note: "General revenues" include all tax collections, intergovernmental transfers, charges, and miscellaneous receipts. Excluded are insurance receipts and revenues from utilities and liquor stores.

Types of Taxes Used

Many different taxes are used in the states to provide state and local revenues. Most of the variation, however, occurs in state rather than local sources because the property tax remains the dominant local tax. In 1964-65, property taxes provided over 87% of total local taxes. Table 2 shows the national pattern and how selected states distribute their state-local taxes among the major tax sources.

Unfortunately comparable data for the years since 1962 have not been published. Several of the states shown on the table have made important changes in the last four years. Neighboring Virginia shows no sales taxes, but many localities in that state, particularly in the Norfolk area, have had local-option sales taxes since 1962. In September, 1966, a 2% statewide general sales tax went into effect, and most cities and counties have also adopted an optional 1% sales tax in addition. New York has a similar situation. In 1962, 10.5% of all state-local tax collections in that state came from general sales taxes, but they were from local-option taxes used solely by the major cities, such as New York and Rochester. Since August, 1965, a 2%

Table 2

Percentage Distribution of State and Local Tax Collections by Source, 1962. National Average, North Carolina, and Selected States.

State	Prop.	Gen. Sales	Motor Fuel	Other Sales	Indiv. Income	Corp. Income	Death & Gift	Motor Veh. Licenses	All Others	Total
United States	45.9%	14.4%	8.9%	8.9%	7.3%	3.1%	1.2%	4.3%	5.9%	100.0%
North Carolina	28.0	17.7	14.6	8.6	12.9	7.7	1.1	4.7	4.8	100.0
Georgia	31.5	25.3	14.4	10.6	7.0	4.0	0.3	3.3	3.6	100.0
South Carolina	24.9	22.1	16.0	14.5	8.8	5.4	0.5	3.1	4.8	100.0
Virginia	36.0	-0-	15.1	14.2	14.7	4.9	0.8	5.8	8.5	100.0
New Jersey	64.8	-0-	8.2	13.6	0.4	1.7	1.6	5.2	4.4	100.0
New York	43.9	10.5	4.3	9.5	18.3	5.5	1.5	2.9	3.6	100.0
Ohio	52.1	13.2	11.1	9.3	3.7	-0-	0.6	5.0	5.0	100.0
Pennsylvania	35.6	17.4	9.9	8.4	6.4	6.3	2.4	3.6	9.9	100.0

Source: Advisory Commission on Intergovernmental Relations, *Tax Overlapping in the United States, 1964* (Washington: Government Printing Office, 1964), pp. 55-56.

statewide sales tax has been in effect. Finally, New Jersey had no sales tax in 1962, but a new statewide 3% levy became effective in July, 1966.

The major state-local tax sources in North Carolina, in order of their importance, are property, general sales, motor fuel, individual income, selected sales, and corporate income. These are the same six major sources relied upon in the nation as a whole, but the proportions found nationally are different in important ways from those in North Carolina. The biggest source both nationally and in this state is the property tax. However, North Carolina received only 28% of all state-local tax collections in 1962 from this source, while the national average was 46%. Among the states shown, only South Carolina relied less upon this tax; New Jersey led the group with 64.8%.

The general sales tax is the second largest source for state and local governments both nationally and in this state. However, North Carolina puts more emphasis upon it than is typical nationally (18% compared with 14%). Two neighboring states, Georgia and South Carolina, placed greater reliance upon it, deriving more than 22% of their tax collections from the general sales tax. As noted earlier, three of the states shown—Virginia, New Jersey, and New York—have made significant changes in their use of this tax, so the figures shown for them on this particular source do not reflect current conditions.

Motor fuel taxes are the third largest source of total state and local taxes both nationally and within North Carolina. Again this state relies upon this tax source more heavily than do the states as a whole (15% against 9%). However, the table shows a regional pattern in which all of the southern states listed make comparable use of the motor fuel tax while all of the northeastern and industrial states place less reliance upon it.

In the national picture, selected sales taxes in 1962 tied with motor fuel taxes for third position among state-local revenue sources. They were fourth in North Carolina, where reliance on these taxes was slightly lower than the national average. One important reason for this drop is the absence in this state of a tobacco tax, which comprises a large part of the total selected sales taxes collected in other states.

Individual income taxes were the fifth largest revenue source nationally (7.3%) but fourth largest in North Carolina, where a great deal more emphasis was placed upon them (12.9%). However, North Carolina was below neighboring Virginia (14.7%) and New York (18.3%) among the states shown on Table 2. The relative importance of income taxes in these two states will probably decline with their new sales taxes.

Corporate income is the sixth largest state-local tax source both nationally and within this state. North Carolina raises from this source more than twice the proportion found nationally—7.7% compared with 3.1%. Not only did this reliance on corporate income in 1962 place North Carolina at the top among the states shown, but the proportion provided by this source in North Carolina was greater than in any other state.

Since property taxes are almost totally a local source of revenue and motor fuel taxes are earmarked for highway purposes, the taxes in North Carolina which support general state expenditures, including grants to local governments, are general sales, individual income, selected sales, and corporate income. Because it places less emphasis than is typical nationally upon property taxes and more emphasis upon the individual income tax with progressive tax rates, the state-local tax structure in North Carolina tends to be less regressive than the norm depicted by national figures.

National Comparisons

A variety of other measures can be suggested for comparing state-local fiscal patterns in North Carolina and other states. Table 3 sum-

Table 3

Data on Various Measures of State and Local Finance, 1964-65, National and North Carolina Amounts and North Carolina Ranking

Factor	U. S. Amount	N. C. Amount	N. C. Rank
Total state and local taxes collected per capita	$ 266.11	$ 188.30	44
Total state and local property tax collections, per capita	$ 118.25	$ 50.06	45
Per capita personal income	$2,566	$1,913	45
Total tax revenues per $1,000 of personal income	$ 105.04	$ 99.69	30
Property tax revenues per $1,000 of personal income	$ 46.68	$ 26.50	45
Property taxes as a percentage of total state and local taxes	44.43%	26.58%	43
State taxes as a percentage of total state and local taxes	50.7 %	74.4 %	4
State aid as a percentage of local general revenue	29.37%	49.62% *	2

Source: U.S. Census Bureau, *Governmental Finances in 1964-65.*
*Included in this calculation are state expenditures for primary and secondary education which are not usually considered to be state aid in this state but are so tabulated by the U.S. Bureau of the Census.

marizes some of these factors and shows national and state figures for each item as well as North Carolina's rank among the states.

In actual dollar figures, per capita, state and local tax collections in 1964-65 amounted to $266.11 nationally. In North Carolina they were $188.30, and the state ranked forty-fourth in this factor. In dollar terms, therefore, the total state and local tax burden in North Carolina is relatively low. Property tax collections nationally in 1964-65 amounted to $118.25 per capita; in North Carolina they were $50.06, and the state ranked forty-fifth.

It is important at this point to note the low per capita personal income in this state. While nationally per capita income in 1964 rose to $2,566, it rose to only $1,913 in this state, and North Carolina ranked forty-fifth in the nation. When this reduced income capacity is recognized, the relatively low state-local tax bill looks somewhat different. For every $1,000 of personal income in 1964-65, total state and local taxes nationally amounted to $105.04. North Carolina's figure of $99.69 was below the national average on this measure, but the state's rank was thirtieth. In other words, while the per capita dollar levy is only forty-fifth among the state rankings, when the low per capita income is recognized, North Carolina jumps to thirtieth in the amount of personal income citizens are spending to meet total state and local tax requirements. On the other hand, the property tax levy per $1,000 of personal income does not follow this pattern. Nationally this relationship in 1964-65 amounted to $46.68; in North Carolina it was $26.50. This state ranked forty-fifth, precisely the same rank it held on property tax collections per capita.

The 1964-65 figures show the continuation of a pattern noted earlier in the 1962 data: total state and local tax collections in North Carolina rely less heavily upon property taxes than is typical nationally. Throughout the nation, property taxes provided over 44% of all state and local tax revenues in 1964-65, but they provided less than 27% in North Carolina and the state stood forty-third in its reliance upon property taxes. The highest states were Nebraska (71.0%), New Hampshire (64.5%), and New Jersey (64.3%). The only states with less than 20% of total state and local taxes coming from property were Alaska (18.0%), Delaware (19.0%), and Hawaii (19.6%).

State taxes comprise a much higher percentage of the total of state and local taxes in North Carolina than is customary nationally. Although the states as a group provided just over one-half of all state-local taxes in 1964-65 (50.7%), the state government produced just under three-quarters of these revenues in North Carolina (74.4%). This finding is not surprising because this measurement in many ways is simply the reverse side of a coin which has the reliance upon property taxes, the major local tax source, on the other side. As might be expected, North Carolina ranks among the highest states in the Union, fourth, in the relative importance assigned state taxes in total state-local tax revenues. Only Delaware (79.3%), South Carolina (75.7%), and New Mexico (75.3%) place more emphasis on state sources. The three states with the greatest reliance on property taxes derive the smallest percentages from state taxes: New Jersey (29.9%), Nebraska (35.5%), and New Hampshire (36.5%).

The final factor on Table 3 illustrates the main reason why North Carolina places such a relatively high dependence upon state rather than local taxes. The state, through a number of grants and support of local elementary and secondary education, is devoting a large part of its revenue to supporting local services. Local general revenues include not just taxes, but all revenues, except those from utilities and for insurance trust funds. While, in the nation as a whole, state aid provides less than 30% of these local general revenues, in North Carolina the state is the source of 50% of these revenues among its communities. In 1964-65 North Carolina ranked second only to Delaware (51%) in the importance of state aid as a revenue source for local governments. Several southern states rank high on this criterion. Louisiana (47%) is fourth, South Carolina (44%) is fifth, and Mississippi (41%) is seventh. The least state support to local general revenues is given by New Hampshire (9%), South Dakota (11%), and New Jersey (14%).

Conclusion

The state-local tax structure in North Carolina has been affected by changes in the allocation of functions between these governments. In the 1930's, the state sought to relieve depression-created fiscal problems by assuming increased responsibility for two traditional local functions: highways and schools. The state needed new revenues before it could take these activities over entirely or give the local governments extensive support for them. The sales tax first entered the North Carolina tax structure at that time. This shifting of fiscal responsibility led to greater reliance upon state rather than local tax sources. Compared with the national pattern, North Carolina makes greater use of state taxes such as the individual income tax, to which progressive rates can be applied, and less use of property taxes, which are likely to be regressive. As a result, its state-local tax system tends to distribute the tax burden more in accordance with personal income or capacity to pay than is typical nationally among the states. □

The State University and Civic Responsibility

by Fred H. Weaver

(Editor's Note: The author is Vice President for University Relations of the Consolidated University of North Carolina. He delivered this address at the presentation of certificates to the Institute's 1966 Municipal Administration class.)

This occasion today represents a coming together of the University and the State in a way that holds a special interest for me. This is no doubt attributable in large part to the character of my experience in the University and the perspective that I happen to have on it at this time.

At the commencement exercises last June, more than 3,000 individuals were formally graduated from the University at Chapel Hill, with various degrees in courses of study ranging from two to ten or twelve years' duration. In the Consolidated University, 5,633 people received diplomas this year. They represent all kinds and concepts of educational program. Completing this one course at the Institute of Government are 43 graduates in municipal and county administration who have come to the campus for twelve weekends to improve their skills as public servants. *Symbolically*, no category of graduates more directly expresses the purpose of the State University or better exemplifies the development of its educational program or affords a more appropriate audience for airing some of its current problems and opportunities.

The theme "The State University and Civic Responsibility" is sufficiently broad to embrace the distinctive tradition of the University of North Carolina, the evolution of public universities generally, and the tensions that currently characterize relations between some universities and the public. You will be relieved to know that I do not propose to explore all of these. But I sieze the opportunity of expounding briefly some aspect of the University relationship to the State before a group of public officials on an occasion when they formalize or broaden their own professional connection with it. To do this I want to talk about the idea of "civic responsibility" in its broad or most elevated sense, the only sense in which it can ultimately serve the end of enlightened or enduring practical applications.

Idea Underlying Founding of University

When the University of North Carolina was established in the last decade of the eighteenth century, the idea of the academic university was already centuries old in Europe. It had also early found expression in the American colonies with the establishment of Harvard College in 1636, and later the College of William and Mary, Yale, Princeton, and others. But when Hinton James enrolled at Chapel Hill in January, 1795, there was something new under the sun. The first student had entered the first university to be established as a part of the organic law of an American State.

Mr. Weaver is presenting a certificate to John Alfred Jones, an engineer for the City of Greensboro. Fred Jones of Hertford, president of the North Carolina Association of County Commissioners, appears in the background.

The founding of the University proceeded from the same historic impulse as the Declaration of Independence and the founding of the American nation. The constitutional mandate for its establishment was drawn at Halifax in 1776 on the authority of the Provincial Council of Safety. In December, 1789, less than a month after North Carolina entered the Union, the General Assembly enacted a University charter which proclaimed "the indispensable duty of every legislature to consult the happiness of a rising generation and endeavor to fit them for an honorable discharge of the social duties of life by paying the strictest attention to their education."

Among the trustees named in the charter were three signers of the federal Constitution, leading statesmen of the patriot cause, and a number who had been conspicuous fighters in the Revolution. One

of these, General William Richardson Davie, introduced the bill for establishing the University and took the lead in securing its passage in the House of Commons. He presided at the laying of the cornerstone of the first building on October 12, 1793, and drew up the "Plan of Studies" wherein he stated that the purpose of the University should be "to train useful and respectable members of society."

University Makes American Ideals A Living Force

What was new was a university created in the spirit of the American Revolution and dedicated to making its ideals a living force. The union of an ancient academic tradition based on freedom of the mind with an infant system of government based on individual liberty marked the inception of the American state university. It opened up new realms of human happiness and fulfillment to the average man and directed the resources of university endeavor to the interest of the people as a whole.

The University was to be, of course, an academic institution devoted to improving the intellectual powers of the youth. But it was to be something more; it was to be an instrument for upbuilding the commonwealth, an agency of the State—open to all who possessed the desire to come and the mental equipment to benefit from its instruction. They would be taught the subjects deemed essential as preparation for productive and successful careers. But it was the further aim to inspire in them a sense of civic duty to charge their minds with the spirit of unselfish service to their fellow man.

After many years of simple and more or less isolated existence, these ideas and exertions of the founders evolved into a cherished University tradition. As the scope of public acceptance and support grew, there were attracted to the faculty scholars who appreciated the opportunity for significant public influence that was implicit in the close relation between the University and the whole life of the State.

In the first university to be created as an instrument of the new democracy, there developed logically a democratic student life. The variety of undergraduate organizations and activities became a vital part of the educational experience and fostered a high degree of student autonomy, student freedom, and student self-government.

The tradition that has been productive of much "trouble" for the University right down to the latest crisis—whether it be sit-in demonstrations, invitations to controversial speakers, law suits against the administration, beards, beatniks, or beer parties—is kindred to the independent spirit in which the University and the nation were nourished, and part and parcel of the concept of government which the founders of University and the nation struggled to establish. These descriptions are one consequence of the freedom of decision which is an essential condition for inculcating in young people a true sense of civic duty and for teaching them to understand and to bear the tasks of leadership in a self-governing democratic society.

Same University Requirements Spur Both Leadership Training and Controversy

What I am trying to say is that the requirements of the University's ability to serve the State by training leaders who understand the true character of free democratic society—for making possible such an institution as the Institute of Government—are the same as those that give rise to activities which bring criticism and therefore require explanation, understanding, and toleration.

There was, of course, for many years no real student government. There was not and there *is* not any guarantee of student freedom or student responsibility beyond the attainment of current resourcefulness functioning within the climate of a propitious tradition. There was until 1931 no Institute of Government. And I say this not simply to emphasize the great significance of the Institute for carrying out one of the most important University aims, but to illustrate the extent of relative separation that existed between the State University and the State.

"Nothing in our educational history" (I am quoting from an address by Frederick Jackson Turner in 1910) "is more striking than the steady pressure of democracy upon its universities to adapt them to the requirements of the people. From the State Universities . . . have come the fuller recognition of scientific studies, and especially those of applied science devoted to the conquest of nature; the breaking down of the traditional required curriculum; the union of vocational and college work in the same institution; the development of agricultural and engineering colleges and business courses; the training of lawyers, administrators, public men, and journalists—all under the ideal of service to democracy rather than of individual advancement alone . . . . And the people themselves, through their boards of trustees and the legislature, are in the last resort the court of appeal as to the directions and conditions of growth, as well as the source of income from which these universities derive their existence.

University Influences Whole People

"The State University therefore has both a peculiar power in the directness of its influence upon the whole people and a peculiar limitation in its dependence upon the people. The ideals of the people constitute the atmosphere in which it moves, though it can itself affect this atmosphere. Herein is the source of its strength and the direction of its difficulties. For to fulfill its mission of uplifting the state to continuously higher levels the University must, in the words of Mr. Bryce, 'serve the time without yielding to it;' it must recognize new needs without becoming subordinate to the immediately practical, to the shortsightedly expedient. It must not sacrifice the higher

efficiency for the more obvious but lower efficiency."

I will spare you a description of the extent to which universities have been further adapted to the requirements of all the people during the more than half a century since 1910. When Turner was hailing the universities' response to the call for scientific farming, scientific forestry, scientific experiments with all of nature's complex forces, and the scientific training of teachers, the Land Grant College at Raleigh (now North Carolina State University) was just 20 years old; the Normal and Industrial School at Greensboro (now the University of North Carolina at Greensboro) was 19. When Turner saw the state universities as safeguarding democracy, sending out experts in the fields of legislation and public administration who were trained to think for themselves and governed not by ignorance, prejudice, or impulse but by knowledge, reason, and highmindedness, the Institute of Government was yet 25 years away.

The rate of change in size, scope, and influence of universities in the quarter-century since World War II is exponential—in geometric progression. The increased numbers of students attending them is but one factor, and probably not the most important when we consider the growth of university expansion and continuing education. This program is itself an example of the increasing tendency for formal education to go on throughout one's active professional life. We used to say that one's real education began when his school or college years ended. Now it is more nearly accurate to say that instruction once begun never ends. This is true for lawyers, engineers, doctors, teachers, and those in virtually all technical vocations.

The walls that once made universities mere cloisters, remote from the life around them, happily have been breached from both sides. The universities' resources have been made available to the society that created them and supports them. But there is peril as well as progress in the new intimacy between the university and the people—the government—the world at large. The peril is that political and social controversy will invade the campus not as intellectual matters but as partisan and dogmatic interests, and that efforts will be made to eliminate the exceptional man or the unpopular doctrine, and thereby spoil the air of free investigation and search for truth.

Free University Representative Of American Principles

The American system of government has no agency that is more representative of its true principles than the free university. And the willingness of governments to protect their universities from political interference while relying upon them to preserve and perpetuate the very foundations of government is witness to the soundness of the idea. The task—the task of us all—is to see the connection between what is plainly useful and valuable in a high place of learning and what, although strange, disagreeable, or unpopular, is nevertheless legitimate and, in the larger sense, beneficial.

It is time for me to sum up. You complete today a course of work in the University that is designed expressly to strengthen and increase your skills as public servants, to enlarge your capabilities, to broaden the scope of your future work, and through you to improve our government. The State serves you. You serve the State. The State serves itself—which is to say all of us. The benefits are patently valuable, mutual, and self-evident. This is the State University functioning.

Conclusion

I have tried to show that this program that we complete today is a true and contemporary specimen of what the founders of the University had in mind when they said "The purpose shall be to train useful and respectable members of society"; that it is possible to continue this purpose with ever wider applications and benefits only if we realize that it is grounded in adherence to fundamental university principles. I have tried to show that these principles are basic not only to universities but to the kind of free democratic society that our forefathers established—that far from being alien ideas or subversive, as we hear people declare, they are essential elements of that society. I have tried to show that principles that sometimes must be defended in unpopular contests, such as radical speakers or peaceful demonstrations, are not less relevant as undergirding and animating such University work than that to which you have been party in the Institute of Government.

I am saying that the State University—in all its ramifications—is a beautiful idea, but it is ultimately neither beautiful nor effective in its aim to serve the democratic state unless it is genuine. And one proof of its genuineness is the existence and toleration of wide differences of creed, opinion, ideology, and belief, whether regarding the way you serve humanity or the way you cut your hair.

I have said this to you because I think there is no better example or interpreter of the bona fide University than a public servant like each of you who has witnessed the success of the idea in his own experience and felt its benefits in his own life, and seen for himself that they all come to focus in betterment of the state and society.

I can imagine no more fitting or more fruitful outposts of University influence than the city halls and county court houses of North Carolina. As you go there, newly equipped and, we hope, inspired to advance the common mission of us all, I bid you Godspeed.

INSTITUTE SCHOOLS, MEETINGS, CONFERENCES

A PATROL SCHOOL GRADUATES

A graduation exercise takes place at the Institute at the conclusion of the first of two 13-week Highway Patrol schools held this year.

Trooper Zane Grey Galleon represents the class in making response to Commissioner Godwin's address.

Commissioner of Motor Vehicles A. Pilston Godwin gives the address welcoming the new members of the Highway Patrol.

Colonel Charles Speed, Commander of the State Highway Patrol, congratulates Trooper W. R. Lynn while John L. Sanders, Director of the Institute, looks on. Joe Garrett, Assistant Commissioner of Motor Vehicles, is in the background.

The Legal Implications of Water-Quality Standards

by Milton S. Heath, Jr.

Heath

(Editor's Note: This article is adapted from a paper presented at the National Symposium on Quality Standards for Natural Waters, in Ann Arbor, Michigan, July 20, 1966. The author, an assistant director of the Institute of Government, has done considerable research and writing on water-resource law.)

The legal issues implicit in the formulation and application of water-quality standards are immensely involved — primarily because the problems that come up are hardly ever simple, clear-cut questions of law. Generally they contain very complex considerations of engineering, public policy, economics, and other factors, as conversations with professional engineers and water-pollution control administrators can clearly demonstrate. Therefore this article makes no pretense of being a definitive work on the subject.

I would, however, like to discuss four[1] questions with legal implications that concern people who live with this field of water-quality management. They are:

(1) How does the governmental machinery for formulating water-quality standards affect the application of the standards?

(2) What is the potential scope of standards—how far can they reach?

(3) What are the practical limits on regulation or on standards?

(4) What is the best method of dealing with established concerns and vested rights?

Each of these questions contains problems or policy matters with legal or governmental dimensions (I wish it could be said that in every case the legal element is part of the solution, but to tell the truth, sometimes it is more nearly part of the problem), and the hypothetical fact situations contained in this paper are designed to point up the issues of law or governmental policy.

I. THE MACHINERY FOR WATER-QUALITY STANDARDS

The logical place to start talking about water-quality standards is with the machinery for creating and administering the standards, because this machinery vitally affects the total consideration of water-quality standards.

Multiple Jurisdiction

Take, for example, the not unusual case of a fish kill that occurs on an interstate navigable river. It originates from faulty waste treatment or a spill at a plant located in State A, and it kills fish running from State A into State B. While this slug of pollution is passing downstream, there is equipment damage to turbines at a dam operated by an independent federal agency such as TVA or Bonneville, and cattle that drink the water are killed in both states. What action might be taken against this polluter, if the source of pollution were identifiable and causation could be proved?

Starting with enforcement possibilities, there might be a violation of an outstanding order of the water-pollution control agency of State A, and at the same time this incident might stimulate the initiation of a federal enforcement proceeding. Or if a federal enforcement proceeding were already under way, the incident might amount to violation of an existing federal court order. Thus dual enforcement proceedings are possible. While perhaps it is unlikely that there would be both federal and state enforcement proceedings, the possibility does appear to exist. If the double jeopardy aspect bothers anybody's constitutional conscience, the technical legal answer is that the constitutional protection against double jeopardy is not construed to apply to the separate actions of two independent sovereigns—that is, of the federal government and a state government. This is not an intrinsically appealing distinction, however, and there are signs that the Supreme Court may ultimately overrule its previous decisions on the subject and hold that cases like this one do amount to double jeopardy.

In the realm of civil liability, the independent federal agency that operates the dam—and would (we

1. Space does not permit covering several other areas in which significant legal or governmental considerations are involved. One is the interrelationship between standards of water-quality management and water-use controls or water rights. Another is the special problems that arise with impounded rivers. A third is the complex of issues surrounding the effects of wastes on the ecology of tidal estuaries. Also, no attention is given specifically to the new federal guidelines for water-quality standards, because they were intensively reviewed by other speakers at the Symposium.

will assume) manage its own litigation—could and probably would seek to recover for the damage to its turbines. Thus, there could be dual proceedings within the federal establishment, with one arm of the United States bringing an enforcement action and another arm bringing a civil action for damages.

A similar parallelism might be found within the state government. Many states have so-called "fish kill" laws that authorize either a fish and game agency or a water-pollution control agency to sue for recovery of the replacement costs of lost fish or wildlife or for penalties on account of fish kills. The applicable state legislation may well permit and contemplate independent fish-kill actions in addition to enforcement proceedings. Thus the polluter in this case could be hit twice by the state government as well as by the federal government.

And there are still those dead cattle, some of them in State A and some of them in State B. It is conceivable that civil actions might be brought in the courts of either State A or State B or in the federal district courts to recover damages for them.

This may sound like an extreme case, but within the bounds of possibility, it is a realistic one.

Why are there so many remedies available for a single wrong? The answer can be found in the evolution of present water-pollution control programs: from common law concepts of nuisance abatement and water rights; to the beginnings of a public health-oriented program of protecting sources of domestic water supply, in combination with conservationist-backed measures to protect fisheries; to autonomous broad-gauged state programs of water-pollution control; and finally, to the beginning and coming of age of a federal water-pollution control program. For the most part each new approach has been piled on top of the existing layers, with the marble-cake result that is illustrated in the foregoing hypothetical case.

While history may explain this labyrinth of overlapping jurisdiction, and while the system may work tolerably well under present conditions, it is far from ideal. Some of its defects are that it allows too much latitude for formulation of conflicting or disparate standards by several policy makers; that it permits too many possibilities for forum shopping and for conflicting verdicts by various triers of fact and law; and that it breeds too much diffusion of responsibility and confusion of the public.

Describing a problem, however, is different from offering a solution. Now that the federal government has moved bodily into the field of water-quality management, there really are only two alternatives: (1) for the United States to occupy this field, following the pattern laid out in such areas as labor relations; or (2) for the United States to channel its main energies into building strong state programs. Uncle Sam has some big carrots and some big sticks. The intriguing question is: to whom will he feed the big carrots and at whom will he wave the big sticks? Will the federal powers be used largely to encourage the states to upgrade their programs or, rather, to move in directly on the polluters? There will undoubtedly be some of both approaches, but where will the emphasis lie? As an observer, not a participant, I can only express my conclusion that no compelling case has been made for bypassing the state governments here, and that the most promising avenues for federal action lie in the direction of constructive federalism to help foster strong state programs.

Federal Activities

Another aspect of the machinery of water-quality standards that calls for comment is the present organizational structure of the federal program. In essence the Federal Water Pollution Control Act leaves the authority to shape and apply standards largely in the hands of a single executive official. We have here both the process of adopting standards (which is essentially a form of law making) and the process of applying standards in contested cases (which is essentially a form of adjudication) To vest these functions in one executive is something of a departure from the usual pattern of law making by legislative or quasi-legislative bodies and adjudication by courts or quasi-judicial agencies—not the only living departure, but nevertheless a departure.

In this age of social and political revolution it cannot be contended that institutional change is bad of itself. Time may reveal that the method adopted by the Federal Water Pollution Control Act is to be preferred in this particular area to a more orthodox approach. None the less, it is worth remembering that there are some fundamental reasons for assigning legislative functions to a body or group of men, legislative in nature, and for assigning judicial functions to courts or to quasi-courts. Measured by ordinary tests, the Federal Water Pollution Control Act places one executive and his agents in a singularly exposed position.

Local-Level Participation

Water-quality management is a complex business, but in a real sense the subject does not become truly complicated until one gets down to local government. And here is where success or failure of a pollution-control program often rides—in the local application of water-quality standards.

The complexity of local government is long and broad. It involves organization, finance, election procedures, substantive powers, jurisdiction, and a host of other matters, not forgetting politics. Prevailing patterns vary greatly from state to state and even within a given state. Furthermore, how the details of local affairs are handled can be highly revelant to a water-quality management effort (as well as to other enterprises). For example, a critical obstacle to a successful water-quality effort might be imbedded in a defective local

property tax assessment system. It is surely clear that a working familiarity with the needs and problems of local government is a vital tool in the kit of any federal or state water-pollution control official.

Take the matter of local government structure. My own state of North Carolina, at the local level, is marked by vigorous, largely nonpartisan city and county government. The counties are beginning to show an interest in utility services for developing areas, and the cities and towns have strong annexation powers that enable them to keep up quite well with fringe-area urbanization. Federal or state officials in such an area would probably be well advised to steer clear of proposals to create new special districts or regional authorities for sewage treatment or collection. But the same advice might not hold in a state where the local governmental structure is more complex, or where city and county governments are less viable.

Finally, there are two current aspects of the subject of local government that have special relevance to water-quality management. One is a revitalized county government that seems to be taking shape in many places, with a growing interest on the part of counties in supplying utility services, including sewage collection and treatment. This development makes it reasonable to expect the county to play an increasing role in abating water pollution.

The other item is a recent proposal for expanded reliance on local governments to build waste-treatment plants for particular industries as one means of stepping up the current over-all level of waste treatment.[2] This raises some interesting legal and policy questions that may be viewed differently in different states. The authority of cities and other local governments to enter upon such undertakings may be clear in some states but not so clear in others. Likewise, the wisdom of such a policy may seem apparent to some but not to others. My point is that these questions should be explored from state to state in order that the merits of this proposal can be properly evaluated.

II. SCOPE OF STANDARDS

How broad is the reach of water-quality standards? A great deal could be written on that question; but we will settle here for considering some of the factors at work.

When a lawyer analyzes the limitations or restraints that define the scope of regulatory standards, he is prone to think in terms only of legal limitations—what will the law allow. Actually, the limitations upon any form of regulation at any given time will be a mixture of legal and other considerations. Constitutional inhibitions or statutory authority will be *one* of the defining or limiting factors. But another will be the practical considerations that guide men's affairs. Also, the state of the art will operate as a limiting factor.

Here are three hypothetical situations intended to show how a mixture of legal, practical, and technical influences operates on the scope of water-quality standards applied in three contexts—esthetics, use of pesticides, and ground-water quality.

Esthetic Standards

For discussion purposes, let us assume a case in which a state agency adopts a standard of water quality that prescribes conditions of permissible color for certain waters. Assume that the primary motivation for this standard is to preserve the visual and esthetic aspects of the affected streams, and that these standards have little if any connection with public health considerations. Assume also that compliance with the standards is technically difficult and incrementally expensive to certain industries that are either already in compliance with all health-related standards or are willing to bring themselves in compliance therewith. Most of you will recognize that this situation treads upon an area in which legal restraints may limit the permissible scope of water-quality standards. These restraints may be both constitutional and statutory.

The constitutional problem is that regulation for strictly esthetic purposes does not fall within the orthodox definition of the police power—that is, the power to regulate. Health, safety, morals, public order, protection of property, general welfare—these are the tried and true measures of the extent of the police power.[3] This is, however, an area of the law which is in flux. The traditional position that esthetic values do not provide a valid basis of regulation has been modified generally, at least to this extent: that esthetic motives are acceptable if there is a valid, independent basis for sustaining a regulation. The courts sometimes have strained mightily to find such an "independent basis" upon which to sustain regulations. Some state courts have perhaps gone a step further and, in a few special situations (such as the preservation of historic sites) have sustained land-use regulations with no traditional police power foundation.[4]

The difficulties posed by the hypothetical water-quality standard I have described are that this standard has no traditional police-power underpinning and that, so far as I am aware, no "special situation" philosophy has been yet carved out by the courts covering this problem. This is not to say, however, that there are any categorical answers available here. For one thing, this area of law, as previously noted, is undergoing change. For another, in real life there usually is some traditional police-power shel-

2. Daniel A. Okun, "Using Tomorrow's Methods to Provide Tomorrow's Water Service," 86th Annual Convention, American Water Works Association (May, 1966).

3. On the subject of esthetic regulation, see, in general, Philip P. Green, Jr., *Cases and Materials on Planning Law and Administration*, Chapter 14, Part I Institute of Government, University of North Carolina at Chapel Hill (1962).

4. It should be noted that there may be a difference in the federal and state constitutional positions concerning esthetic regulations. That is, possibly federal regulations of this sort would be tested by different constitutional standards (probably more liberal) than state regulations.

ter to which one can repair in these matters—be it so obvious a consideration as that color must be reduced in order to provide adequate visibility for safe swimming.[5]

To speak briefly about the statutory situation: without having read all of the relevant state legislation, I would observe from scanning a few of the state water-pollution control laws that there might be some problem in finding authority for esthetically based water-quality standards under broad statutory terminology that does not quite zero in on the issue. The problem here is that, when dealing in an area of constitutional ambiguity, the courts are inclined to be cautious about liberally construing legislation in such a way as to require the gratuitous resolution of unresolved constitutional issues.

Regulation of the Use of Pesticides

Now consider a different context, in which the factors limiting the permissible scope of standards are more of a practical than of a legal nature: regulation of the use of pesticides, and especially of agricultural pesticides.

Consider the problems of developing and applying workable standards to control use of pesticides on lands that drain into waterways and endanger fish life. Let us assume that there is a satisfactory basic legal framework of pesticide control on the statute books; that adequate standards can be devised technically; and that there is a going program of research and detection in a state agency. To the extent of our knowledge, the pesticide control agency goes about its business and does a creditable job of controlling undue use of pesticides for nonagricultural purposes. Yet the fish go on being killed by pesticides.

What is the problem? When fish kills are traced to their source, it appears that a good case can be made which ties the continuing fish kills to agricultural usage of pesticides. It may be that, in a given situation, some of the blame can be placed on a law. Perhaps in a given state there is a statutory exemption for agricultural uses of pesticides or what amounts to an exemption written into the process of administering the law. None the less, the problem does not seem to be essentially a legal one. No constitutional issue is likely to be involved, and an adequate statute can certainly be drafted (if not passed).

I would venture that the root of the difficulty is that the best use of agricultural land is for farming, and contemporary efficient farmers use pesticides. At least, for legislators and administrators to act upon such a premise would be plausible.

Safer pesticides, or alternative methods of pest control, may eventually be developed. Some farmers may be able to control pesticide drainage into waterways. In such ways as these the problem in time may be reduced and perhaps even eliminated.

However, my point is not to pass any kind of judgment but to illustrate by this example a way in which the scope of water-quality standards may be restricted by largely practical considerations.

Ground-Water Quality Standards

The development of regulations for protection of ground-water quality appears to have lagged considerably behind surface-water regulation. There are regions and states (of which Michigan is an example) with going programs. Also, localized regulation has been practiced in some special problem areas. And some states, like New York with its pending ground-water classification proposal, are now moving in on the problem.[6] But there are large regions of the country in which little if anything has been done toward development of standards of ground-water quality.

Perhaps, in a sense, more has been done in other ways than by direct water-quality regulation. I refer to such measures as salt-water intrusion barriers, well-spacing requirements, and other regulations concerning well construction and operation.

If the question arises why the present scope of state standards of ground-water quality regulation is so relatively limited, I do not believe that the answer will be found in the legal sector. Rather, the scope of ground-water standards is now limited, in comparison to surface-water standards, for two reasons that do not involve the law. First, in many places there have not yet arisen the pressures for action to protect ground-water quality that have arisen to protect surface waters. Second, the state of knowledge and capability concerning ground-water quality is also relatively undeveloped in comparison with surface-water technology. Furthermore, there are differences in the nature of ground and surface waters that may make direct transfer of an approach that has worked for surface waters to ground waters impractical. Ground water does not generally flow in channels; it does not afford the same dilution of wastes as surface waters; and after-the-fact enforcement of standards may not serve the same purpose for ground waters as for surface

5. To range slightly afield, a good recent illustration of the typical mixture of elements in problems of this sort is given by the decision of the 2d Circuit Court of Appeals, which ordered the Federal Power Commission to consider factors such as preserving natural beauty in evaluating the proposed Consolidated Edison pump-storage generating plant at Storm King on the Hudson River. *Scenic Hudson Preservation Conference v. Federal Power Commission*, et al., 145 F.2d 608 (CA2 1965). Involved there was a statutory framework directing the Federal Power Commission to license only projects best adapted to a comprehensive plan, including specifically "recreational purposes." (Federal Power Act, Section 10.)

6. New York is holding hearings on a proposal by the State Department of Health to classify all of the ground waters in the state. The proposal would declare that the best use of fresh ground water is exclusively for water supply. A distinction would be made, however, between standards governing, respectively, discharges into consolidated surface formations and into unconsolidated formations. In essence, what New York is considering is an effluent standard for discharges into the ground designed especially to safeguard future water-supply sources.

waters, because of the relative permanence of ground-water contamination.

While legal factors as yet play no large role in limiting the scope of state ground-water standards, this may not be true of potential *federal* regulation. In the 1965 Muskie Committee hearings there is an intimation of a possible future need for federal controls over ground-water pollution.[7] Obviously, the constitutional logic for federal regulation of surface streams cannot simply be automatically extended to ground waters, although some analogous reasoning may prove to be applicable. A ground-water basin is hardly an artery of navigation or commerce in the same sense as a navigable river. It will be interesting to see just what route is traveled in providing constitutional support for federal ground-water pollution controls, when and if the question should arise.

III. PRACTICAL LIMITS ON REGULATION

Standards of water-quality regulation may encounter severe practical limitations or problems in two dimensions. One of these dimensions involves dealing with the individual concern or polluter. The other involves dealing with polluters in the mass.

In the former case the limitations are felt when a water-quality standard first operates with truly coercive effect upon an individual polluter—when, for example, it forces a concern to go out of business or to take some lesser but still drastic step, such as moving to another location. The higher the standards are set, the more instances of this coercion there will be. One of the challenges of the regulatory process is to set standards high enough to radiate a moderate amount of coercion, but at the same time to devise humane and feasible ways to cushion the impact upon the individual concern.

In the latter case the problem is how to react in the presence of the limits of assimilative capacity of a receiving water—or how to allocate assimilative capacity when the maximum burden is reached or is in sight, after all reasonable steps have been taken.

Coercion of the Individual Concern

When considering the practical limits in dealing with the individual concern, the prime legal issue is: How far can one go, in the name of an over-all scheme of regulation, in coercing an individual regulated unit—even to the extent of confiscation? The legal answer is expressed in terms of "substantive due process", i.e., what degree of regulation is permissible in light of the constitutional prohibitions against deprivation of property without due process of law (or any of several other equivalent formulations). Under the banner of public interest, some coercive or confiscatory effects are clearly constitutionally tolerable, as illustrated in the landmark case that sustained a Virginia law authorizing the uncompensated destruction of ornamental cedars that harbored the cedar rust fungus, in order to protect apple orchards from this disease. *Miller v. Schoene*, 276 U. S. 272, 72 L. Ed. 568 (1928).

To bring the subject closer to home: Does the fact that certain actions are tolerable legally justify adoption of a flat standard of water-quality treatment as a matter of administrative convenience? Would it support a uniform requirement of secondary treatment, or a particular secondary treatment process such as activated sludge? There is no foolproof answer to questions of this sort. On the one hand, some comfort can be found in judicial statements to the effect that "the inclusion of a reasonable margin to insure effective enforcement" is allowable. *Village of Euclid v. Ambler Realty Co.*, 272 U. S. 365, 71 L. Ed. 303 (1926). On the other hand, it is questionable whether as a general rule the confiscation of individual interests can be sustained as an ordinary incident of administering a general standard pursuant to a regulatory program. In other words, while the public interest may require compelling compliance with a rational standard of regulation, it may not also justify the failure to compensate those who are affected for their losses.

Several ways have been evolved in related fields of law to cope with this root problem of regulation. For instance, in zoning law, sufferance of nonconforming uses, combined with administrative discretion to allow variances, has made it possible to isolate and deflect the pressures of hard cases from the main body of the law. In some other fields of regulation, the direct approach of providing a mechanism for compensating the losers has been used. In still other areas, exemption of *de minimis* cases has been the safety valve.

No clearly established machinery appears to exist for meeting this unavoidable issue, and it surely is time to begin inquiring after solutions. For example, would exemption of *de minimis* cases go very far toward meeting the issue in a situation where the real difficulty is dealing with the gross polluter who has difficulty in defraying abatement costs? Would legislators be willing to grant variance powers to water-pollution control agencies? Could workable objective criteria be devised for identifying cases in which compensation might be granted? These are the kinds of questions that should be raised and evaluated.

Allocation of Assimilative Capacity

There is currently some debate and re-examination of the concept of the capacity of receiving waters to assimilate wastes. If nothing more, this can perform the vital function of compelling water-pollution control administrators to scrutinize all available alternatives

7. Hearings before a Special Subcommittee on Air and Water Pollution of the Committee on Public Works; United States Senate. 89th Congress, 1st Session (May 19-21, 1965). Testimony of Murray Stein at p. 117.

before having recourse to the allocation of assimilative capacity as a tool of water-quality management. A careful review would include consideration of such measures as advanced treatment, stream-flow augmentation, a second look at possibilities for industrial process changes, and even indirect approaches such as water-use laws and land-use control. In a given case any or all of these possibilities, and perhaps others, may be applicable to widen the available margin. Eventually, though, a point will be reached when sometimes it will be necessary to say "no" to potential new entrants. In other instances the allocation of assimilative capacity will be required; this is already happening under some state programs, with allocation based on factors such as relative water use, and with allowance for growth where feasible. Almost inevitably this process is destined to undergo much refinement in the coming years.

There may be some lurking legal problems in this catalogue of alternatives of allocation. For example, new legislation might be required in some states to make it possible for stream-flow augmentation for water-quality management to serve its intended purpose, or to implement land-use or water-use controls. Moreover, it is not unlikely that some new legislation may be needed to develop or improve the framework for allocation of assimilative capacity.

The best of our state agencies are probably already resolving these practical problems of water-quality regulation through the kind of expertise that is a hallmark of the administrative process. A job that very much needs doing is to compile and evaluate the experience of these agencies in dealing firsthand with these issues. This would be most helpful in developing needed objective criteria for application in this area.

It seems likely to me that in time water-quality regulation will move toward something resembling public utility regulation. This is not to say that there will be or should be identical approaches.[8] Rather, there is a function to be performed in water-quality regulation similar to the function performed by public utility regulation, and water-quality managers may evolve their version of a formal machinery for this purpose.

IV. THE VESTED-RIGHTS PROBLEM

Finally, there is the problem of applying standards in situations that involve claims of "vested rights." Typically these deal with old industrial plants long located in the same place.

Consider a single example that only scratches the surface of a very difficult area for administrators: An established mill received the approval of a state water-pollution control agency of State A in 1962 to discharge its wastes into a large river after approved treatment. This is a plant with liquid wastes that impose a major pollutional load on the receiving stream, such as a yeast plant. The conditions on which this particular waste discharge was sanctioned involved construction of settling lagoons (including a final holding basin), as well as installation of complicated water-control instrumentation, which allow waste discharges to be synchronized with high stream flows in order to take best advantage of the dilution capacity of the river. The cost of this system is substantial, although somewhat cheaper than alternative conventional secondary treatment. The effect of this system is, let us assume, about equivalent to secondary treatment in terms of average stream flows.

The river on which this plant is located is a navigable interstate stream, and it flows into a sister state below the point of this waste discharge. There are periodic complaints concerning the effect of these wastes on the river after it crosses the state line. In 1966 investigations are made by water-quality engineers for the water-pollution control agencies of both states. These investigations result in a clean bill of health for the yeast plant's treatment system, approved in writing by officials of both states.

Late in 1967, following the effective date of the federal water-quality standards legislation, the Federal Water Pollution Control Administration disapproves the standards of State A, insofar as they permit treatment of the type undertaken by this yeast plant, on the theory that this is not the best practicable form of treatment available, or that it amounts to discharging without treatment wastes that are amenable to treatment. Assume that thereafter:

(a) A federal enforcement proceeding on this river results in a federal court order requiring the yeast plant to adopt orthodox secondary treatment measures at a cost exceeding the original treatment system, but the treatment system does not significantly improve the quality of the receiving water; or

(b) State A, under the stimulus of the FWPCA disapproval, revises its standards and thereafter orders the yeast plant to take the action noted under (a) above.

Does the yeast plant have a valid defense against the enforcement order in either case (a) or case (b)?

On the law, it may well be that the plant has no valid defense against this enforcement order in either case. The closer question doubtless is presented by the state agency that modifies its original order under the prompting of federal standards. This case, as described, has a smell of estoppel to it. Although technically the doctrine of the estoppel does not usually apply to government agencies, a reviewing court might be tempted by the facts of this case to look hard for a way to excuse this defendant.

Simple assertion of a constitutionally vested right to an established treatment standard probably would not be sustained. State legislatures

8. Nor is it to suggest that the industries subject to water-pollution control laws are likely to be or should be regulated generally as public utilities. I am referring only to water-quality aspects, or at most to water-use aspects.

have sometimes included grandfather clauses in water-pollution control legislation, reflecting the claims of established mills to preferred treatment, but these have not always achieved their intended purpose. (Witness such a case as *State v. Glidden*, 228 N. C. 664, 46 S. E. 2d 860 (1948), in which inclusion of a grandfather clause invalidated the statute).

A case like this one points up the need for certain routine precautions by regulatory agencies. One such precaution is to be sure that all enforcement orders contain language that clearly preserves the agency's prerogative to modify its orders in light of changed conditions. Precautionary language of this sort in the original order would certainly strengthen the position of the state agency in a subsequent proceeding such as the one described here. Another precaution is to give the industry a full hearing concerning the modified order. A licensee who makes investments in reliance upon a license may be entitled, as a constitutional right, to a full dress hearing on any renewal or substantial change of the license. While this concept may not be strictly relevant to our situation, the same principle seems to apply.

If a subsequent federal enforcement order were involved (case [a]), the orthodox answer would probably be that the federal government is not bound by the prior action of a state agency on the same subject.

While I have talked here strictly about the legal aspects of this problem, in advising an administrator on this matter I would not stop there. It would not take many cases like this to bring a going program into disrepute. The administrator who decided to move against the industrial plant under such circumstances would at least have to be prepared to defend himself against heavy political pressures. The hard fact is that this plant has in its favor a potent combination of equities and practical arguments. There are going to be plenty of cases similar to this one in the coming enforcement era of water-pollution control, and they will tax the ingenuity of administrators and policy makers. It is none too soon to begin developing strategies for dealing with them.

CONCLUSION

This has been a capsule look at the legal aspects of formulating and applying water-quality standards, but some conclusions can be outlined.

First, most of the broad legal issues in the field embody a rich mixture of law, engineering, policy, governmental administration, and economics. On this plane of discussion a simple, straightforward, unmixed question of law is rarely met.

Second, the blossoming of a full-fledged federal interest in water-quality management opens up many new opportunities for more effective water-pollution abatement, but at the same time it complicates an already complex field of activity.

Third, the most difficult—and at the same time the most interesting—unresolved issues for the lawyer and public administrator in the field of water-quality standards revolve around the practical limitations on regulation discussed in Part III of this paper. While these may not always have been matters of pressing concern to water-quality managers before, the quickening pace of water-pollution control activities will bring these questions to the forefront soon. The time has come to take a long, hard look at these "practical limitations" on regulation of individual polluters and of polluters in the mass. □

Attorney General's Rulings

Compiled by George M. Cleland

ARCHIVES AND HISTORY
Custody of Public Records

15 June 1966

A.G. to Dr. Christopher Crittenden

Question #1: Does a county official have authority to remove or permit to be removed from his custody official county records belonging to his office for the purpose of deposit in a local historical society?

Question #2: Does a board of county commissioners have the authority to order a county official to remove or permit to be removed from his custody county records belonging to his office for the purpose of deposit in a local historical society?

Question #3: If a board of county commissioners orders a county official to remove or permit to be removed from his custody public records belonging to his office, may the official legally comply with the order?

Answer: To each of the questions the answer is "No." With reference to question (1) the statutes [G.S. § 121-5] provide that official public records may be destroyed or otherwise disposed of only after the custodian of the records certifies to the Department of Archives and History "that such records have no further use or value for official business"; and Archives and History states that "such records appear to have no further use or value for research or reference . . ."; and the appropriate governing body authorizes destruction or some other disposition. The answer to question (2) then follows that county commissioners do not have the authority to order or permit the removal of county records from the custody of a proper county official unless and until the county official involved has "certified" and

the Department of Archives and History has "stated" as required by G.S. § 121-5. The "No" answer to question (3) is based upon G.S. § 132-3, which holds a public official criminally liable if he removes, or allows the removal of, public records without the consent of the Department of Archives and History.

CONTRACTS

Public Bidding

23 August 1966

A.G. to Laurence A. Stith

Question: Given a situation in which a county has leased a hospital facility to a non-profit corporation with the agreement that the corporation may, with the consent of the county board of commissioners, make additions and improvements to the building, must the operating corporation comply with the provisions of G.S. § 143-129 — i.e., advertise for bids—when it plans to make an improvement to the facility using only its own funds.

Answer: Since the lessor-lessee device is merely used to operate and develop a county facility, it would be highly expedient and most desirable as a matter of public policy to comply with G.S. § 143-129. The money to be expended, although not derived from tax funds, nevertheless has been derived from the operation of a facility of the county which no doubt has been leased to the non-profit organization for a nominal sum. The county would do well to insist on compliance with the statute in question.

COUNTIES

Disposal of Personal Property

15 August 1966

A.G. to William A. McFarland

Question: May a county dispose of personal property at a public or private sale and by what authority?

Answer: The authority of a county to dispose of surplus personal property by public or private sale is implied in G.S. § 153-2(3) (4) and G.S. § 153-9(13). Should the county decide to dispose of the property at private sale, it may deem it wise and expedient to secure informal bids in order to ascertain that a reasonable and fair price is being paid.

MUNICIPALITIES

Residence of Inspectors

20 May 1966

A.G. to (Mrs.) Pearle N. Steagall

Question: Must a building or electrical inspector be a resident of the municipality in which he is appointed to serve?

Answer: This office has previously ruled that a building or electrical inspector is a public officer; therefore, in order to meet the constitutional requirements, he should be a resident of the municipality in which he serves.

Residence of Planning and Zoning Commission Members

13 May 1966

A.G. to Arthur M. Utley, Jr.

Question: Must members of a town planning and zoning commission be residents of the town in which they serve?

Answer: As the question has not been definitely decided by our Supreme Court, a prudent course would be to assume that membership on a municipal planning and zoning commission constitutes one a public officer; as a public officer a commission member would be required to be a resident of the municipality he serves. While it would appear from the language in the case of *In re Markham*, 259 N.C. 566, that membership on a municipal planning and zoning commission would not be a public office requiring members to reside within the municipality, the case of *Harrington v. Renner*, 236 N.C. 321, is some authority to the contrary. If a town has extra-territorial zoning authority under G.S. § 160-181.2, then, of course, membership of its planning and zoning commission would include persons living within the area outside the municipal limits.

Sale of Cemeteries

9 August 1966

A.G. to Koy E. Dawkins

Question: May a town convey its cemetery to a non-profit perpetual care association by private sale?

Answer: No. A municipality can dispose of real property only by public sale under G.S. § 160-2 (6), 160-59, and 160-200(2). Private sales of realty can be authorized by special act of the General Assembly.

Institute Trains Community Action Officials

by Dorothy J. Kiester

Miss Kiester, whose field at the Institute of Government is social work, is responsible for the current training program for Community Action directors.

The Institute of Government has recently undertaken a training program for a new breed of local officials, the directors of Community Action Agencies. County and municipal government is complex enough in the administration of traditional, accepted, more or less well understood functions and activities. The addition of community action programs to engage in the "war on poverty" has added another facet of complexity, and perhaps another dimension of public responsibility. The nature and extent of local government involvement is an evolving phenomenon, just as is the very character of the work these programs are undertaking. The enterprise is a new effort of a democratic society to live up to its principles, to find a way of making them equally applicable to all citizens.

Unfamiliarity of Program

The frankly experimental nature of the community action programs makes many people nervous, because the programs tamper with the status quo—using public funds to do so. There is no unanimity as to what specific goals should be. No one knows yet what will work, and what seems to be working one place may not transplant at all successfully to some other apparently similar community. There are many, many imponderables, including such elements as the personality and skill of the director of the Community Action Agency, the readiness of the established community to accept change, the apathy or hopefulness of the poor people who need for many things to change if they are to have a chance to participate fully in the life of the community and in the management of their own lives.

There are very few experts in this new business of community action. Skills in working with people, in knowing how local government functions, in understanding the problems and consequences of poverty — all are important. So are high levels of skill in public administration, in diplomacy, in creativity. The "job qualifications," and thereby the training required to perform effectively as director of a community action program, are still more theoretical than practical because the role of this new agency in the community and in city and county government is only beginning to emerge. It will be a long time before any clear definition is hammered out, and if such a definition ever is arrived at, there will no doubt always be many local variations.

The fact remains, however, that since the Economic Opportunity Act was passed and funds became available in 1964, some $43,000,000 have come into North Carolina to be spent as wisely as our judgment in this infant program can manage. There are now 41 Community Action Agencies (CAA), involving 84 counties, in the state. Eleven of these agencies are under the sponsorship of the North Carolina Fund, the state's own forerunner of the Office of Economic Opportunity; the remainder are funded from OEO with a local matching of 10 per cent in cash or in kind. Those designated as North Carolina Fund agencies also draw heavily on the resources of the Economic Opportunity Act for a variety of projects.

Need for Training

The 41 new CAA executives bring widely varying backgrounds to their jobs, but they all express a need for training. Their functions and responsibilities are multiple; the very multiplicity makes administration difficult. Community-development objectives are not always clear, and community leaders are not always convinced that the changes implicit in community action programs are really desirable. The boards of these new agencies, all nonprofit organizations, include representation from local governing bodies, from the existing social agencies, from community leadership in general, and — very significantly — from the disadvantaged groups the program seeks to help. Achieving mutual understanding of problems, goals, and program approaches taxes the skill

and ingenuity of the most clear-eyed director – and the patience and tolerance of all concerned.

As some of the practical problems have become clear, the demand for training has become more urgent. The University of North Carolina at Chapel Hill, with the strong support of the North Carolina Fund, has secured a training grant from the OEO to finance a new center the purpose of which is specifically to tackle these problems of training and consultation and program evaluation. Assorted academic and bureaucratic obstacles have delayed its operational beginning, but in the interim, an ad hoc committee, including CAA executives and board members, asked the Institute of Government to provide training in at least one area of particular need—public administration. As negotiations proceeded around this initial request, a few key people in the North Carolina Fund and the State Planning Task Force urged that the plan be broadened to include also some specialized training in principles of community organization and community development, as well as public administration.

Psychologist Richard McMahon and Political Scientist Ken Howard, of the Institute staff, talk in an after-class session with participants in the Community Action executives' training program.

Institute's Training Program

As a direct response, therefore, to an expressed need in the field, the Institute of Government has begun its first training series for the executive directors of Community Action Agencies in North Carolina. The series covers five sessions of two full days (18 hours of instruction) each, spaced at three-week intervals. It began on August 22, 1966, and will conclude on November 16, 1966. Thirty-seven of the 41 directors or their deputies are registered in the course. At the request of the directors, a special session has been planned for CAA fiscal-management people during the October 24-26 session, when budgeting and accounting will be discussed.

The first session was devoted to an examination of the structure and framework within which the Community Action Agencies operate—local government, public agencies, interrelationships, and where the CAA's fit into the existing structure.

The second session dealt with basic administration – decision-making, leadership, authority, and control; supervision; delegation—and includes an evening program on the legal problems of the poor.

The third two-day meeting was devoted to human factors in management – personnel administration, human relations, and motivation, plus an evening discussion on race relations.

The fourth session will go into administrative techniques – where does the money come from for any given governmental activity; budgeting, accounting, plus four hours on manpower and training – and includes an evening program on public relations.

The fifth and final session will consider the role of the board and the executive, program planning, community involvement, and the wide variety of interrelationships in community action programs. This meeting concludes with a two-hour evening discussion on local politics and community action.

Throughout the course all phases of the teaching attempt to relate basic principles in whatever field is under discussion to the practical application of these principles in community action programs. The faculty comes primarily from the Institute of Government, but also draws on the particular knowledge and competence of top administrative personnel in various related agencies. Institute staff members who are participating in this training program are Warren J. Wicker, S. Kenneth Howard, Donald Hayman, Richard McMahon, Elmer Oettinger, and Dorothy J. Kiester. In addition the Institute will count on the expertise of George Esser, North Carolina Fund; John Morrisey, North Carolina Association of County Commissioners; Larry Williams, Office of Economic Opportunity; Robert Byrd, UNC Law School; Dr. Burns Jones, State Department of Public Health; Robert Marley, State Department of Public Instruction; Robinson Everett, Duke University Law School; Hugh Cashion, Employment Security Commission; James Ellerbe, State Department of Public Instruction; Rocco Fazio, North Carolina Fund; Nathan Garrett, North Carolina Fund; Morris Cohen, UNC School of Social Work; Brent Peabody, Office of Economic Opportunity.

Conclusion

This training program is designed to help CAA executives cope with some of the problems they face in their efforts to make the "war on poverty" effective. It is also predicated on the assumption that community action, as the term has come to be accepted, will become an increasingly significant factor in planned social change.

Government at all levels has a vital stake in the outcome of these efforts and can probably anticipate more and more involvement as effective patterns of operation begin to evolve from the present stage of experimentation.

Community action, almost by definition, will or should continue to be a dynamic activity, seeking progressively better solutions to the old problems of how to make "operational democracy" a reality. Many mistakes will be made and much patience will be needed to capitalize on experience, refining what is good and reworking or discarding what is ineffective and wasteful. It is so in all new social endeavors; it is so in the practice of democracy. □

BOND SALES

From May 17, 1966, through August 30, 1966, the Local Government Commission sold bonds for the following governmental units. The unit, the amount of bonds, the purpose for which the bonds were issued, and the effective interest rates are given.

UNIT	AMOUNT	PURPOSE	RATE
Cities:			
Albemarle	$ 130,000	Sanitary Sewer	$3.57
Asheboro	120,000	Airport Improvement	3.75
Creedmoor	401,000	Water and Sewer	4.00
Elon College	40,000	Water	4.47
Greensboro	1,000,000	Parking Facilities Revenue	3.50
Rocky Mount	2,000,000	Sanitary Sewer	3.94
Sylva	300,000	Sanitary Sewer	4.30
Wendell	145,000	Sanitary Sewer	4.39
Counties:			
Cabarrus	3,000,000	School Building	3.68
Cumberland	2,000,000	County Auditorium	3.82

Thomas Attends Paris Conference

Mason Thomas, assistant director of the Institute of Government, who specializes in the fields of juvenile delinquency and public welfare and formerly served as juvenile court judge for Wake County, has returned from a conference at the International Children's Center in Paris. The session, designed as a training program for juvenile court judges from all over the world, extended from September 16 to October 9. Thomas attended the meeting on a fellowship awarded by the Center on the recommendation of the National Council of Juvenile Court Judges, which designated him as its official representative.

The International Children's Center, which receives some financial support from the United Nations, devotes itself to supplementing the training of people who work with children, such as teachers, social workers, and personnel from children's institutions. □

INSTITUTE HOLDS FISHERIES SCHOOL

During the summer the Institute of Government conducted three sessions of schools for the Division of Commercial and Sports Fisheries of the Department of Conservation and Development at Morehead City.

The first session was a pre-service school for potential employees held June 12-18. Douglas Gill, William Campbell, and L. Poindexter Watts, of the Institute Staff, taught the legal subject matter, and the rest of the faculty included Dr. David A. Adams, Commissioner of Commercial and Sports Fisheries; Dr. A. F. Chestnut, Director of the University of North Carolina's Institute of Fisheries Research at Morehead City; Dr. Austin B. Williams, Institute of Fisheries Research; Howard Lupton, State Board of Health; and Captain Reginald Lewis, Division of Commercial and Sports Fisheries.

The other two schools were identical in-service training sessions for all the enforcement officers of the Division of Commercial and Sports Fisheries. Half of the men attended from August 8 to 12, the other half from August 22 to 26. The curriculum and faculty were the same for both sessions: L. Poindexter Watts, of the Institute of Government, taught the legal background. The Research and Development Section of the Division handled the sessions on Research and Development, particularly explaining its expanded program. Surveying was taught by Carl Dempsey, of the Department of Conservation and Development and Geodetic Survey. Richard McMahon, of the Institute of Government, taught Practical Public Relations, and George Ross, United States Fish and Wildlife Service, Department of the Interior, was responsible for Federal Law Enforcement. L. E. Allen and L. E. Williams, of the State Bureau of Investigation, taught Firearms, and Leon K. Thomas, Assistant Commissioner of Commercial and Sports Fisheries, covered administrative procedures. First Aid was taught by Eugene Pond, of the United States Coast Guard. □

Book Reviews

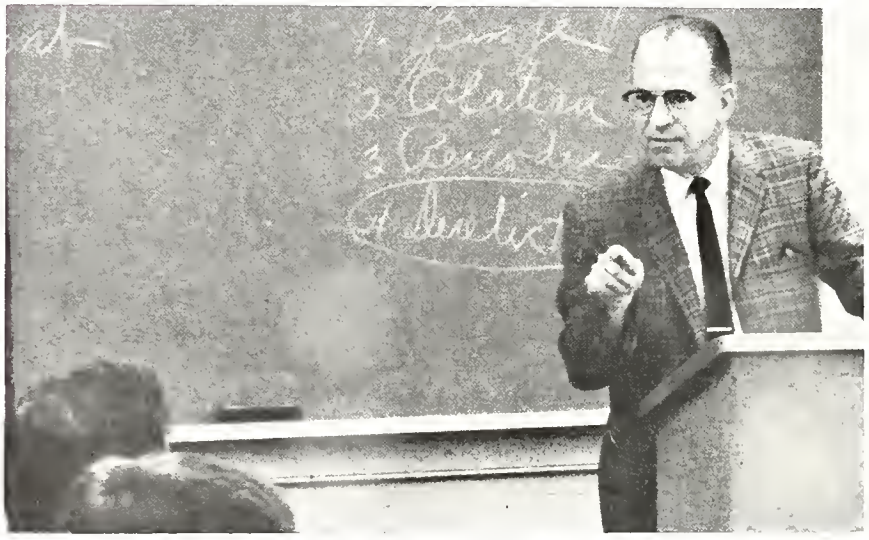
LAW AND PSYCHOLOGY IN CONFLICT by James Marshall. New York: Bobbs-Merrill, 1966. 119 pages.

The sweeping title of this book is a bit misleading. The author does not address himself to all the points of contact where law conflicts with the theories and findings of psychology; rather, the focus of the book is upon the rules of evidence and procedure that appear to conflict with psychology. Perhaps the term conflict should not be used at all, for the author's contention seems to be that the rules of evidence and procedure fail to take into account the inadequacies of perception and narration as shown by psychology, rather than that there is an actual conflict between psychology and the rules of evidence and procedure.

In support of his thesis Marshall describes several writings and experiments in the field of transactional psychology as well as an interesting experiment that he constructed and carried out on his own. The conclusion drawn from these writings and experiments is that perception is a selective process and that narration is an imperfect means of communication. A witness does not perceive raw events; what he sees is colored by his personality make-up and his experience. By the same token, the use of language is affected by experience and other subjective factors and is thereby rendered an imperfect means of communication. These are matters that intellectually curious judges and lawyers have known for a long time, though they may not have articulated them, and concern about the inadequacies of perception and narration have appeared in the writings of Jerome Frank, Robert Hutchins, Mr. Justice Fortas, and Jack Weinstein, among others. Mr. Marshall's contribution to the literature is a review of the relevant psychological findings and theories and an explanation of their significance for the fact-finding process in judicial trials.

This reviewer fully accepts the significance of what *Law and Psychology in Conflict* has to say, nevertheless he feels that the author's approach is wrong. The findings and theories of transactional psychology are available for everyone to read in journals and books; what is needed is concrete proposals for changes in the rules of evidence that facilitate reasonably accurate fact-finding *and* at the same time take account of the other policy ends served by a judicial trial. As Professor Weinstein has written in "Some Difficulties in Devising Rules for Determining Truth in Judicial Trials," 66 COLUM. L. REV. 223, 242 (1966):

"A system for determining issues of fact very accurately in all tribunals might permit a few adjudications a year of almost impeccable precision. But the resulting inability of the courts to have time to adjudicate the thousands of other pending litigations would mean that justice would be frustrated; people could flout the substantive law with relative impunity, knowing that the likelihood of being brought to trial was remote; and plaintiffs would be forced to avoid litigation because of its extraordinary expense and delay. A cheap and swift, rough and ready, approximation of the facts with increased risks of error would be much more effective in carrying out social policy as embodied in the substantive law."—W.A.C. □



Dr. Norbert Kelly, Education Director, North Carolina Department of Public Health, lectures on Basic Family Relationships to the training seminar for probation officers handling the alcoholic offender. The seminar was held from August 29 to September 2.

Clerks and Recorders Hold National Conference

Three North Carolinians who hold high office within the National Association of County Recorders and Clerks attended the NACRC board meeting in New Orleans on July 15. At left, Eunice Ayers of Forsyth County, who is immediate past president of NACRC and currently chairman of the board of directors, talks with Ray E. Lee of Los Angeles.

Duke Paris, Register of Deeds of Alamance County, is a member of the Board of Directors of NACRC. On the right is Horace Skinner of Rockford, Ill. Betty June Hayes, Register of Deeds of Orange County, is secretary-treasurer of the organization.

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NEW PUBLICATIONS of the INSTITUTE OF GOVERNMENT

Now Available

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by Robert E. Phay

Judicial Review of Property Tax Appraisals in North Carolina

by Donald A. Furtado

Police Community Relations

edited by Norman E. Pomrenke

NOVEMBER AT THE INSTITUTE OF GOVERNMENT

. . . a preview of coming schools, meetings, and conferences

	November
Driver License Hearing Officers	October 31, 1-2
Committee of Clerks of Superior Court	Every Wednesday
Annual Institute for Employment Security Employees	3-4
Police Administration	8-10
Municipal and County Administration	10-12
Magistrates	10-12
Community Action Program Directors	14-16
North Carolina Association of Assessing Officers	16-18
Registers of Deeds	18-19
Press-Broadcasters Court Reporting Seminar	18-19
Juvenile Probation Officers	29-30