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North Carolina has stricter alcoholic beverage control laws than most states. This issue contains an article on liquor control in this state.

photo by James Callaway

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WHAT SHOULD WE HAVE FOR DRINK?
Legal Controls on the Use of Alcohol in North Carolina

Michael Crowell

If all the world were apple pie,
And all the sea were ink,
And all the trees were bread and cheese,
What should we have for drink?

—Mother Goose

The most extreme recorded drinking feat was one recorded in 1810 at Wroxham, Norfolk, England, where a man was witnessed to have lowered 54 pints of porter in 55 minutes. This must be regarded as an exaggerated report and the true record is closer to 30.79 pints in 60 minutes by Horst Pretorius (West Germany), aged 36, in June 1968. Jack Keyes, 23, of Londonberry, Northern Ireland, reportedly drank 36 pints in 60 minutes in Blackpool, England, in March, 1969.

—*Guiness Book of World Records*
(1971 edition—current editions omit reference to this record because of the dangers inherent in trying to surpass it.)

The use of alcoholic beverages seems about as old as man himself. Among the artifacts discovered from the late Stone Age are beer jugs. The Romans apparently took advantage of excessive consumption by the barbarian Gauls to defeat them in battle. The highly developed early Egyptian civilization is said to have included many people who regularly drank themselves into a stupor. And just as there have been alcoholic beverages for centuries, so has there been concern with controlling their use. Spartan soldiers were allowed a limited wine ration. Plato recommended that wine be prohibited to children under 18, to slaves, and to public officers. In China, attempts at regulating the manufacture and distribution of wine date back twenty centuries, with prohibition laws being passed and repealed many times over the centuries. The Romans tried unsuccessfully to restrict the planting of vineyards in Gaul.

In the tenth century distillation was discovered, and the products of that process were at first considered a major medical breakthrough—a notion still with many of us today. In fact, the word "whiskey" derives from the original designation of that beverage as the "water of life," the antidote to senility. Other properties of distilled liquor were soon discovered, however, and efforts to control it followed not long thereafter.

ALCOHOL CONTROL IN THE UNITED STATES

Liquor has been regulated in the United States since the founding, but the controls were fairly modest until the mid-1800s. In the 1840s the first temperance societies were formed and adopted prohibition as one of their goals. Maine adopted prohibition in 1851, and in the next several years a third of the other states did so. But within a dozen years most of those statutes had been repealed or so modified that they no longer truly represented prohibition. In 1862 the need to finance the Civil War produced the Internal Revenue Act, the first time taxation of liquor became an important source of revenue for the federal government.

Following Reconstruction, a second wave of temperance activity swept the country, and around 1880 eight states passed prohibition laws. By the turn of the century most of those statutes also had disappeared.

The last sweep of the prohibitionists began around 1910 and culminated, of course, in the federal Volstead Act in 1919. By then, however, most of the country was already covered by state and local dry legislation. Prohibition was seen not as an isolated phenomenon but as part of a large package of reforms; it was a companion of child-labor laws, conservation, antitrust legislation, taxation of income, and federal regulation of commerce.

EARLY CONTROLS IN NORTH CAROLINA

In North Carolina, legal control of alcohol distribution and use dates from colonial days. A law prohibiting drunkenness was on the books in 1715 but apparently was not strictly enforced. In the early nineteenth century the

This article is adapted from a paper presented before the North Carolina School of Alcohol Studies on June 6, 1975. The author, an Institute faculty member, is also a member of the Advisory Council on Alcoholism to the Secretary of Human Resources.

state courts ruled that private drunkenness was not a crime, and public drunkenness became a misdemeanor only when repeated often enough to become a nuisance. In 1800 the state began prohibiting the sale of liquor in certain areas—originally "at places where people are assembled for divine worship." The local acts began banning liquor sales near specific schools, polling places, courthouses, stores, factories, and so forth, and then the limits were extended to cover a half-mile around the location, then a mile, two miles, and eventually whole towns. In the late 1800s state acts gave towns and then counties the authority to prohibit alcohol sales completely within their jurisdiction.

Limitations on the hours of sale by local act also began early in the last century. The first restrictions were on sale during hours of divine worship, then during days of church services and election days, and so forth.

The early regulations were generally not by state act. The legislature granted to the county courts and county and town commissioners the authority to control liquor on the local level. In 1791 that authority included the power to refuse licenses to sell liquor to those of "gross immorality." Beginning in 1828 licenses were to be limited to "only such free white persons as shall satisfactorily show to the court their good moral character."

Around 1800 restrictions began on who might buy liquor. Gamblers were excluded and university students unless they had written permission from the president or faculty of their institution. The prohibition was eventually extended to unmarried persons under 21 and inmates of state hospitals.

Not until the late nineteenth century did limits begin to appear on amounts of purchases.

The manufacture of alcoholic beverages was generally regulated only by local act until the early twentieth century. Advertising of alcoholic beverages was not regulated until statewide prohibition.

Control through taxation has existed since colonial days. At various times the moneys derived from taxes on sale or distribution of intoxicating beverages have gone directly to the state or directly to local governments or have been shared. The 1791 legislature levied a tax of 48 shillings on liquor retailers; all of that sum went to the state except eight shillings for the county clerk as a collection fee.

Another legal control on the use of alcohol is the involuntary treatment of alcoholics and the imposition of legal disabilities on those with drinking problems, but generally these statutes are much more recent. Such provisions as the appointment of guardians and the hospitalization of "inebriates" date from the period following repeal of Prohibition when the state was developing its present system of liquor control.

THE CURRENT SYSTEM OF CONTROL

Present law in North Carolina seeks to control alcohol use in a variety of ways. The first of these is the alcoholic beverage control (ABC) legislation. Most of that law concerns the administration of the alcohol distribution system—licensing requirements, enforcement mechanisms, distribution of proceeds—but it also regulates hours of sale, amounts of purchases, methods of transportation, and a number of other activities. Both civil and criminal penalties are provided for violating those statutes.

No longer a part of the ABC statutes but certainly an integral component of the system of alcohol control are the taxation statutes. In addition to license fees, distributers and purchasers of alcoholic beverages are subject to an involved schedule of privilege license taxes, sales taxes, surcharges, and add-ons.

Next come the criminal laws. Best known of the criminal offenses are those that restrict the driving of vehicles after excessive drinking and prohibit appearance in public in a drunken state. The criminal law also deals with the manufacture and distribution of bootleg liquor, and a combination of civil and criminal remedies may be used to control alcohol-related activities that can be defined as public nuisances.

Finally, the commitment statutes provide for the regulation of those who have lost control over their use of intoxicating beverages.

Other state statutes might also be considered part of the system of alcohol control (disabilities from holding certain offices, or being licensed for professions, or being appointed as guardian, for example), but the ones just mentioned—ABC laws, taxation, criminal statutes, and commitment procedures—are the main body of the control system. This is by no means a coordinated system of control. It is rather a hodgepodge collection of regulations developed at different times by different people for different purposes. Control of alcohol consumption was the primary motivation for some of this law, but often it was only indirectly considered. Some of the law involves codification of moral standards of a previous century; much of its detail has no purpose of its own other than serving as a vehicle for compromise between money-grabbing liquor lobbyists and righteous prohibitionists. Some of the rules are designed only to raise money.

This is to say, the statutes do not reflect any coordinated state policy on alcohol control. Most of it is instead compromise and historical accident. And if there were a systematic state statutory policy, it still might not be effective. A long tradition exists in this state of local control over distribution of alcohol (remember that the first licenses were granted by county courts), and a variety of local legislative acts and ordinances remain to continue that tradition. Also, whatever state law does exist is subject to enormous discretion in implementation—from the regulation-making power of the State ABC Board to the local law enforcement officer's discretion on arrest and the prosecutor's and the court's power to dispose of accusations in a variety of ways.

Because there is not a coordinated system to describe, this article will instead summarize the major components of the system that does exist and, to the degree possible,

point out what motivations shaped the laws in their particular form. Then it will discuss the laws' effect on alcohol use and the trends that might be expected in this area in the future.

THE ABC STATUTES

Beer and Wine. All sales of intoxicating beverages (that is, beverages with one-half of 1 per cent or more of alcohol by volume) are prohibited in the state unless authorized by local election. Elections on the sales of beer and unfortified wine[1] may be held in any county or in any city of 500 or more upon request of the governing body or petition of 20 per cent of the registered voters. The ballot allows a choice of approving on-premises or off-premises sales, or both, or neither. If sale is approved, private establishments may distribute those beverages but must have the proper licenses and pay certain fees. State statutes regulate the hours of sale; not later than 1:00 a.m. (2 a.m. when regular daylight-saving time is in effect) nor earlier than 7 a.m., and not before 1 p.m. on Sundays, but cities and counties may prohibit sales at all times on Sunday (except for places having a brown-bag permit). The general prohibition against sale on election days and holidays does not apply to beer and wine.

Wine and beer may not be purchased by anyone under 18.

Any amount of beer or wine may be transported in one's vehicle, but possession of over five gallons of wine or 20 gallons of beer creates a presumption that the possession is for sale. Possession for sale is a violation of the law without the proper permits.

Contrary to popular belief, neither public consumption of beer and wine nor carrying a beer can in one's hand while driving is unlawful, nor is carrying and openly drinking a beer in the local football stadium illegal. (A local ordinance prohibiting public possession of beer has been invalidated by the State Supreme Court; some localities still have ordinances prohibiting public consumption but they are of doubtful validity.) State statutes do contain several restrictions on which places may have beer and wine permits. Beer and wine may not be sold on campuses of public colleges (but are permissible at private schools), nor, generally, within 50 feet of a church or public school. Permits for sale of wine are not allowed for poolrooms or billiard parlors.

"Hard Liquor." The distribution of alcoholic beverages is considerably more restricted than the distribution of wine and beer. The term alcoholic beverages includes any item with an alcoholic content of more than 14 per cent by volume, which means fortified wines and spirituous (or "hard") liquor. General law prohibits the sale of alcoholic beverages except as authorized by county-wide election. North Carolina general law does not provide for city elections on sale of alcoholic beverages, but the legislature had approved many special acts for various cities over the years, and there are now more city ABC systems than county (but keep in mind that the provisions of general law regulating alcoholic beverage sale procedures do not apply unless the special act incorporates the general law). Alcoholic beverages may be sold only at city or county ABC stores following voter approval. An election on establishing ABC stores may be called by the county commissioners or by petition of 20 per cent of the registered voters of the county; local acts for city ABC elections may follow that percentage or choose another. If established, local stores are operated by the local board, but the number and location of stores is subject to approval of the State ABC Board. A store may not be located in a community that voted against the stores even though the county as a whole approved establishment. ABC prices and maximum hours (not longer than from 9 a.m. to 9 p.m.) are both set by the state; the local board can limit the hours of sale even more if it wishes. State law prohibits sales on Sunday, New Year's Day, the Fourth of July, Labor Day, Thanksgiving, Christmas, and statewide (but not local) election days. It also prohibits sales to those under 21.

Generally, without a special permit, only one gallon of alcoholic beverages may be bought and possessed at a time. The possession of a greater amount than that creates a presumption that the liquor is held for resale, which is unlawful. If the seal on the bottle is broken, an alcoholic beverage may not be transported in the passenger area (including the glove compartment) of the vehicle. Alcoholic beverages are allowed in licensed clubs, but the liquor must be stored in an individual locker for the owner. Alcoholic beverages may be brought into restaurants that are licensed for "brown-bagging"; to receive such a license, the establishment must seat at least 36, have kitchen facilities, and be engaged primarily in the business of serving meals. These forms of consumption outside one's home are prohibited after 1:30 a.m. (2:30 under daylight-saving time), before 7 a.m., and before 1 p.m. on Sunday. Consuming alcoholic beverages is prohibited at all times on the ABC store premises and on public streets and highways. Displaying them at athletic contests is also illegal.

Advertising of all liquor is subject to State ABC Board regulation. The regulations go into considerable detail; for example, they set the type size that may be used in advertisements for beer, the material of which a sign advertising liquor must be made, the total number of square inches allowed for a sign, the maximum dimensions for a wine list, the use of decorative scenes (grapevine borders, vineyards, and cellar scenes) on the cover of the wine list ("limited to two on the cover, four on the inside, but no more than three such scenes being depicted on any one page").

Sale of alcoholic beverages by the drink is prohibited.

1. The popular term "beer" is used here, but really all malt beverages are being considered. Malt beverage is the term used in the statute and on the ballot; it covers ale, malt liquor, and porter as well as beer.

The sale of fortified wine (over 14% alcoholic content) is not subject to a separate vote but is allowed in localities where ABC stores are established. Fortified wine may be sold in private establishments.

Local acts of the General Assembly allowing such sales in particular counties have been held unlawful under the State Constitution's prohibition against local acts regulating trade. The legislature has power to authorize liquor by the drink on a statewide basis and in 1973 asked the voters' advice on whether to do so. The referendum went overwhelmingly against such sales.

Recent changes in the law have liberalized the manufacture and possession of home-made wines and beers. Generally, no limits apply to private production of such items, which are not subject to taxation.

Although the price of alcoholic beverages sold in ABC stores is set by the State ABC Board, the profits all go to the localities where the stores are located. Any state revenue comes from excise taxation. State law sets a few limitations on how ABC sales profits shall be used. Each county board is required to spend from 5 to 15 per cent (but not more) of its total profits to enforce the ABC laws, through either employment of special ABC officers or support of existing local agencies. Seven per cent of the profits must be spent on education on the use of alcohol and for rehabilitation of alcoholics. This requirement exists in state law, but the ABC statutes are so drafted that if a local act provides for a different distribution of profits, that local act controls. Thus not all local boards must spent 7 per cent of their profits on alcoholism education and rehabilitation. Legislation has failed each of the last three years in the General Assembly to make the 7 per cent expenditure mandatory for all local boards.

In addition to the expenditure of profits just indicated, a 5 cents per bottle add-on is provided for each bottle sold in the ABC stores, the proceeds of which are to be returned to the county commissioners for construction and operation of facilities for education, research, treatment, and rehabilitation of alcoholics. The project for which the funds are spent need not necessarily be located in the county. The revenues from this add-on totaled $2.25 million last year. (This 5-cent addition to the profit on each bottle sold is separate from the 5-cents per bottle additional tax used for construction of the alcoholic rehabilitation centers. The ABC tax add-on, discussed below, has recently been repealed.)

According to general state law, all ABC profits not earmarked as just indicated are to go to the county general fund for expenditure for any public purpose. However, most ABC systems have had special legislation passed that specifies a different distribution, mostly to local schools and hospitals.

Last year, the profits from ABC stores, after deductions, amounted to about $19 million statewide.

TAXATION

The provisions on taxation of liquor should be discussed along with the ABC system since they were originally enacted together and were all considered part of the same scheme of regulation.

Basically, liquor may be taxed by four means. (1) For each of the regulated activities indicated previously, a permit must be obtained from the State or local ABC board and a fee paid for that permit. (2) With the permit, one becomes eligible for and subject to a privilege license for that activity, issued by the Department of Revenue for a fee. (3) Beer and wine are subject to the same sales tax as other items; hard liquor is exempt. (4) All forms of liquor—beer, wine, hard liquor—are subject to a separate schedule of taxation, called excise taxes.

Permit Fees. As previously indicated, a permit from the ABC board is required for almost every activity other than the purchase of liquor (and a permit is required even for purchasing if over a certain amount is to be bought at one time). The fees for permits are small and they do not generate much money, but they help to support the administration of the system. For example, the fee for a beer and wine permit is usually $25. For brown-bagging permits, the fee goes up. A restaurant seating less than 50 must pay $100 for its permit; if it seats 50 or more, the fee is $200. A brown-bagging permit costs a private club $200. Permits must be renewed annually, but the renewal charge is only a fraction of the original fee (generally a fourth). All revenues from permit fees go into the state General Fund to be used for any purpose.

License Fees. Once the ABC Board had issued a permit, the Department of Revenue is required to issue the privilege license for the same activity upon payment of the fee.

A privilege license is required for virtually every kind of liquor production and distribution activity. A beer manufacturer must have a license, as must a winery (the rate is based on the amount produced); there are bottlers' licenses, wholesalers' licenses, retailers' licenses, salesmen's licenses, city and county licenses, and so on. Some examples of the fees (annual) are: beer manufacturer, $500; beer wholesaler, $150; city license for on-premises sale of beer, $15; state retail beer sales license, $5.

Sales Tax. Beer and wine are subject to a system of double taxation. They are subject to a special schedule of excise taxes on their sales and also are covered by the general state and local sales tax. The revenues from the sales tax on beer and wine are handled in the same manner as all other sales tax revenues.

Excise Tax. The excise tax on a 31-gallon barrel of beer is $7.50. The excise tax on wine is 60 cents per gallon (only 5 cents for wine made from North Carolina grapes). These excise taxes are collected by the state but are shared with the local governments. The sharing formula generally is that 47.5 per cent of the collections are returned to the cities and counties from which they were collected (note that this means only those cities and counties in which beer and wine are sold at retail), the amount going to each local government based on its population. In the most recent year for which figures are available,

cities and counties received about $9.3 million from beer and wine taxes.

A surtax in the same amount as the excise tax applies to beer. It is collected by the state but is not shared with local governments.

The excise tax on the sale of hard liquor was changed by the 1975 General Assembly. Previously, the tax was 10 per cent of the sales price, plus a 2 per cent surtax, plus a 5 cents per bottle add-on. (This 5-cent tax is distinct from the 5-cent additional profit discussed earlier, which is not affected by the 1975 change.) Beginning on August 1, 1975, the excise tax on the sale of hard liquor became 22.5 per cent with no surtax or add-on. All of this revenue goes to the state; in fiscal 1973-74 this tax was worth about $35 million to the state. All liquor *taxes*—beer, wine, hard liquor—brought the state and local governments about $78 million last year.

The 5-cent tax add-on to each bottle sold in the ABC stores, which was removed August 1, was enacted by the 1965 General Assembly to provide funds for constructing the three alcoholic rehabilitation centers and provided about $2.75 million for that purpose. North Carolina has never favored special funds of that nature, and in 1967 the revenues from that add-on were directed to the state's General Fund rather than to the particular purpose of building the alcoholic rehabilitation centers.

COMPARISON WITH OTHER STATES

Compared with other states' alcoholic control systems, North Carolina's system as just outlined is fairly restrictive. This state is a last bastion against liquor by the drink; liquor stores and their hours are more limited than elsewhere; transportation is restricted; the 21-year age limit is retained for the purchase of hard liquor; and rather strict control is kept on advertising. Liquor is simply not as available in North Carolina as elsewhere. Based on 1970 statistics, the national average of premises licensed for sale of spirituous liquors was 1.13 per 1,000 population. For other states with state-owned stores, the average was .93 per 1,000 population. For North Carolina, the average was .06, the lowest in the country.

ORIGINS OF THE PRESENT ABC LAWS

The ABC and tax statutes for liquor were enacted with the specific intent to restrain the immoderate use of alcohol. These laws were first passed in the late 1930s after repeal of the Eighteenth Amendment, ending Prohibition, and have not basically changed since then. This legislation was essentially the work of the Commission to Study the Control of Alcoholic Beverages in North Carolina, appointed in 1936 to report to the 1937 General Assembly. The commission held hearings throughout the state, solicited the views of many people in law enforcement and some in alcoholism, studied other states and various statistics, and apparently was seriously concerned over what effect the ABC laws would have on the consumption of alcohol. So soon after Prohibition and the horrors of that experiment, the commission saw that whatever system was adopted had to meet two basic requirements: ". . . one was to restrict the use of alcohol within as narrow a limit as possible on account of the well recognized evils of the intemperate use of alcohol as a beverage; and second, to avoid excessive restrictions which, however sincere, would result in defeating the desired ends."

With those goals in mind, the commission could see only two alternatives: a system of licensing private businesses to sell liquor, or a monopoly in which the state alone controlled the sale. Local control was strong enough that each county had to be given an option, but the commission found obvious faults with any "dry" system. The statistics on drunk driving that it studied showed that counties with liquor control fared better than all-dry counties. Evidence indicated that considerable moonshine was made in dry counties. And reports were received that in counties that adopted a control system, bootleggers had been run out of business and sales to minors had substantially decreased.

Faced with choosing between a licensing system and a monopoly, the commission chose the latter, mainly because of the profit motive: "The crux of the whole situation is that monopoly stores should not attempt to increase the volume of sale; whereas, it must be expected that private licenses would try to do this. . . . Wherever the profit motive has been permitted to become paramount it has done so at the expense of control."

The commission felt that a monopoly system would not only have no profit motive to pressure it to increase sales but also would have better control over prices, and low prices were thought an essential element of any system: "The higher the price the less effective the weapon for competing with the illicit handling of liquor. . . . [P]rices should be lowered to a point where there might be successful competition with the bootlegger and yet kept sufficiently high to prevent immoderate purchasing."

The commission thought that it was dangerous to see the ABC system as primarily a means of raising revenue. It cited the experience of the state of Washington, where consumers of alcoholic beverages went back to bootleggers when a 10 per cent sales tax was added to liquor sales. And the commission felt that setting aside liquor profits for specific purposes, no matter how worthy the goals, would be a mistake, since it would lead to an irresistible tendency to promote sales to increase the funds available for that purpose.

Other advantages seen in the monopoly system were that it would help "take the handling of liquor out of the hands of a criminal element." Advertising should be restricted but could not be done so fairly under a licensing system, since the private businesses would need to make a profit. State monopoly would eliminate political pressures in the state legislature whenever controls on liquor were being considered: because there would be no

licensees, there would be no one to lobby for loosening controls. Also, licensees could not be expected to enforce restrictions on sales as dependably as could employees of state stores: "Private licensees could hardly be expected to turn away a customer when there was much uncertainty about his age, nor would they consider too carefully whether a prospective purchaser had reached such a stage of intoxication that he should not be sold more liquor."

Some of the conclusions of the 1936 commission may be questioned, but the commission should be commended for its efforts to divine the effects the ABC law would have on use of alcohol. The ABC statutes have been subject to considerable revision since their enactment, but at no time has such an effort to judge their effects been repeated. A complete recodification was made in 1971, but without consideration of what effect the changes might have on use of alcohol. The 1971 General Assembly, after passing the revision of the ABC statutes, asked the Legislative Research Commission to consider what effect the changes would have on sales and use of alcoholic beverages and on enforcement of the laws. The 1973 report is almost entirely restatements of the law and suggestions for technical corrections in the 1971 statutes. Apparently only once was the effect on consumption considered, and that consideration resulted in recommendations to extend ABC store hours and leave them open on certain holidays; the entire support for that suggestion consists of the following line: ". . .[This] will serve the purpose of more effective control and better law enforcement by restricting bootlegging."

THE EFFECT OF THE LAW

Now that we have had a crash course on the system of alcohol control in North Carolina, its history, and its intended effect, what difference does it make? Well, we do know that this state has a moderate level of over-all alcohol consumption. Despite the very restrictive control of outlets, the consumption of spirituous liquors is about average for a state with a monopoly system. We do not have much other specific information for North Carolina, but the research in other states and other countries seems to point to one conclusion. The level of alcohol problems is very little affected by whether the control system is a state monopoly or a private licensing system, whether liquor by the drink is sold, whether hours of sale are regulated, or how many outlets for liquor there may be. Changes in one or more of those factors can have an effect. Studies in rural Finland show that the opening of a new liquor store in an area where liquor outlets are rare can have a measurable effect on consumption, but without that peculiar kind of circumstance, the kinds of controls mentioned above seem to make little difference. The available literature seems to indicate that the 1936 commission in this state was wrong; having a monopoly system rather than licensing private businesses apparently does not affect the state's rate of alcohol problems.

This does not mean that there are no legal controls that will affect alcohol consumption. National Prohibition seems to have been somewhat successful, at least initially. Total consumption was lower during Prohibition than it was before or after. One study indicates that "[t]he consumption of liquor, expressed in terms of its content of pure alcohol, dropped during the early years of prohibition to one-third the pre-war level, . . . [and then rose to] two-thirds as great as prior to the World War."

The reduction in alcohol consumption caused by Prohibition was not, however, necessarily distributed equally across the social spectrum: "Prohibition in the U.S., in driving up the price of alcohol beverages, seems to have accomplished a major shift in the distribution of consumption between social classes: under prohibition, the consumption of alcohol per capita by the working class declined by about 60%, but the per capita consumption 'by the business, professional and salaried class [was] fully as great' towards the end of prohibition as it was at its inception."

Prohibition had other effects that do not make it a likely choice for new legal controls to reduce alcohol problems. And whatever effects national Prohibition had on consumption, they did not last. Over-all consumption has apparently increased at a steady rate since repeal of Prohibition.

Another legal control that seems to have some effect is price, to the extent that it can be controlled by the law. Higher relative prices can reduce over-all consumption apparently, but to be effective the higher price must be for all intoxicating beverages—high price on one beverage simply diverts drinkers to another and the excessive-use problem remains; alcoholism is just as possible from beer as from hard liquor. As with Prohibition, higher pricing may result only in shifting the relative levels of consumption by the different social classes.

The recitation of the odd assortment of liquor taxes, surcharges, and add-ons would indicate that there has been no state policy to take advantage of the effect that pricing might have on consumption, even though a state with a monopoly can do this better than one without. Revenue production rather than control, though warned against by the original ABC study commission, seems to be the de facto state policy.

COMMITMENT LAWS

The most indirect of the controls on alcohol use that will be discussed here are the commitment statutes. The purpose of these laws is not to regulate alcohol intake or prevent alcohol abuse but rather to treat abuse once it has occurred and hopefully reduce the likelihood and extent of its repetition. State policy favors voluntary treatment over involuntary, but there are mechanisms for forcing treatment of those with alcoholism, as the discussion below will indicate. A question beyond the scope of this article is the effectiveness of any form of treatment

for alcoholism and particularly the relative merits of voluntary and involuntary treatment. Some argue that this peculiar "disease" of alcoholism, to a great extent self-induced, lends itself to cure only after a confession of the need for treatment. But many programs exist in which that choice is forced upon the alcoholic. Too many dangers lie in wait for a writer on this subject to allow any comment here other than a description of the process for forcing treatment of an alcoholic under present law.

The commitment statutes were completely revised by the General Assembly in 1973 and 1974 to make it more difficult to hospitalize a person involuntarily and to guarantee him due process before hospitalization can take place. A person is subject to involuntary commitment if he is an "inebriate" *and* is imminently dangerous to himself or others. Inebriate means alcoholic, since that term is defined as "a person habitually so addicted to alcoholic drinks . . . as to have lost the power of self-control and that for his own welfare or the welfare of others is a proper subject for restraint, care, and treatment." That definition is somewhat inadequate since it says in essence that a person should be committed if he has a drinking problem that would make it good for him to be committed. The requirement that he also be imminently dangerous is the real barrier to abuse of the commitment procedure.

Anyone who knows of an alcoholic's problem and dangerousness may file an affidavit to that effect with the clerk of court or a magistrate, and that judicial official, if he finds that the allegations are probably true, can order a law enforcement officer to take custody of the person within 24 hours. The person is to be taken within 48 hours to a community health center (or elsewhere if that is not practical) for examination by a physician within 24 hours of his arrival. If whoever makes the original affidavit is a physician, then that examination is not necessary. If the physician agrees with the allegation of alcoholism and dangerousness, the clerk of court is notified and a commitment hearing is scheduled within ten days of when the alcoholic was taken into custody; meanwhile the alcoholic person is held in the community mental health center or other approved facility awaiting the hearing, but may be released by the director pending the hearing if he does not agree with the diagnosis.

The commitment hearing is before a district court judge, and the alleged inebriate is entitled to notice, advice of counsel (paid by the state if the person is indigent), and cross-examination of witnesses. Commitment, either outpatient or inpatient, may be ordered by the judge if he finds "by clear, cogent, and convincing evidence" that the person is an inebriate and dangerous. The treatment may be ordered at a private facility or at a facility of the Division of Mental Health Services for up to 90 days; the head of medical services at the facility has authority to release before that time if he finds that hospitalization is no longer needed. Additional commitments of up to 180 days and up to one year are allowed following essentially the same procedures.

If the inebriate is not only imminently dangerous but also violent and needs restraint, so that taking him before a physician for the initial examination would likely endanger life or property, an officer may take custody and take the person directly before a clerk or magistrate for examination and holding before the district court hearing.

Once a person has been committed, the statutes declare that he has a right to treatment, which means that an individual treatment program must be formulated within 30 days after he is admitted. Restrictions on visitors, phone calls, use of one's clothing, regular access to exercise, keeping one's own money, and so forth are not allowed unless written notice is given to next of kin indicating the reasons for the restriction.

CRIMINAL LAWS

Traditionally the criminal law's concern with alcohol use has focused on two situations—driving after excessive drinking, and appearing in public in an intoxicated condition. These two situations are what will be discussed here, but alcohol apparently plays a significant role in criminal activity generally. For example, a study of 20 years ago in Ohio showed that about 80 per cent of those arrested on assault charges, 70 per cent of those arrested for murder, 60 per cent of those arrested for robbery, and 45 per cent of those arrested for rape had blood alcohol levels of .10 or higher. We do not know the effect that alcohol has in inspiring criminal conduct, but we may reasonably infer that alcohol may sufficiently release inhibitions to allow a number of people to do things they would not do if sober.

DRUNK DRIVING

The use of alcohol is closely associated with the number and severity of traffic accidents. North Carolina now has several legal means for dealing with drunk driving. A section of the motor vehicle law prohibits driving a vehicle while under the influence of intoxicating liquor. A first violation of that statute can result in a penalty of a $100 to $500 fine and/or 30 days to six months' imprisonment. Upon conviction, the Department of Motor Vehicles is to suspend the driver's license for up to one year, but the trial judge may grant a limited driving privilege. For second and subsequent violations, the punishment is raised up to a maximum of two years' imprisonment, the period of license revocation is extended, and a limited driving privilege may not be granted.

An officer who makes an arrest for driving under the influence is entitled to require the person being arrested to take a chemical or breath or blood test to determine his blood alcohol level (the breathalyzer is almost invariably used), and the refusal to take that test by itself requires

the Department to suspend the driver's license for six months. Before 1973 the period of revocation was 60 days and the defendant could have his license returned if he was later acquitted of the drunk-driving charge. Now a later acquittal has no effect on the revocation for failing to take the test.

Effective January 1, 1975, the drunk-driving statute was amended to create the offense of driving with the blood alcohol level of .10 per cent or higher. This charge may be used in lieu of the charge of drunk driving and carries the same penalty. It requires no proof whatever that the driver was affected by the alcohol in his system—that the alcohol affected his driving; all that must be proved is that he had a blood alcohol level of .10 per cent or more.

The recent changes in the motor vehicle laws show the legislature's clear intent to make convictions for drunk driving easier. The legislation was passed in response to arguments that easier convictions would reduce the devastation on our highways caused by drunk drivers. It is not universally accepted, however, that the changes in the law will have this effect. Ever since the connection of alcohol with bad driving was established, various states have passed stricter and stricter regulations on driving under the influence. The laws of many states have required the driver to take a breathalyzer test and have provided that the presence of a certain blood level (it was .10 per cent under the previous law in this state) raises a presumption that the driver was under the influence. Now the trend is toward legislation making the presence of a certain blood level unlawful itself. But, for all that, the rate of drunk driving and alcohol-related accidents apparently has not dropped.

The evidence from other jurisdictions is conflicting on whether the new .10 per cent offense will have any appreciable effect. A similar change did have obvious benefits when first implemented in Great Britain, but apparently mainly because it was instituted with great fanfare and much publicity on how tough enforcement would be. When experience showed something less than that, the rate of drunk driving went back up. The difficulties in predicting the actual effect of any legislation might be gauged by looking at some questions that arise about the new .10 per cent offense. Will juries be suspicious of a gadget, the breathalyzer, that they do not really understand very well and refuse to convict on its evidence alone? With the breathalyzer results now all-important, will defense attorneys refuse ever to concede the blood alcohol level of the defendant and greatly extend the time needed by the state to show the reliability of the machine, thus requiring breathalyzer operators to spend more time in court and reducing their availability for their other duties? And will that back up the court calendar so that the number of drunk-driving convictions actually drops? And will the new .10 per cent offense mean that no judge or jury will ever again convict a defendant of driving under the influence with a level less than .10 per cent even though it is clear that driving can be substantially impaired at a lesser level?

Finally, what difference will it really make if the number of drunk-driving convictions is increased? If the evidence that the dangerous drunk driving is done by a very small number of drivers with very serious drinking problems is correct, perhaps increased convictions will have no effect because those people are already being convicted and are still unable to halt their drinking. Increasing the number of convictions might only extend the criminal penalties to drivers who are less dangerous. Perhaps we ought instead to remove criminal penalties for this conduct altogether and increase treatment for the few drivers who create the serious traffic dangers.

PUBLIC DRUNKENNESS

One area in which decriminalization has been tried extensively already is public drunkenness. Unfortunately the approach has been disappointing. Because public drunkenness accounts for about one-quarter of all arrests in the country—about one-third of the nontraffic arrests in North Carolina—and because putting the drunk in jail for a few days does little to keep him from coming back again and again, a number of jurisdictions have chosen to remove the criminal penalty for that offense and try to divert the chronic alcoholic who is the worst offender to some detoxification and treatment program in which his alcoholism will be dealt with and he will emerge less likely to get drunk and appear in public to the nuisance of other citizens. In this state, being drunk in public is still a misdemeanor, and the legislature for the past several sessions has rejected attempts to repeal the offense; but some significant changes have been made in the law. Because of court decisions (which were later nullified by the U.S. Supreme Court), provisions were added to the drunkenness statute that a person who could show he was an alcoholic would have to be acquitted of the offense. That provision remains the law, but it also remains the law that if the defendant is successful in that defense, he is subject to up to two years' commitment or restriction for treatment. Not surprisingly, faced with that choice or 20 days in jail for a conviction of the criminal offense, few raise the defense of alcoholism.

(The 1973 General Assembly, making a compromise on drunkenness law reform, attempted to encourage police to help drunks by codifying the practice of taking drunks home or to a hospital rather than arresting them. The criminal offense was left on the books, however, and no direction was given to when an arrest should be made and when other assistance should be provided. As this is written, several trial judges have found the drunkenness statute now unconstitutional because of the delegation of the legislative function to the officer. That result was considered and discussed in the Fall 1974 issue of *Popular Government* on page 19.)

In other states, repeal of the drunkenness offense is usually accompanied by a new authority for police or

other public officers to take "protective custody" of public drunks—not to arrest them but to take them for detoxification and further treatment. Recent changes in the Hughes Act provide additional federal funds to the states that take this approach. This is another reform that, on the surface, appears to be perfectly reasonable: Stop arresting all those drunks, treat them instead, and they will become cured and not bother us any more. But a closer look at what has happened elsewhere is somewhat discouraging. First of all, alcoholics who get arrested for public drunkenness are generally not susceptible to ready cures if, indeed, any alcoholics are. Detoxification and a few days' treatment do not have that great an effect on a middle-aged, homeless man with no skills, poor job prospects, and considerable medical and dental problems. The reasons for his alcoholism are many and the treatments needed are diverse. And treatment is expensive. So, instead of taking the drunk out of the jail and curing him and reducing his cost to society, decriminalization of the drunkenness offense in this manner can be a very expensive proposition for the state. And even if substantial sums of money are spent on his rehabilitation, the chances of meaningful success may seem too low for the lawmaker to take that risk with the public's money.

SUMMARY

The problems of legislating with regard to public drunkenness illustrate well the difficulties of trying to control alcohol use by statute. The prohibition on public intoxication does not prevent people from becoming drunks. As we have seen in several examples, the law is a blunt instrument and not often the best means for changing social customs. But the public drunkenness experience also illustrates that the well-meaning lawmaker, who genuinely wants to reduce the effects of alcoholism, is receiving little help from the medical and social scientists. The alternatives proposed for dealing with public drunks seem to the lawyer a confusing assortment of uncoordinated treatment modes, none of which has much prospect of success. Each alcoholism professional seems to have his own pet theory, and the lawmaker must be perplexed about what should be codified and funded. And he gets little better help from the social scientists. The people at the detoxification project in St. Louis claimed substantial success for their alternative to arresting public drunks—and thereby inspired many of the changes in the law. But it turns out that their success was overstated and their costs underestimated. And that is typical; "evaluations" of experimental projects most often seem intended only to prove their sponsors correct and not to make an objective review of what works and what does not. With that kind of assistance—along with all of the political difficulties of legislating on this subject—it is not surprising that lawmakers continue to mostly "muddle" and compromise their way through decisions on legal control of alcohol and that the law remains an essentially neutral force rather than a positive one for reducing alcohol abuse.

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PRIMARIES AND POWER — Presidential Politics in North Carolina

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IN MANY WAYS, the hallmark of the 1975 General Assembly was the battle for political control, and few matters taken up this session show that struggle more clearly than the election laws. Many of the 1975 amendments to the state's election procedures reflect the fact that legislators, political parties, and party factions believe that the rules by which elections are conducted and under which candidates and parties must operate determine the outcome of the elections and shape the destiny of politics and government. The most significant 1975 actions illustrating this point are the decisions by the General Assembly to separate the presidential primary from the statewide primary and to change the rules by which candidates may run in the presidential primary.

The presidential primary was the focus of the most intense political in-fighting of the session, as the so-called moderate and conservative factions of the Democratic Party battled to boost the respective candidacies of former Governor Terry Sanford and Alabama Governor George Wallace. The battle was triggered by H 269, which would have abolished the primary altogether. At various times it involved H 718 (changing the date of the primary and candidate eligibility) and S 537 (specifying which candidates may appear on the ballot). In the end, it turned on the fate of H 627, enacted as Ch. 744, which fixed a March primary, changed the candidacy eligibility rules, and eliminated the candidates' filing fee.

When the unusually complex legislative maneuverings had ended with the ratification of Ch. 744 two days before adjournment, the moderates had prevailed. At issue was whether a head-to-head clash between Sanford and Wallace would be orchestrated by changing the present law. The issue was resolved so that the clash would occur, as Sanford forces ultimately preferred.

Wallace himself appeared before a legislative committee to urge that the primary not be repealed (H 269). He characterized this proposal as part of a multi-state move to block his nomination. He argued that the repeal would never have been considered had he not entered the 1972 primary and beaten Sanford by 107,000 votes. He — and legislators of a variety of liberal to conservative hues — argued that the primary has the salutory effect of opening up the nominating system by furnishing party members with an easy way to express their preferences and that it is a way of increasing members' participation in party affairs. Finally he and others suggested that preserving the primary could be one way to dispel public cynicism and distrust of politics.

His extraordinary appearance before the legislative committee (extraordinary because it is rare for a governor of one state to enter so directly into the politics of another, because many state political leaders sought to bask in his glow for their own purposes, and because his arguments were persuasive) precipitated the failure of H 269 in the Senate. The bill had already passed the House, where Sanford forces sponsored it in an effort to prevent their candidate from having to risk the humiliation of another defeat by Wallace and to ensure Sanford's nomination in this state through his likely control of the caucus machinery.

The arguments in favor of killing the primary were forceful but unpersuasive: the additional expense of two primaries ($450,000 to $500,000) and the facts that party disunity would be minimized, party activity and organization would be enhanced, delegates' votes would be more easily bartered through the first ballot, and Sanford would probably be more successful than Wallace in garnering caucus votes.

HAVING LOST IN THEIR EFFORTS to repeal the primary, Sanford's allies then turned their efforts to changing the rules of eligibility in order to guarantee a showdown between Sanford and Wallace, but a showdown in which Sanford's vote would not be diluted by the presence of other candidates (such as Senators Bentsen and Jackson, former Senator Harris, former Governor Carter, and Representative Julian Bond). In this fight, they were far more successful.

In its final form, Ch. 744 (H 827) provides that a person may not be a candidate in the presidential primary unless he has qualified for public financing of his campaign from the federal Presidential Primary Matching Payment Account or has filed a petition with 10,000 voters' signatures supporting his candidacy. More significantly, no eligible person may be a candidate unless he

requests the State Board of Elections to place his name on the ballot. This provision was the subject of much debate.

Wallace supporters – in an effort to open the field to as many candidates as might want to enter it in order to dilute Sanford's votes (as occurred in 1972)—sought to permit each nationally recognized candidate automatically to be put on the ballot unless he specifically requested otherwise. Sanford allies, on the other hand, secured the passage of a provision that a qualifying candidate must notify the State Board that he wants his name to appear on the ballot. Sanford's strategists figured that both he and Wallace will seek to appear and that other candidates may not wish to enter that kind of battle and would dilute Sanford's vote if they did; accordingly, they sought to make it easy for other candidates to avoid entering.

Still another aspect of the amended primary law favors Sanford's candidacy. Recognizing that Wallace and former Governor Reagan of California might run as third-party candidates in the general election as well as in the Democratic or Republican primaries, Sanford's legislative friends amended the primary law to provide that no person who is a candidate in a party primary may appear on the general election ballot as a third-party candidate or an independent.

GOVERNOR WALLACE'S APPEAL in North Carolina is strong. His 1972 primary victory and his influence in the 1975 debates on whether to retain the presidential primary law testify to it. Recognizing that his appeal has a coat-tail effect, the legislature was obliged to decide when the presidential primary should be held, particularly whether it should be held at the same time as the statewide primary. Its decision was to separate the two primaries by a substantial period of time.

Under the former law, the presidential and statewide primaries both were held early in May. Under the new law, the presidential primary will be held on the fourth Tuesday in March (March 23, 1976), and the statewide primaries on the third Tuesday in August (August 17, 1976). This split is designed to have the effect of minimizing Wallace's appeal in state primaries, making the North Carolina presidential primary the fourth earliest in the country (preceded only by New Hampshire, Florida, and Illinois), and thus making it more the center of national attention than it was previously. Its national significance will substantially affect the Wallace and Sanford candidacies. If Sanford defeats Wallace, he will be recognized early as a promising and viable candidate, but if he loses, he can count himself out of the race altogether (he already has stated that the North Carolina primary is a make-or-break proposition for him). By the same token, if Wallace succumbs to Sanford, his prospects will dim since he will have been beaten not only by a fellow Southerner but by a moderate as well.

Having concluded to separate the presidential and statewide primaries, the legislators then had to decide when to hold the statewide primary. Some favored retaining the May date. They argued that an early statewide primary would permit time for primary wounds to heal before the general election, that farmers are more likely to vote in the spring than during the fall harvest, that preparing for a second primary is administratively difficult in the short period between late August and the time the machinery goes into gear for the fall general election, that shortening the time between the primary and the general election is not likely to reduce the costs of general election campaigns, and that indeed the shorter time would cause the parties and candidates to place more reliance on media (thus increasing the cost of running) and less on volunteers (thereby weakening party organization).

Advocates of the August primary contended that the shorter time between the primary and the general election would save the candidates and the parties money, reduce physical stress on candidates, and overcome voter disillusionment and disgust with politics ("the less they hear about politics, the less cynical they will be about it"). They also pointed out that farmers, students, and those on vacation in August may vote by absentee ballot if they really want to participate in the primaries. Finally, they sought to place a long period between the presidential and state primaries, hoping to minimize Wallace's coattail effects. The upshot of the debate was that the statewide primary will be held on the third Tuesday in August.

CAPITAL PLANNING AND BUDGETING FOR LOCAL GOVERNMENT

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THE CITY OF WILMINGTON will spend $265,000 this year to buy new pumps for its sewerage treatment plant and another $195,000 to pave the streets in the low and moderate income neighborhoods. Catawba County has set aside $50,000 of its 1975-76 budget to buy a new landfill site and will spend $3,200 to replace a pick-up truck for its building inspection office. Goldsboro has budgeted $1.2 million this year to build a new police-fire complex. These expenditures differ in nature and amount, but are alike in one way—they are all capital outlays.

This article will examine the elements involved in planning and budgeting for capital outlays and improvement. Specifically, it will look at the capital improvement plan, financial projections for capital planning purposes, project evaluation, sources of funding for different types of capital outlays, authorization of capital projects or outlays by the governing board, and capital budget execution. But first we need to define capital outlay and see why special processes have evolved in many jurisdictions for capital planning and budgeting.

WHAT IS A CAPITAL OUTLAY?

Capital outlays are different from other expenses. Capital outlays are durable—that is, they yield benefits for many years, and/or they result in the acquisition of property that has a long life. Capital outlays are ususlly nonrecurring; that is, they are not made year after year but less frequently, and often with irregular intervals of time between periodic replacements. Capital outlays are also typically expensive, requiring large expenditures compared with most on-going current expenditures.

Two formal definitions of capital outlay are available in the literature. One is from economics, and it gives a broad meaning to the concept. The other is from accounting, and it provides a more restricted definition.

Economics states that a capital outlay is any expenditure that will produce a stream of benefits in future years as well as the present one,[1] whereas a current expenditure yields benefits for only the current year. Under this definition, whether the capital outlay results in the acquisition of a fixed asset or property is irrelevant. Thus, even advertising or research and development expenditures, which accounting practices almost always charge to a current account, would be considered to be capital expenditures if they are made to obtain benefits, revenues, or services for the future years as well as the present one. An example of a local government expenditure of this kind would be an expenditure for a change-over to new property tax collection procedures that are intended to raise the percentage of the property tax levy that is actually collected. Economics would classify this expenditure as a capital outlay because the impact or benefits resulting from it will occur very largely in the future. This is clearly a broad conception of capital outlay.

Accounting, on the other hand, says that a capital outlay is one that results in the acquisition of a fixed asset.[2] This is the definition generally used for capital planning and budgeting. A fixed asset refers to tangible property that is held or used for a long period of time.[3] Fixed as used here does not mean immobile; thus, an automobile is commonly classified as a fixed asset. The major difference between these two definitions from accounting and from economics is whether a fixed asset is acquired. Economics says that any outlay that produces future benefits, whether or not a fixed asset is acquired, is a capital outlay. To qualify as a capital outlay under the definition from accounting, however, an expenditure must both produce future benefits and result in the acquisition of a fixed asset or add to an existing one. Indeed, it is through the use of the fixed asset that the future benefits are realized.

The definition from accounting is the one generally used in government financial practices, and that is the meaning intended for capital outlay in this article. The major categories of capital outlay under this definition are:

1. G. David Quirin, *The Capital Expenditure Decision* (Homewood, Ill.: Richard D. Irwin, Inc., 1967), pp. 1-2.

2. National Committee on Government Accounting, *Governmental Accounting, Auditing, and Financial Reporting* (Chicago: Municipal Finance Officers Association of the United States and Canada, 1968), p. 155.

3. In commercial accounting, the notion of fixed asset may also encompass intangible property that has a long life and monetary value.

1. Land. This category includes land; legal, brokerage, and other expenses incidental to the purchase of land; and land-preparation costs.

2. Buildings. This designation refers to permanent structures for housing persons or property and equipment or furnishings that are fixed or attached to such structures. The costs for legal, architectural, and engineering services related to building construction also belong here.

3. Improvements other than buildings. Examples in this category are streets, bridges, tunnels, and water or sewer lines.

4. Unattached equipment or furnishings. Included here are trucks, automobiles, pumps, desks, and other equipment that is used for more than one year or fiscal period.

WHY CAPITAL PLANNING AND BUDGETING?

Why would a local government establish a special process or set of procedures for making and implementing capital outlay decisions? What are the factors that contribute to the importance of and need for capital planning and budgeting? First, the sheer magnitude of many capital outlays and the large amount of money required for them, especially in the construction of buildings or improvements, is reason to give special attention to capital outlay decisions. Because capital outlays are often so large, the decisions of local government to undertake them can shape the most basic features of a community. For example, a school board's decision to locate a new high school on the north side of a city can speed major new development there and indirectly slow growth in other neighborhoods. Moreover, capital outlay decisions usually bring about the largest alterations in a locality's budget. In other words, while operating expenses remain relatively stable from year to year, the thorniest problems in a locality's budget often concern capital construction or acquisition requests.

Capital planning and budgeting are needed also because the consequences of a capital outlay decision usually extend well into the future. In other words, the impact of the decision is probably irreversible for as long as the useful life of the facility or equipment acquired with the outlay. Thus, when the local governing board decides to build a new city hall or a county courthouse in a particular style and on a specific site, the community will have to live with that decision, whatever its merits, for perhaps thirty or forty years—there is not much of a market for a secondhand city hall or courthouse. Similarly, if a small town buys a new fire truck, it has committed itself to the technology represented by the new truck's capabilities for perhaps ten years. We may hope that those capabilities adequately meet the fire-fighting needs of the town, for it will probably have to rely on the truck for a long time whatever its adequacy.

Capital outlay decisions are frequently financed in whole or part with bonds, and the risk of default in bond financing is another reason for having special procedures for making capital outlay decisions. Moreover, with bond financing the governing board this year binds future governing boards to pay annual principal and interest installments on the bonds. In other words, the present governing board exercises significant authority over those that follow it; therefore, care should be taken in making capital outlay and financial decisions.

Capital planning and budgeting helps a community provide for the orderly replacement and development of public facilities. To maintain the quality and efficiency of public services such as water and sewer systems, public transportation, schools, or recreation, the facilities involved must be replaced or upgraded periodically. Moreover, new buildings or equipment are often needed to meet the growth in service demand. Both the replacement and new capital needs must be taken care of within the limited capital resources of the community. A capital planning and budget process helps achieve this purpose—not by lessening the need for new or replacement facilities or by increasing the resources to meet capital needs, but by setting priorities to meet the most pressing needs first, by submitting projects to several analytic stages to eliminate poor or very low-priority projects, by more careful scheduling to lower somewhat the costs on approved projects, and by providing revenue projections to help a community avoid overextending itself financially in meeting capital needs.

In sum, the size or magnitude of capital outlays, their effect on the basic features or development of a community, the fact that capital decisions once implemented are irreversible for a long time, the frequent reliance on bonds to finance capital projects, and the need for orderly replacement and development of capital facilities all help to explain why capital planning and budgeting can be an important decision and management process for local government.

CAPITAL PLANNING AND BUDGET PROCESS

What is a capital planning and budget process? It cannot be precisely defined. In a very general sense, the process plans, budgets, and implements capital outlays or improvements. However, this says very little, except that the process does not or ought not to stop with authorization. It extends to implementation, whether this be purchase or construction.

This article describes the capital planning and budget process in terms of six elements encompassed in three stages:

1. Planning stage, which consists of the capital improvement program and the projection of revenues available for capital outlays.

2. Budget stage, which has three steps or elements: project evaluation, project financing, and authorization or approval of the capital budget.

3. Implementation stage, which refers to construction or to the purchase of land or equipment.

All three stages with their six elements constitute a full capital planning and budget process. We should note here that the appearance of a capital or fixed asset statement in a local unit's budget does not mean necessarily that the unit has a separate process or special procedures for making capital expenditure decisions. A statement in the budget documents can be used to show what expenses are capital and how much of the budget they take. Many jurisdictions, including the federal government, use such a statement in their budget books without having either a full-fledged or even a partial capital planning and budget process. Such a process implies that capital outlay decisions are treated differently from operating decisions.

CAPITAL PLANNING: THE CAPITAL IMPROVEMENT PROGRAM

A capital improvement program (CIP) is a list of capital projects that a locality expects to undertake or capital outlays that it expects to make in the future. Usually, a CIP extends five or six years into the future. Charlotte has a five-year CIP and Morganton a six-year program. Experience has shown five or six years to be a reasonable time horizon for projecting capital needs of local government. If the projection goes out much further into the future, it becomes less a projection and more a guess.

In simple form, a CIP may be no more than a list prepared by the administration that shows future capital outlays by year. However, in both content and process, a CIP usually evolves into something more elaborate, especially for medium-sized or large jurisdictions.

The content of a typical CIP is best illustrated by the form on page 15. Later such a form would be used for each outlay or project expected to be made or undertaken in the planning period. The form divides each project into elements, which are usually planning and design, construction, land acquisition and preparation, and equipment or furnishings. The form (and correspondingly, the CIP process) distinguishes among different time periods. The first period is for prior years' expenditures. The second is for expenditures submitted for appropriation by the governing board in the budget year, 1976 on the form shown. The third is for the planning period per se, 1977 through 1980; and the final time period refers to costs that can reasonably be foreseen beyond the planning period — that is, beyond 1980. This time-phasing of projects or project elements is important not only in scheduling but also in setting priorities. A project planned for 1977 has a higher priority than one listed for 1980. The CIP form also shows the sources of funding for each project: bond proceeds, local current revenue, capital reserves, and federal or state aid. It also indicates the effect of a capital project or outlay on the annual operating budget, what department or agency is requesting the project, and what other departments have an interest in it.

The preparation of a CIP is usually coordinated by the planning or budget finance officer in medium-sized to large localities and by the public works director or manager in small communities.[4] Some small towns such as Wake Forest and Granite Quarry have contracted with the State Department of Natural and Economic Resources for preparation of a CIP.

The total time required for CIP preparation, review, and approval may span three or four months in large jurisdictions and a month or two for small ones. An important question with regard to timing is whether the CIP process should occur before, simultaneously with, or after the annual budget process. In Greensboro last year, the CIP process started in early fall and was completed in early March when the annual budget process was getting under way.[5] Thus, the CIP was one factor that set the stage for the annual operating budget in Greensboro. The other was a five-year projection of annual operating needs. Without such a projection, preparing the CIP before the annual operating budget runs the risk that capital plans will be formulated without regard for program or annual operating needs. Ideally, the best timing is probably to proceed with the CIP and annual budget processes simultaneously. The inherent difficulty in such a schedule is that each process requires much work, in both preparation and review, and doing both together may be very difficult in practice.

Most capital projects or outlay proposals that are included in a CIP usually originate at the request of city or county departments, particularly departments responsible for streets, roads, and water-sewer operations and those that have new programs that are just getting under way. In some cities – for example, Greensboro – citizen groups and individual citizens are becoming increasingly active in proposing capital outlay expenditures for the city.

Once capital outlay proposals for the CIP are made, they undergo several stages of review. The local planning agency and planning staff often make one review. They evaluate capital outlays proposed for inclusion in the CIP in terms of need, conformity to the locality's comprehensive development plan (if there is one) and land-use patterns, and whether alternatives are available to the proposals. The planning agency may hold public hearings on the capital proposals, which can be conducted in city hall or the county courthouse or in the neighborhoods.

The manager or chief executive officer also reviews capital outlays or projects proposed for inclusion in the CIP. In medium-sized and large jurisdictions, he will

4. Detailed models of the CIP process for local government appear in Lennox L. Moak and Kathryn W. Killian, *A Manual for the Preparation and Adoption of Capital Programs and Budgets by Local Governments* (Chicago: Municipal Finance Officers Association of the United States and Canada, 1964), and in the American Society of Planning Officials, *Capital Improvement Programming* (Chicago: ASPO Planning Advisory Service, 1961).

5. Information about the Greensboro CIP process was obtained from interviews with the planning and finance directors of Greensboro.

Capital Improvements Program
1976 – 1980

a. PROJECT TITLE	b. CAPITAL PROGRAM	c. DEPARTMENT	d. PROJECT NO.
e. PROJECT LOCATION	f. INTRA-DEPT'L RELATED PROJECT	g. INTER-DEPT'L RELATED PROJECTS	
h. PROJECT DESCRIPTION AND JUSTIFICATION			

i. TOTAL PRIOR EXPENDITURES	j. TOTAL 5 YR. CIP COSTS	k. TOTAL PROJECT COSTS	l. TOTAL CITY COSTS	m. TOTAL OTHER AID COSTS	n. FIRST YEAR OPERATINC COSTS

o. PROJECT ELEMENT	p. PRIOR EXPENDITURES	q. 1976 CAPITAL BUDGET	r. FUND SOURCE CODE	s. FY 77	t. FY 78	u. FY 79	v. FY 80	w. TOTAL 5-YEAR COST	x. COST BEYOND 1980
TOTAL									
BOND FUNDS									
LOCAL CURRENT REVENUE									
CAPITAL RESERVES									
FEDERAL OR STATE AID									

likely ask for help from the budget or finance director, the city or county engineer, and the planning officer. This review considers whether particular proposals are in fact capital and belong in the CIP or are more appropriately handled in the operating budget; it checks the technical accuracy of the proposals; and it evaluates them in terms of need, financial feasibility, and the availability of alternatives.

The final review of CIP proposals is conducted by the local governing board. The review can be carried out by the full board or by a committee on public works or finance. In either case, more public hearings may be held at this stage, with popular feelings on projects weighed against need, financial feasibility, and other factors. When the review is finished and the final decisions about inclusion or exclusion of projects are made, the governing board can stop here, or it can adopt a formal resolution approving the CIP. This latter course is recommended by most authorities since it formalizes the CIP process. However, such a resolution is not legally binding. It neither commits funds to a project nor gives the go-ahead to start construction or to make a purchase. The resolution is basically a statement of governing board intent. Actual appropriation for any capital outlay included in the CIP must occur either in the annual budget ordinance or in a separate capital projects ordinance. After the CIP is reviewed and approved by the governing board, a CIP document is usually published and distributed.

The CIP process can be repeated every year (as it often is in larger cities and counties), or it can be repeated less frequently — that is, every few years or only when major capital outlay needs face the community. The advantage of annual repetition or renewal is that by the time most of the individual projects or outlays reach the point of budget authorization and appropriation, they have been submitted to review several times.

CAPITAL PLANNING: REVENUE PROJECTIONS

Revenue projections are undertaken to provide an estimate of the financial resources available for capital outlay purposes for the same five- or six-year period that is covered by the capital improvement program. Such projections are important because having a CIP without knowing about revenue in effect proposes capital decisions without regard for the financial ability of the community to implement the decisions. Moreover, projecting the revenue available for capital outlays means that future operating needs are also projected. Because capital outlays are frequently financed with current revenue, the revenue available for capital outlays cannot be predicted realistically without also figuring how much revenue operating needs are likely to absorb in the future.

Four projections are involved in predicting revenue available for capital outlay purposes: local current revenue, federal and state aid, expenditures for operating needs, and debt-incurring capacity. Using the first three projections, non-debt financing available for capital outlays in any year of the planning period is simply local current revenue plus federal and state aid minus expenditures for operating needs for that year. Adding debt-incurring capacity to this equation yields an estimate of total possible financing for capital purposes for the year. This is in a very general way how the projections are used.

Projections of local current revenue are usually based on past trends in existing revenue sources. In looking at the trends, natural growth must be distinguished from growth resulting from changes in a revenue or tax base or rate made by the local governing board or the General Assembly. Since the revenues from individual sources usually grow at different rates, projections are better based on the individual revenue trend for each revenue source followed by summation than on the total revenue trend. If changes in revenue classifications have been made during the trend period, past classifications must be adjusted to make them consistent with existing ones. Finally, in making the projections, existing revenue sources and tax rates are assumed to continue through the planning period, and the trends, as carried into the future, must of course be adjusted for changes in fiscal conditions expected in that period.

Two major local current revenue sources in North Carolina are the property tax and income from water-sewer systems. Projection of future revenue from the property tax must consider existing assessed valuation, future building activity, any revaluation or annexation that will occur during the planning period, and the expected collection rate. Water-sewer operations are often self-supporting; therefore, cost is suggested as the most appropriate base for projecting revenue from them. This involves predicting the number of water-sewer customers (by category if applicable), the average consumption per customer, and cost per gallon at the expected level of projection. This yields the amount of revenue that must be secured to cover costs. These revenues can then, in terms of existing rates, be increased to allow for profit or decreased to account for subsidy of water-sewer operations.

Federal and state aid is a major source of revenue for county government and of growing importance for municipal government in North Carolina. Projecting the amount of federal and state aid available to a local governmental unit for capital or operating purposes is problematic; the degree of difficulty depends greatly on the legal and administrative provisions governing the distribution of that aid.

Projecting federal general revenue-sharing for a local unit has been relatively easy to this point.[6] Money from this source has been distributed pursuant to a five-year congressional appropriation by a formula based on

6 Until this year, local units have known well beforehand and with considerable accuracy how much revenue-sharing they were going to get for a particular year. Revenue-sharing allocations for some local units have changed unexpectedly this year, probably because of changes in the data sources used in the revenue-sharing formula.

population, tax effort, and per capita income weighted inversely. The distribution chain for revenue-sharing is short, going directly from the U.S. Treasury to the locality. The renewal of revenue-sharing beyond 1976 is uncertain, which creates a major projection problem.

Other federal and state aid is distributed pursuant to an annual appropriation and by either formula or grant. Major formula aids are welfare and the entitlement and hold-harmless portions of the community development program. In projecting formula aid, the major problems are ascertaining the appropriations that Congress or the General Assembly will make each year, determining whether they will change the formulas, and if so, how. The distribution chain for formula aid is medium-long, going from the U.S. or state treasury, through the appropriation process by Congress or the General Assembly, and then to the locality. Projecting aid coming to a locality from either the federal or state government by formula is difficult but can be done with reasonable accuracy. Moreover, it is much less difficult than projecting federal and state aid distributed by grant.

Federal grant aid is an important revenue source in education, and federal and state grant aid is also available to law enforcement, mental health, and many other local programs. Projecting such aid is very difficult because grants are made pursuant not only to an annual appropriation but also to the judgment of a federal or state administrator. Also the distribution chain for grant aid is long; for federal grants it runs from the U.S. Treasury, through the appropriation process by Congress, and through an administrative decision by a federal official before the aid comes to the locality. Despite the hazards involved in projecting federal and state grant aid, the projection should be made for capital planning purposes, however, with a wide conservative margin left for error.

Once local current revenue and federal or state aid is projected, the amount of this funding that must go to finance operating needs in the planning period is then projected. As with local current revenue, the projection of operating expenses is based on historical trends, grouped by certain categories (usually departments, functions, or funds) and adjusted for the conditions expected to prevail in the planning period.

Projecting debt-incurring capacity is an important element of financial projections for capital planning purposes simply because most localities issue bonds to finance major capital improvements. Most debt assumed by local governments in North Carolina is general-obligation debt, which means that it is backed by the unit's full tax-raising power. Such debt is subject to a legal limit in North Carolina, and debt-incurring capacity for a locality can be conceived of in terms of this limit. The limit prohibits general-obligation debt from exceeding 8 per cent of the value of the locality's property that is subject to property taxation.[7] The 8 per cent limit does not pertain to revenue bonds—bonds backed solely by the earnings of a public enterprise, refunding bonds—bonds issued to retire or pay off existing outstanding debt, or bonds for water, sewer, gas, electric power, and erosion control. One calculates debt-incurring capacity in terms of the 8 per cent limit for any year in the planning period by multiplying appraised property value by 8 per cent and subtracting from that general-obligation debt authorized and outstanding together with such debt that has been authorized but not issued.

The 8 per cent statutory limit gives North Carolina local governments broad leeway for contracting new general-obligation debt. In other words, given the existing debt of local units, the limit typically provides a very large debt-incurring capacity and serves mainly as an outside limit on such capacity. The North Carolina Local Government Commission therefore generally recommends that a lower debt limit, anywhere from 3 to 6 per cent, be used as a practical limit or guide depending on local fiscal conditions and the purpose for which the debt is contracted. Moreover, other economic or fiscal indicators can be used to determine what is a fiscally sound debt-incurring capacity for a locality. One is debt per person. Another is debt per $1,000 of personal income, and a third is the percentage of the local operating budget that goes to annual principal and interest payments. This percentage can range from a few percentage points to 25 or 30 per cent of the annual budget; 20 per cent is considered by some authorities to be a reasonably acceptable level.[8] Note that in calculating debt per person or per $1,000 of personal income, all types of debt—general obligation, revenue, and so forth—should be included.

CAPITAL BUDGETING: PROJECT EVALUATION

Project evaluation refers to a detailed and often technical study of a capital outlay proposal, and it is usually done late in the planning stage or early in the budget stage. In other words, it is the study that a locality does or has done just before it decides finally whether to commit funding to a capital outlay or project. As such, it relates more to capital budgeting than to capital planning.

Project evaluation can be conducted by in-house staff or contracted out to a consulting firm. If the project is large and involves technical considerations, part or all of the evaluation will be contracted out to an engineering or economic consulting firm. The purpose of evaluation, no matter who does it, is to help determine the need for and/or economic viability of the project. For capital construction, this may involve drawing up general specifications but not detailed specifications or blueprints.

The methods or techniques for project evaluation range from approaches that rely on observation and judgment to complex economic models. Informed judgment

(Continued on page 20)

7. N.C. Gen. Stat. § 159-55.

8. J. Richard Aronson and Eli Schwartz, *Management Policies in Local Government Finance* (Washington: International City Managers Association, 1975), p. 325.

MORGANTON: A CASE STUDY IN CAPITAL PLANNING

Edward Wyatt

The author is the Morganton city manager

IN THE SPRING OF 1974, Morganton was finishing major water and sewer projects and obligations under an earlier annexation, and it was in a sound position to undertake a new program of capital improvements. The city administration was reluctant to do capital planning through the annual budget because the pressures of the annual budget tend to work against the establishment of the long-range goals and work schedules needed for capital planning. In order to plan for Morganton's future needs and set priorities, the administration proposed that the city develop a Capital Improvements Program (CIP) extending from fiscal year 1975-76 to fiscal year 1980-81. The city council approved the proposal in May 1974, and work began on the CIP last fall.

The planning director coordinated the preparation of the CIP. He began by asking all department heads to give him a list of capital needs for the next six years. The list was to include capital projects and equipment purchases estimated to cost $2,500 or more. The planning director and the city manager then reviewed this list and deleted some requests that were unrealistic or not feasible. The planning director and the director of finance worked on funding for the requested projects, and in late November and early December the planning director and the manager again reviewed the requests and determined priorities. In this process, all projects were matched with appropriate funding.

In drawing up the list of projects and setting priorities, the administration had invaluable help from earlier planning studies that had been financed by federal 701 funds and contributions from a citizens' advisory committee that made recommendations in the fields of transportation, growth policy, beautification, recreation, cultural enrichment, housing, and human resources.

The physical format of the CIP had two sections. The first listed projects by functional areas, and the second cross-referenced projects by funding. An explanation was included beside each project and equipment purchase. The first section permitted review of projects by functional areas for the next six years, and the second is helpful to the finance department in coordinating funding. This approach is simple, and it makes the report more understandable.

Resources. In determining funding, the director of planning and the finance director reviewed revenues for the preceding five years. This review showed past growth in particular sources. However, because of the present economic situation, no growth was projected for the future. Any growth that may occur will then help to cover escalating costs and unanticipated small projects.

Morganton has had substantial funds to devote to capital improvements projects for general governmental activities. The following funds have been devoted almost entirely to capital projects and equipment purchases in recent years: Capital reserve, Powell Bill, and general revenue-sharing funds. Many cities have had to use revenue from the latter two sources to balance the operating budget, but this has not been necessary in Morganton. Also, community development bloc grant funds will be used almost entirely for capital projects.

The major source of revenue for the Capital Reserve Fund is ABC surpluses, which have increased greatly since the ABC store was opened in 1963.

The Powell Bill funds were increased for fiscal year 1971-72 from ½ cent to 1 cent per gallon of gasoline. The amount is distributed to all municipalities in North Carolina according to a formula based on city road mileage and population.

Another major source of capital funds is general revenue-sharing, which is slated to continue through 1976. The CIP assumed the continuation of this source of revenue through the planning period. If revenue-sharing is not continued, the capital program will need to be revised and a number of projects reduced or deleted. In connection with revenue-sharing, the wisdom of conservative budgeting of anticipated revenues has already been demonstrated. Since the CIP was prepared, we have learned that the city will lose approximately 10 per cent in next year's revenue-sharing allocation. The Community Development Act of 1974 has given the city another funding source that may be used for capital projects. The city has a hold-harmless

entitlement for the next five years amounting to an excess of $750,000.

The revenue picture for the water and sewer fund is quite different. The water and sewer rates had to be increased greatly for fiscal year 1975-76 just to balance the fund—the sewer rate by some 85 per cent and the water rate by an average of 16 per cent. These increases will provide just enough for limited extensions and a systematic line-maintenance program. Thus, except for about $100,000 in unspent water bond funds, very little capital financing is available for extensive water projects. A project costing over this amount will not be possible without state and federal funding. The situation is not as bleak with sewer projects because of an unissued $2,000,000 bond authorization. To meet a present need, some bonds may soon be issued from this authorization, but we expect that most of the authorization will be used for future projects.

Electric revenues are likely to provide adequate money for reasonable capital improvements to the electric system—a fringe benefit of the fact that efficient management is keeping operating costs low and improvements are being made systematically. Even though its capital improvements are made on a cash basis rather than through a bond issue, the city's retail electric rates are still considerably lower than those of the private power company in our area.

Programs. Many capital projects and equipment purchases are planned for the period from 1975-76 through 1980-81, which is possible because of a large amount of capital resources that will be available to Morganton during this period.

The principal capital improvements scheduled for the next two fiscal years, 1975-76 and 1976-77, are streets and the urban-renewal project (some of the urban-renewal work will include street construction). Street projects slated for the next entire six years include an annual resurfacing program, petitioned street-paving, a replacement program for curbs and gutters and sidewalks especially in the Central Business District, and the further development of a major thoroughfare program. This last project includes a loop system for the CBD and will include widening, curbing, and guttering a four-block area of the CBD.

Recreation will get a lot of attention in the planning period, particularly in the development of neighborhood recreation areas and facilities. Until now, most capital improvements in recreation have been restricted to the two large facilities. On the basis of the earlier Community Development Report, the planning board recommended that further improvements not be made at central recreation facilities until the neighborhood recreation program has been developed. However, the CIP Report recommended that the eight acres that would be acquired from the Urban Renewal Authority contiguous to the Collett Street Recreation Center be developed immediately. This was proposed since the property is available, and there is an informal stipulation to develop it for recreation purposes. The Recreation Advisory Commission also recommended that initially at least a second ball field and a field house be built on the property. This recommendation was included in the CIP for FY 1976-77 in addition to the neighborhood facilities.

Also among the high-priority needs for the city council to consider were a new warehouse, a new police station and expanded fire facilities, and cemetery expansion. These projects are more involved in terms of cost and policy determination than most of the others included in the CIP.

The city council has been disposed to build a new warehouse so that the present garage, which now contains the warehouse, could be enlarged to permit only servicing of vehicles. The city council was quite interested in servicing vehicles for Burke County and the Town of Drexel, if these parties would participate in the cost of the new warehouse. A warehouse would provide adequate storage room for supplies, a meeting area for the Public Works Department, offices for the public works superintendents, and a communications center. The administration is now reviewing this warehouse proposal, which represents a major step in intergovernmental cooperation.

A new police station is badly needed. The present one was renovated in 1958 for a police department that had 19 people. The department now has a total staff of 42. The CIP report recommends using the present joint fire and police facility for the fire station and expanding the fire substation, particularly for training purposes. This would occur after a new police station was built.

The two existing cemeteries have virtually no vacant spaces. After some initial discussion about whether the city should expand its cemetery facilities (and if so, where) or encourage private development of a cemetery, the city council accepted the Cemetery Commission's recommendation to expand the city's facilities. This is included in the CIP.

The CIP program contains many equipment purchases. Most of them represent replacement of existing equipment and therefore involve little policy decision, but a major policy consideration was whether all police patrol cars would be replaced each year. Previously only half have been replaced each year, which has caused maintenance problems. The city council decided to replace all police cars beginning in the first year of the CIP since old police vehicles can then be used by other city departments. This practice will be reviewed annually.

Several water and sewer system projects were planned in the CIP including replacing and extending

water and sewer lines. However, two major projects listed for FY 1975-76 include a major outfall line and a 16-inch water line. Major expansion of water and sewer treatment facilities is listed for the latter part of the six-year period. The city council agreed that these will have to be reviewed more closely as that time approaches and actual use can be more accurately determined. These projects will require the issuance of bonds, some of which are now authorized.

The CIP provides for growth of the electric system, including placing electric lines underground in the CBD and development of a loop system for this area.

After formally reviewing it in two special meetings, the Morganton City Council adopted the Capital Improvements Program on May 24, 1975. The Council's role had not been passive. It had actively participated in amending recommendations of the administrative staff and the planning board's recommendations, and in the preceding twelve months it had extensively reviewed a number of in-depth planning reports and studies.

Future and Summary. Planning reports and documents too often gather dust and are little used—"rubber stamped" by planning boards and governing bodies. This, in turn, has caused little acceptance for such plans and, therefore, a small degree of implementation. We think that Morganton's CIP can be successfully implemented because the report has correlated revenues with proposed programs—assuming that costs and revenues remain reasonable constant.

Even though community needs and elected officials may change, the chances that most of the program can be implemented are good. The needs have been defined and subscribed to by the administrative staff, boards, and commissions, and, most especially, the city council.

It is contemplated that each phase of the CIP will be implemented in the annual budget for the year it is planned. Also, there will be an update of the CIP each year to keep it current and on a six-year basis.

Morganton has a Capital Improvements Program monitoring system that will help us to keep abreast of project implementation in any particular fiscal year. The system charts both the expected and the actual progress of projects and equipment purchases so that all departments can see how capital programs are getting along. This greatly improves accountability and responsibility. Without such an approach, the express direction of the governing body may not be implemented in accordance with its wishes.

The future will tell whether Morganton's Capital Improvements Program will be effectively implemented. But we feel, since the city council is committed to the program, that the long-range goals will be realized and that available funds will be used in the most productive way.

CAPITAL PLANNING (Continued from page 17)

based on field study or inspection is the simplest and probably the most often used of all evaluation methods. It is most applicable when the outlay being considered is a relatively small construction project or the purchase of equipment, or when the priorities among competing or alternative outlay proposals are fairly clear. It generally involves consulting with experts, manufacturers, and those who will use the facility or equipment and visiting other jurisdictions that have a similar facility or piece of equipment. Such an approach makes no claim of technical certainty, for the result it produces rests ultimately on the judgment of the trained and experienced analyst.

Another method of project evaluation is to use pre-established priority rankings. Categories of capital need are established, and project requests for any one year are allocated among the categories. This technique is particularly useful when the dollar amount of capital project requests far exceeds the available financing. It helps to assure that high-priority projects get first draw on the funds. A pre-established priority ranking system for capital construction projects might have the following categories, ranging in order from high to low priority:

- Urgently needed for safety of persons and property:
- Renovation or addition to improve existing facility.
- New facility to relieve existing, undesirable situation.
- New facility to handle workload expansion in existing program.
- New facility for a new program or service.

The difficult part of a pre-established priority ranking system lies in selecting the categories and arranging the priorities in a way that satisfies both the manager and the governing board and then in staying with the priority categories from year to year. A pre-established priority ranking system will not work if there is significant disagreement between the manager and the governing board or among governing board members about the priorities, or if the categories are changed yearly.

Economic techniques can be used for project evaluation when a project will generate a stream of revenue over the period of its useful life. Government activities or projects that produce revenue are those financed in significant part with user fees – for example, water-sewer operations, mass transit, certain recreation programs, and sometimes solid-waste pickup and disposal. Economic analysis can also be used to evaluate a capital project or piece of equipment that generates a stream of savings over the period of its useful life. For example, a municipality may be renting privately owned office facilities, and the question arises whether the cost of a new city hall would be compensated for in whole or part by the savings in private office rentals (less annual maintenance cost on the city hall) by having the city hall.

Various economic techniques can be used to evaluate capital projects. Two of the most widely used ones are discussed here. One is called the pay-back method. This is simply the number of years required before the annual net proceeds or income from a project recoups the orig-

inal capital cost or investment. Thus, pay-back is stated in years or by time period, and it is calculated by dividing the initial capital investment by anticipated annual net income resulting from the investment. The pay-back method is simple. Another advantage is that when capital funds are lean, it favors projects that return income or capital to the locality quickly. The disadvantages of pay-back are that (1) it fails to consider earnings after the investment has been recouped; and (2) it weights earnings in different time periods or years equally, whereas because of inflation and the uncertainty or risk associated with the future, near-term earnings should be weighted more heavily than far-term earnings in project evaluation.

A second economic technique that can be used for project evaluation in the public sector is the discounted-cash-flow or net-present-value method.[9] Under this method, the stream of annual net income or savings over the expected life of a project is discounted back to the present time; the discounting mechanism would probably be the interest rate that the locality must pay for borrowed funds. Then, the sum of the discounted net income or savings is compared with the initial investment in the project, and if the discounted income or savings exceed the investment, the project may be considered to be economically viable.

One advantage of the discounted-cash-flow method of project evaluation is that unlike the pay-back method, it considers all net earnings or savings of the project over the period of its useful life. Moreover, it takes into account the time value of money by weighting earlier earnings or savings more than later ones through the discount factor. However, this method presents a problem in the selection of an appropriate discount rate. Some economists argue that a locality's cost of borrowing provides too low a discount rate because of the tax-exempt status of municipal bonds. Moreover, the money allocated to a government project, if invested in the private sector, could most probably earn a rate or return much higher than the municipal borrowing rate. Another problem with the discounted-cash-flow method (shared by all economic analysis techniques) is that it gives undue emphasis to benefits that can be quantified. The capital outlays or projects of local government usually have substantial nonmonetary benefits, and the economic techniques do not take them into account very well. Indeed, when economic analysis is used for project evaluation, nonmonetary benefits and costs are often neglected.

CAPITAL BUDGETING: PROJECT FINANCING

In the capital planning process, financial projections are made to set long-term capital needs within the expected level of available funding. The principal financial issue at the budgetary stage is how heavily the locality will rely on each of three sources to fund capital outlays or projects. The sources are current-year revenues, borrowed money, and capital reserves. The issue must usually be addressed for both the capital budget as a whole and individual projects or outlays.

The use of current revenue to finance capital outlays or projects is commonly called pay-as-go financing. The capital budget of a locality may be financed entirely or partially on a pay-as-go basis. Full pay-as-go funding is usually more feasible for older communities where most of the initial capital improvements of any magnitude have already been taken care of and the community need only finance replacements from time to time and purchase equipment. Furthermore, pay-as-go financing, whether full or partial, is usually more practical when capital outlays are recurrent. This means that the community spends more or less the same amount for capital purposes each year. The total dollar amount is constant or rises or falls at the steady rate. The most common types of capital outlays financed on a pay-as-go basis, regardless of locality characteristics, are equipment purchases and minor construction and remodeling projects.

The advantages of pay-as-go financing for capital outlays are: (1) it encourages responsible spending by requiring the same officials who approve projects or outlays also to levy the taxes to pay for them; (2) it avoids paying the interest charges that are involved with bonding; and (3) it avoids the accumulation of large, fixed principal and interest charges in the operating budget. Such charges, if they amount to more than 20 per cent of the operating budget can be a very heavy burden in a recession.

A second method for financing capital projects is borrowing, which is designated pay-as-use because the financing comes ultimately from annual debt service payments made while the capital facility or equipment is being used. Pay-as-use financing is commonly employed when the project is very large relative to the resources of the community and when the project need not be replaced for many years, e.g., a city hall or sewerage treatment plant. Pay-as-use financing is also generally necessary in new communities or older ones that are growing rapidly. Such communities typically face substantial and rather immediate needs for public facilities that can be provided only through borrowing. Similarly, pay-as-use financing is often involved in annexation, in which extending municipal services to a new area requires new public facilities. Equipment acquisitions and remodeling or minor construction projects are usually not financed by borrowing.

Borrowing or pay-as-use financing for capital projects has several advantages. First, through annual debt service payments spread over the useful life of a project, each generation of users of a project pays a significant portion of its cost. Second, in a period of inflation, pay-as-use financing enables a locality to borrow dear or expensive dollars and pay back with cheap ones. This has at least been true during the post-World War II era and particu-

9. *Ibid*, pp. 303-10, for elaboration of the discounted-cash-flow or net-present-value method of project evaluation.

larly during the past few years when interest rates have not compensated for inflation.[10] Third, when current revenue or reserves are used to finance capital projects, the projects may have to be delayed until the funds are accumulated. Pay-as-use financing enables a project need to be met almost immediately. Finally, although borrowing carries an interest cost, the use of current revenue for capital projects has a corresponding opportunity cost (opportunity cost is equal to the rate of return the locality or its citizens could have earned by investing the current revenue rather than allocating it to finance the capital project).

Capital outlays or projects can also be financed with money accumulated in one or more capital reserve funds. North Carolina law authorizes the governing boards of local governments to establish such funds, for any purpose for which they may issue bonds.[11] Once a reserve is established, moneys are accumulated in it by annual appropriation, transfers of money from other funds, and interest earnings from investments.[12] When the reserve is big enough to pay for a project or outlay, it is expended on the project. Thus the timetable for reserve financing of capital outlays is opposite that of bond financing. In reserve financing, annual installment payments are made before the capital item is acquired, while in borrowing or pay-as-use financing, the annual debt service payments are made after acquisition.

Capital reserve financing is feasible when a locality perceives a major capital construction need that is not immediate so that the locality can accumulate a reserve for several years before meeting the need. Whether this method will work depends on how stable the construction dollar is. Occasionally, capital reserves are used to accumulate funds for land purchases or the local match required to secure federal or state aid available for capital projects. Reserve funds are also employed when a steady flow of revenue can be counted on year after year to finance certain capital outlays. For example, an equipment reserve revolving fund can be used to finance the replacement of equipment used by city or county agencies. Such a fund is first established by transferring seed money from the general fund, but thereafter it is financed by annual depreciation charges to the line departments.[13]

Reserve funding of capital outlays carries with it the same advantages and disadvantages as capital financing with current revenue, but it also has another disadvantage—the temptation to divert an accumulated capital reserve to current operating purposes. This temptation is particularly strong in recessionary times when actual current revenues fall short of the estimates.

CAPITAL BUDGETING: AUTHORIZATION OF CAPITAL OUTLAYS

The third step in the budgetary phase of capital planning and budgeting is authorization of capital outlays or projects by the governing body. The North Carolina Local Government Budget and Fiscal Control Act formerly required such authorization to occur in the annual budget ordinance or in an amendment to that ordinance,[14] but the 1975 General Assembly amended that act so that local governments can authorize capital projects or outlays either in the annual budget ordinance or an amendment thereto or in a separate capital projects ordinance.[15] The new law defines "capital projects" broadly to include any project that is financed in whole or part with bonds or notes or involves the acquisition of a capital asset. A capital asset is the same as a fixed asset, which means that any capital outlay—whether for land acquisition, construction, or equipment—could be authorized by a capital projects' ordinance.

With the flexibility allowed by the new law, local governments in North Carolina have three options for authorizing capital outlay expenditures. One is through appropriation in the annual budget ordinance. The second is through appropriation in a comprehensive capital projects ordinance that embraces all capital outlays or at least the major ones. The third is by an individual capital projects ordinance for each capital outlay or project—again with only the major outlays included and the others handled in the operating budget. This third alternative would be similar in nature and effect to authorization by amending the annual budget ordinance, with one exception: Authorization initiated through individual capital projects ordinances would continue for the time required to complete the project or acquire the asset, while authorization initiated through annual budget amendments would be annual or less, which means that for a multi-year project, authorization would have to be renewed each July 1 until the project is complete.

Each method of authorizing capital outlays has advantages and disadvantages. Authorization in the annual operating budget helps assure that capital expenditure decisions are coordinated with current budget decisions. Moreover, because annual budget authorization is only for a year at a time, it provides for periodic review of projects in process or under construction.

10. *See* Phillip Cagan, *The Hydra-head Monster. The Problem of Inflation in the United States* (Washington, D.C.: American Enterprise Institute for Public Policy Research, 1974), chapter 1.

11. N.C. GEN. STAT. § 159-18.

12. N.C. GEN. STAT. §§ 159-20, -21.

13. For accounting purposes it may be preferable to treat a revolving fund for equipment purchases as an intragovernmental service rather than a capital reserve fund. In either case, the financing underlying a particular equipment purchase is a reserve accumulated through annual depreciation charges.

14. *See* David M. Lawrence, *The Local Government Budget and Fiscal Control Act, Annotated* (Chapel Hill, N.C.: Institute of Government, 1974), p. 15.

15. N.C. Sess. Laws 1975, Ch. 514. Also see "1975 Amendments to Local Government Budget and Fiscal Control Act," *Municipal Finance Bulletin*, No. 13 (June 1975, Institute of Government, Chapel Hill, N.C.).

The disadvantages of authorizing capital outlays in the annual budget ordinance apply mainly to large multi-year projects. One is the incongruity of authorizing a project only a year at a time when in fact contracting and spending for the project and construction will take several years. This problem can be alleviated somewhat by time-phasing the stages of a project—for example, for a construction project, appropriating money for planning in one year, land acquisition in the next, and construction in the third.

A more difficult problem with authorizing capital outlays in the annual operating budget is that such a practice can cause that budget to fluctuate erratically, so that confusion arises as to the amount of the regular on-going budget. Also, it can camouflage substantial growth in the operating budget. For example, a major increase in the operating budget can be obscured by a completion of a capital project and its removal from the annual budget in the same year.

The disadvantages of capital outlay authorization in the annual budget are addressed or overcome by using a capital projects ordinance. This type of ordinance, whether comprehensive and embracing all major projects to be authorized in a year, or broken into separate ordinances for individual projects, continues in force until acquisition or project construction is complete. In other words, the authorization and the money appropriated by it do not lapse at the end of a fiscal year if not contracted or spent. Second, by authorizing capital projects separately from operating ones, current expenditures and benefits flowing therefrom are matched more readily with current revenues. Large capital outlays with benefits that occur in future fiscal years are segregated, and this helps decision-makers and the general public to determine precisely what the current, on-going budget is and to identify and deal with changes and increases in that budget from year to year.

The disadvantages of relying on a capital projects ordinance to authorize capital outlays lie, first, in deciding whether all capital outlays or only those that are above a certain dollar level or of a specific nature—for example, those involving construction—will be authorized through such an ordinance. Presumably, small recurring capital outlays would be authorized in the operating budget, while major capital outlays would be approved by a projects ordinance. However, the definition of a major capital outlay or project could be changed from year to year to suit special conditions, which would deprive the capital projects ordinance of any advantage it has in pinning down what the annual operating budget is in a particular year or how it changes from year to year. Second, if a capital projects ordinance is passed at a different time from the annual operating budget, capital decisions may be reached without giving adequate regard to their effect on annual operating needs. Finally, enacting capital project ordinances for individual projects or outlays may foster a fragmented approach to capital decision-making, each capital outlay being evaluated on its own merits but without regard to any priorities among different capital needs.

No general conclusion can be reached here about the most appropriate or best method for capital outlay authorization. Only experience by localities with the new law will provide the basis for such a conclusion.

IMPLEMENTING THE CAPITAL BUDGET

The last step in the capital planning and budget process is implementation. Failure here can put all the plans and financial arrangements made in the earlier stages of the process down the drain. Key facets of capital budget implementation are management of revenue proceeds for a project, equipment purchases, and design and construction of buildings or improvements.

Management of revenue proceeds available for capital outlay purposes usually requires an investment plan. A locality may have revenue accumulated and committed to a project well before the revenue must be spent. For example, bond proceeds are often authorized and issued before construction begins,[16] and federal grants for capital purposes are sometimes received before the grant money must be spent. An investment plan is usually established for such funds so that they do not lie idle in the locality's depository but rather earn interest and become available in cash in the appropriate amounts to meet payments to vendors and contractors when the payments fall due. In order, the appropriate criteria for selecting investments are safety, liquidity, and income.[17]

Two important factors in implementing equipment purchases are timing and bid procedures. Equipment purchases for most local units of government in North Carolina are financed from current revenue or intergovernmental grants. Borrowing is usually resorted to only when the equipment costs a lot or will be placed in a new facility that is being built and bonded. When local current revenue is the principal source for buying equipment, the purchases can be timed to coincide with the period of greatest revenue in-flow from the local sources. Unlike expenditures for salaries and supplies that must be made regularly throughout the year, equipment purchases can be made when the locality chooses. And since such purchases usually require much money, making them when revenue in-flow is large—i.e., December through January—eases the locality's cash-flow problem.

Equipment purchases by local governments in North Carolina must also be made according to the applicable purchasing laws. For example, any piece of equipment that costs $2,500 or more must be purchased by contract and according to formal bid procedures involving public

16. Issuance must not occur so far ahead of construction that the arbitrage provisions of the U.S. Internal Revenue Code are violated.

17. Regulation of investment by local governments occurs pursuant to N.C. Gen Stat. § 159-30.

advertisement and submittal of sealed bids.[18] Moreover, any equipment costing from $1,000 to $2,500 must be purchased using informal bid procedures, i.e., bids secured by telephone or in a similar manner.[19]

Implementing capital outlay decisions that involve construction is more complex than implementing other capital decisions. First, if the project is of any magnitude, an architect or engineer is usually employed to draw up plans and specifications. North Carolina law requires that this be done when the cost of the project exceeds $45,000,[20] and the law aside, securing an architect usually pays off in avoiding costly construction mistakes. Architects are not selected by bidding. They are chosen through private negotiation focused primarily on design considerations and, in some of the larger cities and counties, on a simple rotation basis unless special skill or experience is required. Architects are paid on a sliding scale, ranging from 5 to 10 per cent of the project cost, depending on the size of the project. In reviewing architectural plans, local officials must balance high construction costs against low maintenance costs later versus low construction cost and high maintenance costs later.

Construction of a capital project may be done by a local unit's own permanent work force if the estimated cost of the project is $50,000 or less. If project cost is more than $50,000, construction work on the project must be contracted out.[21] Implementing a construction contract and supervising construction under a contract for a capital project carry special concerns. First, state law requires that any contract involving an estimated expenditure of $10,000 or more must be let through formal bid procedures, and construction contracts costing from $1,000 to $10,000 must be let by informal bid.[22] Second, if the total project cost is $20,000 or more, separate contracts are required for heating, air conditioning, plumbing, electrical installation, and refrigeration.[23] Third, a performance bond or the equivalent is required for any construction contract.[24] This bond protects the locality financially from the contractor's failure to complete his work. A retainage provision written into the contract has a similar effect. Such a provision allows a locality to hold back a portion, usually 5 to 10 per cent, of each monthly payment to the contractor for work done during the month and construction materials delivered to the site. This money is not paid to the contractor until construction is complete and is satisfactory to the locality. Finally, during construction, the work done should be inspected frequently, daily if possible, by either the architect or the city or county engineer or building inspector.

18. N.C. Gen. Stat. § 143-129.
19. N.C. Gen. Stat. § 143-131.
20. N.C. Gen. Stat. § 133-1.1
21. *See* N.C. Gen Stat. 143-135, as modified by N.C. Session Laws, 1975, Ch. 295.
22. N.C. Gen. Stat. §§ 143-129, -131.
23. N.C. Gen. Stat. § 143-128.
24. N.C. Gen. Stat. § 143-129.

CONCLUSION

We might ask here whether a particular town, city, or county should establish special procedures or a separate process for capital planning and budgeting. But the actual experience of North Carolina localities in making capital outlay decisions indicates that this would be an inappropriate question. All or nearly all North Carolina local units already use some of the steps that are described here as elements of capital planning and budgeting. State legal provisions require the performance of some steps, especially those having to do with project authorization and implementation, and some of the other steps simply represent sound, common-sense approaches to planning and carrying out individual capital outlay decisions.

Therefore, perhaps the better questions to ask are whether the individual procedures that a locality has for making capital expenditures should be pulled together, and whether other missing elements or procedures—for example, the capital improvement program and revenue projections—should be added to form a unified process for capital planning and budgeting for the community. Some of the criteria that will help the community answer these questions go back to the reasons cited for capital planning and budgeting at the beginning of the article. Thus, the more the following conditions hold, the more likely a community is to benefit from having a separate capital planning and budget process: (1) it faces large capital needs requiring the expenditure of substantial amounts of money; (2) meeting these needs is likely to shape or alter the basic features of the community; (3) bonding will be required to meet at least some of the needs; (4) and other procedures will probably not guarantee that the needs are met in an orderly and fiscally sound manner.

But applying these criteria does not address the almost equally important question of how complete the capital planning and budget process of a community should be. In other words, must a local government use all six of the capital planning and budget steps or elements described in this article to have an acceptable (or "useful") capital planning and budget process? Probably not. For example, a particular community may develop long-range revenue projections but no elaborate capital improvement program in the planning stage. Or it may have no formal evaluation of individual projects in the budget stage. It is impossible to say in general what elements must be present to have a minimally acceptable capital planning and budget process. This question can be answered only in terms of the needs, resources, and conditions of the individual community. We may venture that the fuller the capital planning and budget process, assuming the steps of the process are exercised skillfully, the more likely the capital decisions emerging from the process will meet the needs of the community.

Finally, a general factor that bears on whether a community should adopt special procedures for capital plan-

(Continued on page 37)

WHO GOES TO PRISON?
The Likelihood of Receiving an Active Sentence

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OF PERSONS ARRESTED for crimes, it will probably always be true that some are guilty and some are not, that not all the guilty are punished, and that not all of the innocent escape punishment. Like our other institutions, the criminal justice system is far from perfect. Lately its shortcomings have become particularly apparent, as the crime rate, which in the early 1970s showed signs of stabilizing, now resumes its upward climb. With the continuing concern about the effectiveness of the police, courts, and correctional agencies in controlling crime, and about unequal treatment of various groups in society, it may be worthwhile to ask some questions about imprisonment, the most severe punishment that can be inflicted for most crimes. Governmental leaders—for example, the Attorney General of the United States—are looking to the threat of punishment and the incarceration of especially dangerous offenders as means of controlling crime. Obviously, the factors that influence whether defendants go to prison are relevant to this concern.[1] Maintaining fairness in the criminal process is perhaps even more important than deterring crime. The extent of belief in the basic fairness of the process may well in the long run shape citizens' respect for the law and for law-abiding conduct.[2]

The general question addressed here is what factors influence whether a criminal defendant goes to prison. More specifically, this article analyzes the relative importance of various factors in determining whether a person arrested and charged with burglary, breaking and entering, or larceny goes to prison. The factors considered include (1) those directly related to the law or legal policies, such as the weight of the evidence against the defendant, his criminal record, and the seriousness of the charge against him; (2) demographic factors such as the defendant's sex, age, race, income, and employment; and (3) other elements related to how a defendant's case is processed, including defense counsel and bail. Some of these factors can be measured fairly precisely from official records (our source of data) for each defendant; others can be only indirectly and crudely measured, but reliably enough to suggest what goes on in the "real life" of the criminal process. Any reader can point out factors that are not included and perhaps ought to be. Some examples are the quality of the prosecution (amount of time allocated to preparation, experience of the prosecutor, and the like) and the identity of the judge (judges, being human, think and feel diversely and thus vary in their choice of penalties for a given offense). Nevertheless, the factors included in the study are sufficient to provide some structured insight into the process that leads a defendant from arrest to prison or some other outcome.

In this analysis, the "prison" category includes defendants who have been convicted and received an active prison sentence, no matter how long; the "no prison" category includes defendants who have avoided prison, including those who have been convicted but have received a fine, probation, or suspended sentence rather than imprisonment, as well as those who were not convicted. The analysis includes no study of variation in the length of active sentences or the offense for which the defendant was convicted. If one is generally concerned about who gets punished and why, one also wants to know not only whether defendants went to prison, but also how long their active sentences were and how the offense they were convicted of compared with the one they were originally charged with. (Most convictions occur by plea of guilty, and pleas to an offense less serious than the original charge are often accepted by the prosecutor and judge; even when a formal trial is held, the verdict may

1. For research on the deterrent effect of certainty of punishment, see Bailey, Martin, and Gray, *Crime and Deterrence: A Correlational Analysis,* 11 J. RESEARCH IN CRIME AND DELINQUENCY 124 (1974); Antunes & Hunt, *The Impact of Certainty and Severity of Punishment on Levels of Crime in American States: An Extended Analysis,* 74 J. CRIM. LAW & CRIM. 486 (1973); Erickson & Gibbs, *The Deterrence Question: Some Alternative Methods of Analysis,* SOC. SCI. QUART. 534 (December 1973); Tittle, *Crime Rates and Legal Sanctions,* SOCIAL PROBLEMS 409 (Spring 1969). The available evidence indicates that the variation in the likelihood of arrest and punishment accounts for perhaps one-tenth of the variation in crime rates. See Kobrin, Lubeck, Hansen, & Yeaman, *The Deterrent Effectiveness of Criminal Justice Sanction Strategies* (National Technical Information Service Publication No. PB-214570, U.S. Dept. of Commerce, Springfield, Va., 1972). Comparing California counties, the authors concluded that sanctioning activity by both police and courts accounts for only about 10 per cent of the variation in crime level (a per capita index weighted for offense seriousness).

2. We know of no research that attempts to relate crime rates to public perceptions of fairness in the criminal justice system.

convict the defendant of a lesser offense.[3]) Unfortunately, so few of the defendants in this study received active sentences that variation in sentence length could not be meaningfully analyzed; however, some general information appears in Table 1. The subtleties of charge reduction were not closely studied because they seemed less important than whether defendants went to prison.[4]

The questions addressed in the study have been stated, but something needs to be said about the kinds of answers sought. Probably if all the persons connected with each defendant's case could have been interviewed, particular circumstances would have been identified that led directly to his emerging from the criminal court with or without a prison sentence, but resources for the study did not permit that. The answers that the study suggests are in terms of statistical relationships and probabilities rather than in terms of direct causes. An example of a direct cause is Mrs. O'Leary's cow kicking over the lantern left in the shed, thus (according to legend) starting the great Chicago fire. If statisticians had tried to analyze fire hazards before that fire as we have tried to analyze the present data, they would not have known about specific fire-starters like Mrs. O'Leary's cow. Their conclusion might have been stated: "In densely populated cities like Chicago, the presence of cowsheds filled with hay and other combustibles increases the rate of fires from x to y, thus making it more likely that there'll be a hot time in the old town tonight." Obviously, statements of this type do not become catchy popular songs, nor do they have the instant appeal to common sense that the cow story does. Nevertheless, in seeking a general understanding of what is going on, we often must deal with statistical abstractions.

Before getting into the details of the study, we should review briefly the kinds of processes that operated in the criminal prosecutions studied and identify the principal decision-makers. The first step in each case was arrest; the arrest may have resulted from a police officer's investigation of a suspicious person or situation that he observed while on patrol, or it may have resulted from a crime reported and investigated until enough was known to arrest a suspect. After arrest, each defendant was taken before a magistrate, where he had an opportunity to obtain bail. He had a right to engage an attorney to defend him. If he qualified as indigent, he was entitled[5] to have an attorney assigned to him free of charge by the court. He also had a right to do without counsel altogether. In Mecklenburg County, when the study was being made, the arresting officer played an important role in prosecuting the defendant. It was usually he who decided what offense to charge, the magistrate and assistant district attorney exercising little review. The assistant district attorney (prosecutor) had the task of obtaining a conviction unless he found that the defendant was innocent or inappropriately charged. In many cases, the prosecutor decided to drop ("nol pros") the charges, often because sufficient evidence—such as a key witness's testimony—was not available to convict. The charges could also be dismissed by the judge without a trial. In many instances, plea-bargaining that involved the prosecutor, the defense attorney, the defendant, and sometimes the judge took place. In typical plea-bargaining, the prosecutor seeks a *conviction* by plea of guilty, often to an offense less serious than the one originally charged, to save the time and effort involved in a formal trial; the defendant and defense attorney often seek a lenient *sentence*. The essence of the bargain is often this: "If the defendant will plead guilty to the offense of_____, the State will recommend a sentence of_____." (Of course, the judge may not go along with the arrangement, in which case the defendant may refuse to enter his plea.) If no guilty plea was entered and the charges were not dropped or dismissed, a formal trial took place. Evidence was heard by either a district court judge (if a misdemeanor was charged) or a superior court jury (if a felony was charged), and a verdict (finding of guilty or not guilty) reached. If the verdict was guilty, the judge imposed the sentence within the range allowed by law for the offense. The relative frequency of the various types of dispositions among the defendants studied appears on Table 1.

WHY MECKLENBURG COUNTY?

The data analyzed here were taken from official police and court records and reflect the prosecutions of all those arrested and charged with burglary, breaking and entering, and larceny in 1971 in Mecklenburg County, North Carolina (Charlotte and its suburbs). Mecklenburg County was the site for the study because the Institute of Government of the University of North Carolina at Chapel Hill participated, at the request of Charlotte-Mecklenburg officials, in a federally funded effort to help the city and county in planning to control crime. The Charlotte-Mecklenburg Criminal Justice Planning Council—representing the city and county governments, the courts, and

3. One charged with an offense may be convicted of that offense or a lesser included offense. For example, a person charged with larceny of goods worth more than $200, a felony under North Carolina law, may plead guilty to misdemeanor larceny or be found guilty of that charge if the jury finds that he stole the goods but they were worth less than $200.

4. Of the 159 persons charged with burglary who were convicted by plea of guilty, only 45 per cent pled guilty to the offense charged; most of the rest pled guilty to misdemeanor breaking or entering, an offense not involving the intent to commit larceny or a felony inside the building entered. Only 33 per cent of those who were charged with felonious larceny and later pled guilty actually pled guilty to felonious larceny; the rest pled to misdemeanor larceny. In this analysis we deal only with the original offense charged in court. The more serious the initial charge, the greater is the likelihood of prison, because the probability of being convicted for a serious offense is greater. Also, the seriousness of the initial charge may affect the process leading to conviction for the reasons indicated in the text.

5. At the time of the study, indigent defendants qualified for free defense counsel only if charged with an offense subject to a maximum punishment exceeding six months imprisonment or a $500 fine [N.C. Gen. Stat. § 7A-451 (a)(1) (1969 Replacement Volume)]. Most of the defendants studied qualified under this statute; the only exceptions were the relatively few charged with concealment of merchandise (N.C. Gen. Stat. § 14-72.1).

law enforcement and correctional agencies—decided to give special attention to the crimes of burglary and larceny and, in 1972, asked the Institute of Government to study the incidence of these crimes[6] and what happened to those apprehended and charged with them. The present data were collected in response to that request.

How representative are the data? Although drawn from Mecklenburg County, they are probably generally representative of other North Carolina cities at the present time, and perhaps of similar cities throughout the nation as well. Of course, Mecklenburg County has not stood still since 1971. Reforms have been introduced—such as new forms of bail, which have reduced the disadvantage of the low-income defendant in obtaining pretrial freedom, and screening of felony charges, which has probably resulted in more effective prosecution. Nevertheless, we feel that when important variables are controlled for, these data still essentially describe what is now going on in the criminal courts of the state's urban areas.

Because some of the findings may be controversial, we should note here that the present study was not undertaken because Mecklenburg County's criminal justice system was thought to be functioning ineffectively or unfairly. Actually, Mecklenburg was then and still is considered one of the more progressive judicial districts in the state. One of the study's findings is that defendants had a greater probability of going to prison if their incomes were low. This should not be interpreted to mean that the poor man is worse off in the Mecklenburg courts than elsewhere in the state, nor that there is *intentional* discrimination against the poor defendant or in favor of the affluent defendant in the criminal courts.

THE PROBABILITY OF GOING TO PRISON

The relative frequency of various court dispositions and sentences appears in Table 1. Thirty-eight per cent of the defendants had their charges dropped by the prosecutor; 13 per cent received other nonconviction dispositions such as dismissal of charges by the judge; less than half (44 per cent) were convicted, mostly by plea. The most common sentence after conviction was a suspended prison term, usually with probation. Few defendants received prison sentences as a result of their brush with the law—only 18 per cent (147 out of 798). Thirty per cent of those sentenced to active prison terms received one year or less, and 29 per cent received more than two years; the median sentence length (half-way point) was between one and two years, and this was also the sentence most commonly received.

If one assumes that probation or a fine is not an especially unpleasant sentence and that imprisonment is the only punishment available that substantially intimidates potential offenders, then the results of the study suggest that the criminal court is providing a rather weak deterrent to crime at present. One reason that only 18 per cent of all those arrested received active terms was that some defendants were innocent. Also, even though the law provided imprisonment as a possible punishment for all these offenses, imprisonment was probably thought to be an inappropriate punishment for petty theft. (Of the 798 defendants studied, 168 [21 percent] were charged with larceny of goods valued at $5 to $50; larceny of lesser value was excluded from the study.) Let us consider just those defendants charged with burglary. Throughout this paper, the term "burglary" is used in a general sense to denote not only common law burglary—the breaking and entering of a dwelling at night to commit a felony—but also other breaking or entering of buildings generally, in the day or at night, with the intent to commit felonies or any larceny. Larceny involving less than $5 in property value and automobile theft were excluded from the study. The proportion of nonresidential burglary defendants that went to prison was only 36 per cent; of residential burglary defendants, only 20 per cent; of felonious larceny defendants, only 8 per cent. Even those in groups with the highest "prison risk" (as determined

Table 1
Court Disposition and Sentences
of 798 Burglary and Larceny Defendants

	No.	Percentage
DISPOSITION AT OR BEFORE TRIAL		
Charges dropped by prosecutor	301	38%
Other nonconviction without complete trial	101	13
Acquittal after trial	33	4
Plea of guilty	319	38
Convicted after trial by judge or jury	44	6
Total	798	100
OUTCOME FOR ALL DEFENDANTS		
Prison	147	18
Conviction without prison sentence	216	27
Nonconviction	435	54
Total	798	100
SENTENCE OF CONVICTED PERSONS		
Fine	30	8
Suspended sentence (usually with probation)	186	51
Prison	147	40
Total	363	100
MAXIMUM LENGTH OF PRISON SENTENCES IMPOSED		
6 months or less	41	28
6 months to 1 year	18	12
1 to 2 years	42	29
2 to 3 years	2	1
3 to 5 years	18	12
5 to 10 years	22	15
Over 10 years	2	1
Total	145	100
[2 missing cases]		

6. The incidence study appears in S. H. Clarke, "Burglary and Larceny in Charlotte-Mecklenburg: A Description Based on Police Data" (Institute of Government, University of North Carolina at Chapel Hill, 1972).

from analysis to be explained later) had only a 50 to 60 per cent likelihood of going to prison. One's assumptions about which defendants were truly guilty are critical here, of course, because in deterring crime by maintaining a threat of punishment, the law permits us to punish only the guilty. If we assume that only those *convicted* were in fact guilty, then guilty burglary defendants had a nearly even chance of avoiding prison; 47 per cent of convicted burglary defendants (84 out of 178) did not receive active sentences. Even in the highest "prison risk" groups, the chance of avoiding prison after conviction was still substantial (about 34 per cent). On the whole, if we can generalize from these data, it would seem that a burglar or thief is far from certain to go to prison even if arrested.

VARIABLES IN THE STUDY AND THEIR RELATION TO PRISON OUTCOME

Table 2 describes the 798 burglary and larceny defendants studied with regard to the variables chosen for the analysis. The theories that led to the selection of these particular variables will be discussed later,[7] but a few variables should be explained here. Income is defined in terms of the median income of the census tract where the defendant lived rather than in terms of his own personal income, on which no information was available; this is an accepted technique in criminological research.[8] Employment information was based on what the defendant told the arresting officer shortly after arrest; a good many defendants did not respond to questions about employment. Type of offense will be explained later. "Arrest promptness" refers to whether the defendant was arrested on the day when his alleged offense occurred or later.

How strongly related was each of the variables to whether defendants received prison sentences? Table 3 indicates the proportion of defendants in the "prison" and "no prison" outcome categories associated with each variable. Twenty per cent of male defendants went to prison, while only 1 per cent of females (1 out of 70) did. This suggests that the defendant's sex had some effect on the probability of going to prison, but the sample contained so few women (70 out of 798 defendants) that no conclusion could be reached statistically. The one woman who went to prison had the characteristics that made men more likely to go to prison, and the 69 women who were not imprisoned did not have these characteristics. For this reason, the data on females were combined with the data on males in later stages of the analysis.

Though we thought that the defendant's age would have an effect on whether he received a prison sentence, in that the court would deal more leniently with younger defendants, the data do not indicate such an effect. Different age groupings did not change this result.

Race shows up at this stage as an important variable; blacks went to prison twice as often as whites. But later analysis showed that when other more important variables such as income are controlled for, race has little or no importance.[9]

Employment also shows up as very important at this stage; defendants who were employed or students were roughly half as likely to go to prison as unemployed defendants. We included employment as a variable because we thought prosecutors and sentencing judges would be more lenient with defendants who stood to lose job or educational opportunities. However, the apparent effect of employment, like the apparent effect of race, did not hold up once more important variables were controlled for.[10]

Income evidently had a large effect; defendants of low income (i.e., those who lived in census tracts where the median income of families and single individuals was less than $7,000 per year) had more than twice as great a probability of receiving prison sentences as those of high income (those who lived in tracts with higher median incomes). (Those of "unclassified" income who did not reside in the City of Charlotte, and thus could not be assigned to census tracts, were mostly residents of the higher-income suburbs and were about as likely to receive a prison term as high-income defendants. They are therefore grouped with high-income defendants in the rest of the analysis.) This apparent effect of income persists when other variables are taken into account.

The type of offense the defendant was initially charged with had a strong relation to whether he went to prison; this relationship remained when other variables were controlled for. The percentages of those who went to prison for the four offense types shown in Table 3 ranged from 8 to 36 per cent. We had a theory about the relationship between the offense charged and whether the defendant went to prison: the more serious the original charge, the more serious the charge he was convicted of would be (if he was in fact convicted), and thus the more punitive the sentence received. We also expected that the seriousness of the charge could affect the likelihood of *conviction,* because the police and prosecutor would tend to have better evidence when charging a defendant with a more serious offense. This expectation was generally

7. A more complete description of the statistical methodology used in the study is available from the authors.

8. See Wolfgang, Figlio, & Sellin, DELINQUENCY IN A BIRTH COHORT 47-52 (1972).

9. Professor Philip J. Cook of Duke University has suggested that the apparent absence of a statistical relationship between race and the likelihood of going to prison may be due to two factors that work in opposite directions and cancel each other out. The black defendant may be at a disadvantage simply because of his color, but the severity of his alleged offense may be given less weight because the victim of it is quite often black also. The present data provide no way of confirming this speculation because no information on victims was collected.

10. A substantial proportion of defendants did not give employment information to their arresting officer. Because we believed that most of these defendants were in fact unemployed and because their likelihood of going to prison and other characteristics were generally similar to those defendants who stated that they were unemployed, we merged the "Unknown" and "Unemployed" groups in the analysis.

Table 2
Central Characteristics of Defendants

	No.	Pct.
SEX		
Male	728	91%
Female	70	9
Total	798	100
AGE		
Under 21	322	40
21 and over	470	59
Unknown	6	1
Total	798	100
RACE		
Black	439	55
Other	359	45
Total	798	100
INCOME[1]		
Low	434	54
High	190	24
Unclassified	174	22
Total	798	100
EMPLOYMENT		
Employed or student	479	60
Unemployed	149	19
Unknown	170	21
Total	798	100
TYPE OF OFFENSE CHARGED		
Nonresidential burglary	164	21%
Residential burglary	175	22
Felonious larceny	157	20
Misdemeanor larceny[2]	302	38
Total	798	100
CRIMINAL HISTORY (PRIOR ARRESTS)		
None	320	40
One or more	478	60
Total	798	100
ARREST PROMPTNESS		
Arrest same day as alleged offense	324	41
Later day	474	59
Total	798	100
BAIL STATUS		
Bailed (i.e. released before court disposition)	587	74
Not bailed	211	26
Total	798	100
ATTORNEY STATUS		
Private attorney	340	43
Assigned attorney	226	28
No attorney	232	29
Total	798	100

1. Income is defined in terms of median income of census tract of residence; "low" is $0-6999, "high" is $7000 and over, and "unclassified" refers to suburban residents who are mostly "high" income and are treated as such in the analysis.

2. Includes 30 nonlarceny misdemeanor defendants misclassified by police coders (12 were charged with vandalism), and 45 defendants charged with misdemeanor breaking or entering.

supported by the data.[11] But how does one define "serious"? The four categories used, ranked from most to least serious, are nonresidential burglary, residential burglary, felonious larceny, and misdemeanor larceny. The ranking is based partly on the maximum penalties provided by law and partly on what we believed to be prevailing attitudes among police, prosecutors, and sentencing judges. It may seem surprising that residential burglary, here defined as the breaking into and/or entering of someone's home with the intent of committing a felony or larceny therein, is thought to be less serious than nonresidential burglary, here defined as the breaking and/or entering of a nonresidential building (often a store) with the intent of committing a felony or larceny therein. However, breaking into a home, typically in the daytime when all occupants are away, may generally be more opportunistic and amateurish and require less planning and skill than breaking into stores, whose owners often take greater security precautions than homeowners.[12] Also, a somewhat greater property loss is involved in the typical nonresidential burglary. (In any case, the data indicate that nonresidential burglary defendants had a greater chance of going to prison than residential burglary defendants.) Burglary of both types is generally considered more serious than larceny because the security of a home or building is violated and the property loss is usually greater. Felonious larceny (generally, a theft of goods worth more than $200) is considered more serious than misdemeanor larceny because more money is involved and the maximum penalty is higher (ten years of imprisonment versus two years).[13]

Criminal history is here defined in terms of the defendant's record of prior arrests in Mecklenburg County, excluding those for minor offenses like traffic violations and public drunkenness. Defendants with no prior arrests were only half as likely to go to prison as those with one or more arrests on their record. One reason for including

11. Of defendants charged with nonresidential burglary, residential burglary, felonious larceny, and misdemeanor larceny, the percentages who were convicted were 62.8, 42.9, 23.6, and 48.7 respectively. For those charged with burglary of any type, the percentage convicted was 52.5, and for those charged with larceny, 40.1. These figures give some support to the hypothesis.

12. About half of the residential burglaries in the study were "true" common law burglaries in that they occurred at night; under N.C. GEN. STAT. §§ 14-51 and -52 (1969 Replacement Volume), these carried a maximum punishment of life imprisonment, or if the residence broken into was *occupied* at the time, the death penalty. Breaking or entering of a store or other nonresidential structure involved a ten-year maximum imprisonment [N.C. GEN. STAT. § 14-54(a)]. Nevertheless, residential burglary was probably considered more opportunistic and less calculated than breaking into a store.

13. In later stages of the analysis, defendants charged with felony and misdemeanor larceny were grouped together because of their similar probability of going to prison.

Table 3
First-Order Relationships Between Independent Variable and Prison Outcome

	Prison	No Prison	Total
SEX			
Male	146	582	728
	(20%)	(80%)	(100%)
Female	1	69	70
	(1%)	(99%)	(100%)
AGE			
20 or less	62	260	322
	(19%)	(81%)	(100%)
21 and over	85	391	476
	(18%)	(82%)	(100%)
RACE			
Black	99	340	439
	(23%)	(77%)	(100%)
White and other	48	311	359
	(13%)	(87%)	(100%)
INCOME			
Low	104	330	434
	(24%)	(76%)	(100%)
High	19	171	190
	(10%)	(90%)	(100%)
Unclassified	24	150	174
	(14%)	(86%)	(100%)
High or unclassified	43	321	364
	(12%)	(88%)	(100%)
BAIL STATUS			
Released	70	517	587
	(12%)	(88%)	(100%)
Detention	77	134	211
	(36%)	(64%)	(100%)
ATTORNEY REPRESENTATION			
Private attorney	40	300	340
	(12%)	(88%)	(100%)
Assigned attorney	85	141	226
	(38%)	(62%)	(100%)
No attorney	22	210	232
	(9%)	(91%)	(100%)
EMPLOYMENT			
Employed or student	70	409	479
	(15%)	(85%)	(100%)
Unemployed	40	109	149
	(27%)	(73%)	(100%)
Unknown	37	133	170
	(22%)	(78%)	(100%)
Unemployed or unknown	77	242	319
	(24%)	(76%)	(100%)
TYPE OF OFFENSE CHARGED			
Nonresidential burglary	59	105	164
	(36%)	(64%)	(100%)
Residential burglary	35	140	175
	(20%)	(80%)	(100%)
Other felonies (mostly larceny)	12	145	157
	(8%)	(92%)	(100%)
Misdemeanors (mostly larceny)	41	261	302
	(14%)	(86%)	(100%)
Other fel. or misd. (mostly larceny)	53	406	459
	(12%)	(88%)	(100%)
CRIMINAL HISTORY (PRIOR ARRESTS)			
No prior arrests	38	282	320
	(12%)	(88%)	(100%)
One or more	109	369	478
	(23%)	(77%)	(100%)
ARREST PROMPTNESS			
Arrested same day as offense	71	253	324
	(22%)	(78%)	(100%)
Arrested later day	76	398	474
	(16%)	(84%)	(100%)

criminal history is that judges (and prosecutors) consider a defendant's prior convictions in making decisions about his sentence. Arrests serve as a proxy for prior convictions in the sense that a person with no arrests on his record also has no convictions. Also the fact that the defendant has a "police record"—i.e., a record of arrests, not necessarily of convictions—may make police witnesses and prosecutors try harder to obtain a conviction and prison sentence.

"Arrest promptness," as already explained, refers simply to whether the defendant was arrested on the same day that his alleged offense was reported to have occurred. We used arrest promptness as a very crude measure of the strength of the evidence against the defendant. One would suppose that the strength of the evidence has a strong effect on whether the defendant is convicted and therefore affects the likelihood that he will go to prison. However, strength is hard to define objectively, and harder still to measure uniformly in all cases. (The court and police records used in the study contained little of the information needed to make such measurements.) The reason for using arrest promptness was as follows. If the defendant was arrested the same day his alleged offense occurred, it was fairly likely (we theorized) that an eyewitness was involved—perhaps someone who reported the offense to the police, who then responded quickly and made an arrest, or perhaps a policeman himself who saw suspicious circumstances and reacted swiftly. Also, when the arrest quickly followed the offense, the evidence left behind would be less likely to be obliterated or interfered with. The availability of an eyewitness to the crime, or of "fresher" evidence, would make conviction more likely. On the other hand, if more than a day was required to make the arrest, "the trail would grow cold"—i.e., eyewitnesses would be harder to find, physical evidence might have been disturbed, etc. The data gave some support to our theory. Table 3 indicates that defendants arrested the same day as the offense occurred were somewhat more likely to go to prison than those arrested later (22 per cent versus 16 per cent). This is a weak effect, but it persists when other variables are controlled for. We suspect that a better measure of strength of the evidence

would have shown this variable to have a much stronger statistical relationship to whether a defendant went to prison than arrest promptness showed.

We hypothesized that both bail status and attorney representation (i.e., whether the defendant's attorney, if he had one, was court appointed or privately retained) would affect the defendant's likelihood of going to prison. The defendant who is not free while awaiting trial has more difficulty than one who is free in preparing his defense and, if convicted, in developing a plausible argument for a nonprison sentence. For example, the defendant who must remain in jail may have difficulty persuading favorable witnesses to come forward or inducing his employer, family members, or others to support his request for probation. As later analysis of the data will show, bail status seems to have had little effect on whether the defendant was convicted but did affect whether he would receive a prison sentence if convicted.

What about attorney representation? We thought that the defendant with privately retained counsel would probably have a better chance of avoiding prison than the indigent defendant with court-assigned counsel, either because privately retained lawyers are generally more experienced (or, possibly, more competent) than court-assigned ones or because privately retained lawyers are better paid and consequently do a better job of representing the defendant's interests. The data support the hypothesis that those with private counsel were less likely to go to prison than those who have assigned counsel. Surprisingly, defendants without any counsel had a very low probablity of going to prison (this finding is explored in more detail later). Table 3 shows that bail status and attorney representation were both strongly related to whether a defendant went to prison. Defendants who were not bailed were three times more likely to go to prison than those who were bailed, and defendants with court-assigned attorneys were three times more likely to go to prison than those with privately retained attorneys.

Although bail status and attorney representation both had a strong association with whether a defendant went to prison, we will postpone considering their importance until the contributions of other variables have been assessed. The reason is that bail status and attorney representation are obviously linked to the defendant's ability to pay. We treat the defendant's income as a primary factor in determining whether he comes out of criminal court with an active sentence and his bail status and attorney representation as secondary or intermediate factors.

Which variable (other than bail status and attorney representation) had the strongest relationship to whether the defendant received a prison sentence? To answer this question, we used a statistical measure of the amount of variation in the likelihood of a prison sentence explained by each variable in Table 3.[14] By this standard, type of offense is more important than any other variable. Our procedure was to make adjustments for offense type, then select the next most important variable, then make adjustments for it, then select the next most important, and so on. (Other statistical criteria indicated when to *stop* the selection process.) The result was selection of these variables, in order of importance: (1) type of offense; (2) defendant's income; (3) criminal history; and (4) arrest promptness.

None of the remaining variables (employment, age, and race) showed a significant effect when these most important four variables were accounted for. Furthermore, substituting employment, age, or race for any of these four resulted in explaining less, statistically speaking, of the variation in the probability of receiving an active sentence. This suggests that age, race, and employment had little if any importance in determining whether the defendant went to prison.[15]

How did the defendant's probability of going to prison relate to the four most important variables taken together? This can be seen in Table 4. Each row in the table constitutes one group of defendants defined according to offense charged, income, prior arrests, and arrest promptness. The percentage of defendants in each group who were convicted and received active prison sentences is given in the column labeled "Observed Prison Proportion." (This should not be confused with "Predicted Prison Proportion," which was generated by the statistical model that is explained later in this article.) Where the total number of defendants in the row is small (less than 10), the observed proportion should be considered not very reliable.

Table 4 shows, generally speaking, that the percentage of those convicted who received active prison sentences was highest for those charged with nonresidential burglary, lower for those charged with residential burglary, and lowest for those charged with larceny. Also, within each of the offense categories, low-income defendants usually are more likely to go to prison than high-income defendants, and a defendant whose income and offense are the same as another's is more likely to receive an active sentence than the other if he has an arrest record (that effect is more noticeable with the less serious offences) or if his arrest was on the same day as his alleged offense.

Graph 1 is a pictorial representation of Table 4. Each vertical bar on that graph represents one of the groups of defendants defined according to their offense, income, criminal history (prior arrests), and arrest promptness; the height of the bar indicates the proportion of the group represented who went to prison. The height of the bars generally drops from left to right, passing from the most to the least serious offense. Within each type of offense, bars on the low-income side are generally higher than

14. The measure was the Pearson chi-square divided by its degrees of freedom.

15. One might expect employment status and income to be related; however, as defined in this study, they were not strongly related. Of the low-income defendants, 28 per cent were unemployed, compared with 20 per cent of the high-income defendants. Although this relationship is significant at the .05 level, it is not very substantial.

Table 4
Four-factor Model of Proportion of All Defendants Receiving Prison Sentence:
Comparison of Observed and "Predicted" Values

Model Q (D.F. ¾ 1) ¾ 81.70
Residual Q (D.F. ¾ 21) ¾ 6.01
Percentage variation explained = 93%

Offense	Income[1]	Prior Arrests	Arrest Promptness[2]	Total Defendants	Defendants Sentenced to Prison	Observed Prison Proportion[3]	Estimated Standard Error	Predicted Prison Proportion[4]	Estimated Standard Error
Nonresidential Burglary	Low	One or more	S	29	15	51.7%	9.3	53.7%	5.0
	High	One or more	S	15	4	26.7	11.4	30.4	2.5
	Low	One or more	L	34	12	35.3	8.2	30.4	2.5
	High	One or more	L	31	11	35.5	8.6	30.4	2.5
	Low	None	S	12	7	58.3	14.2	53.7	5.0
	High	None	S	11	3	27.3	13.4	30.4	2.5
	Low	None	L	18	6	33.3	11.1	30.4	2.5
	High	None	L	14	1	7.1	6.9	7.2	1.3
Residential Burglary	Low	One or more	S	30	10	33.3	8.6	30.4	2.5
	High	One or more	S	5	1	20.0	17.9	30.4	2.5
	Low	One or more	L	51	15	29.4	6.4	30.4	2.5
	High	One or more	L	36	4	11.1	5.2	7.2	1.3
	Low	None	S	10	2	20.0	12.6	30.1	2.5
	High	None	S	5	1	20.0	17.9	30.1	2.5
	Low	None	L	18	1	5.5	5.4	7.2	1.3
	High	None	L	20	1	5.0	4.9	7.2	1.3
Larceny and other	Low	One or more	S	66	15	22.7	5.2	19.3	3.2
	High	One or more	S	43	5	11.6	4.9	7.2	1.3
	Low	One or more	L	82	14	17.1	4.2	19.3	3.2
	High	One or more	L	56	3	5.4	3.0	7.2	1.3
	Low	None	S	26	2	7.7	5.2	7.2	1.3
	High	None	S	72	6	8.3	3.3	7.2	1.3
	Low	None	L	58	5	8.6	3.7	7.2	1.3
	High	None	L	56	3	5.4	3.0	7.2	1.3

1. High income includes unclassified income here for reasons indicated in the text.
2. S = arrest same day as offense; L = later day.
3. Number of defendants sentenced to prison divided by total defendants in each row.
4. Proportion generated from "risk group" Model explained in text.

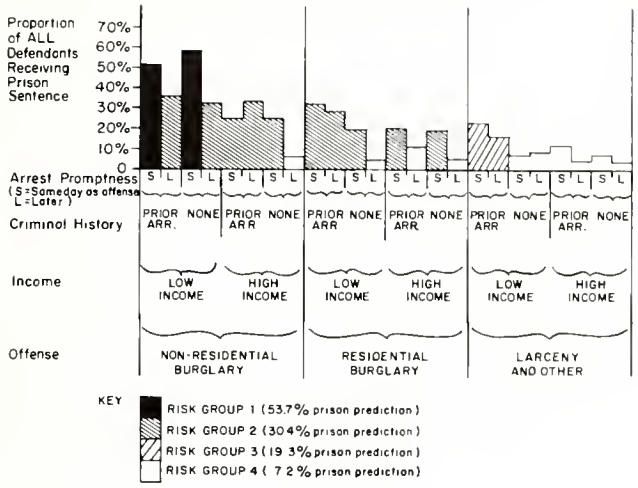
those on the high-income side, indicating that low-income defendants are more likely to go to prison. Within each income group, prior arrests tend to increase the likelihood of an active sentence (this effect is visually discernible everywhere except in the extreme left portion of the graph, which pertains to low-income nonresidential burglary defendants). Finally, in most instances, each bar representing defendants arrested on the same day as their offense ("S" on the graph) is higher than the bar immediately to its right, representing defendants arrested later ("L" on the graph). This shows the moderate effect of arrest promptness (our proxy for the weight of the evidence against the defendant), an effect that persists when three other variables are controlled for.

The various shadings of the bars on Graph 1, ranging from black to white, can be explained as follows. To simplify or "smooth" the data, we defined four "risk groups" corresponding to the four shadings of the bars on the graph. These risk groups were picked according to the proportion who went to prison. Using the four risk groups as artificial variables and employing methods developed by the Biostatistics Department in the School of Public Health of the University of North Carolina at Chapel Hill, we generated a statistical model of the probability of going to prison in which 93 per cent of the variation in that probability was statistically explained.[16] This signifies that the data are consistent with the following hypotheses about the likelihood that a burglary or larceny defendant will go to prison:

1. The type of offense charged, defendant's income, criminal history, and arrest promptness account for most of the variation the the probability of going to prison. The other variables – age, race, employment – have little or

16 A variety of applications of the GSK method to medical, public health, traffic safety, and political science data have been published. The basic theory is explained in Grizzle, Starmer, & Koch, *Analysis of Categorical Data by Linear Models*, 25 BIOMETRICS 489-504 (1969). The values generated by the model, which are the "predicted" values in Table 4, are a "smoothing" or efficient description of the data based on assigning defendants into four groups according to likelihood of going to prison. Using a statistic analogous to R^2 in multiple regression, the four group model explains 93 per cent of the variation in prison risk.

Graph 1. Proportion of All Defendants Receiving Prison Sentence, Grouped by Offense, Income, Criminal History, and Arrest Promptness



no effect (although the data are insufficient to allow a possible effect of sex to be ruled out).

2. A defendant charged with burglary (either nonresidential or residential) generally has about a 30 per cent probability of going to prison, with the following exceptions:

a. The probability that he will go to prison is high, about 54 per cent, when the defendant is charged with nonresidential burglary (the more "serious" form of burglary, as explained earlier), has a low income, and is arrested on the day his alleged offense occured in other words, when he has three out of four strikes against him in terms of the most important variables. (The height of the black bars on Graph 1 represents this situation.)

b. The likelihood of going to prison is quite low, about 7 per cent, when the defendant had three out of four variables *in his favor,* i.e., when (1) he is charged with residential (less "serious") burglary, has a high income, and was arrested on a date later than that of his offense; or (2) is charged with residential burglary, has low income but has no arrest record, and was arrested later than the date of his alleged offense; or (3) is charged with nonresidential burglary but has a high income, no arrest record, and was arrested later than the date of his alleged offense. (The leftmost four white bars on Graph 1 represent this situation.)

3. Defendants charged with larceny, whether a felony or misdemeanor, generally have a very low likelihood of going to prison (about 7 per cent) except when they have the double disadvantage of low income and an arrest record; in that situation, the likelihood is higher, about 19 per cent.

In summary, the statistical model, using all the data, tends to confirm what we can see in Table 4 and Graph 1: the probabilities of going to prison are generally higher for those charged with burglary than for those charged with larceny, and within type of offense, it varies according to whether all the other variables (income, arrest record, arrest promptness) are favorable to the defendant or work to his disadvantage.

THE DEFENDANT'S INCOME

We have seen that these data suggest not only that legally relevant variables—type of offense charged, criminal history, and strength of evidence—substantially affect the probability that the burglary or larceny defendant will go to prison but also that a legally irrelevant variable—his income—substantially affects this probability. Other things being equal, the higher-income defendant seems more likely to emerge from the criminal court without an active prison sentence that the lower-income defendant. To understand how the defendant's income has its effect, we must examine the process that leads from arrest to prison or some other final court disposition.

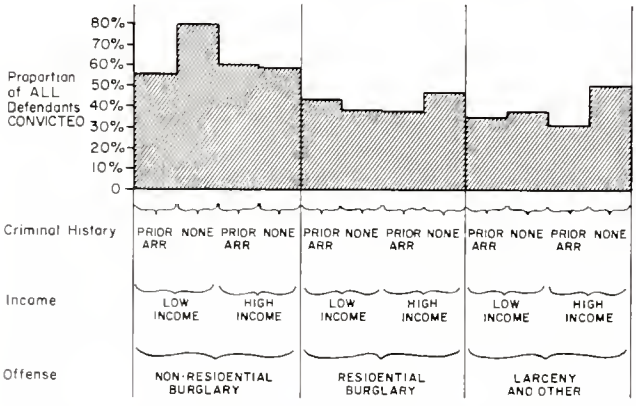
In our study, income *did not* affect the probability that a defendant would be convicted—i.e., convicted of some criminal offense, although perhaps not the one originally charged. (As explained earlier, no attempt was made to investigate reduction of the original charges and the possible effect of income and other variables on it.) Income *did* affect the sentence received by those who were convicted; this effect probably resulted in part from low-income defendants' pleading guilty to more serious offenses, generally, than high-income defendants and in part from low-income defendants' having a disadvantage in obtaining a lenient (nonprison) sentence once convicted of a given offense. Most of the effect of income was exerted through the mechanism of bail and attorney representation. Not surprisingly, the low-income defendant was less likely to obtain bail than the high-income defendant and more likely to be represented by a court-assigned attorney than by a privately retained attorney. Defendants without bail were more likely to go to prison than those who obtained bail, and those with court-assigned attorneys were more likely to receive active sentences than those with privately retained attorneys. When bail and attorney representation are considered, along with the other variables shown to be of importance (type of offense, criminal history, and arrest promptness), most of the effect of income on the likelihood of a prison term disappears. This finding supports the claim of many criminal justice reformers—a claim that has often been made with little hard data to base it on—that improving the low-income defendant's pretrial release and defense opportunities will reduce the injustice he suffers in the criminal court. (More will be said later about improving bail and defense service.)

The general conclusions about how income affects whether defendants go to prison were reached by examining two processes separately: (1) the process leading from arrest to conviction (usually a guilty plea, less often a guilty verdict) or to nonconviction (dismissal, *nolle prosequi*, acquittal); and (2) the sentencing of those con-

victed. Examining conviction separately from sentencing may be somewhat misleading because in plea-bargaining (some form of which is the most common route to conviction) the sentence is seen as the *quid pro quo* for the charge to which the defendant pleads guilty. Nevertheless, the sentencing judge has complete discretion to impose sentence within the range permitted by the legislature. He need not accept any guilty plea; he must satisfy himself that there is a factual basis for a plea; and he need not agree to the sentence that the prosecutor, defense counsel, and defendant have agreed on.

Graph 2 summarizes the findings with regard to conviction: The likelihood of conviction, which was 45 per cent for the entire group of defendants, was affected to some extent by the seriousness of the offense charged; nonresidential burglary defendants were most likely to be convicted, residential burglary defendants somewhat less, and larceny defendants the least. Criminal history (prior arrests) had an effect opposite to what might have been expected; defendants with an arrest record were somewhat more likely to be convicted than those without a record. This probably results from the fact that they were more reluctant to plead guilty—and with good reason, since, as we have seen, they were more likely to receive an active sentence if convicted. Income had little or no effect (see Graph 2), as statistical significance tests confirm.

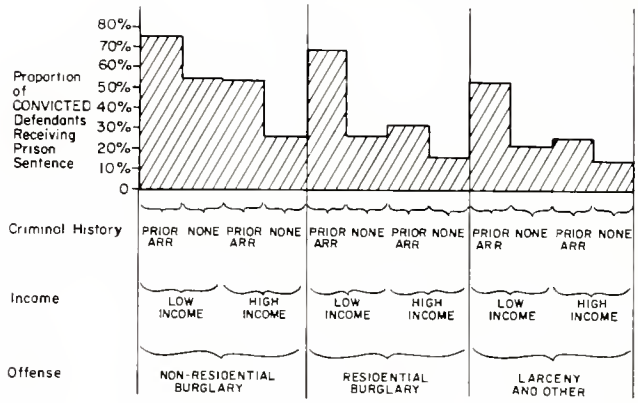
Graph 2. Proportion of All Defendants Convicted, Grouped by Offense, Income, and Criminal History



Graph 3 shows the percentages of those who were sentenced to active terms among the 362 defendants who were convicted. (The over-all proportion was 41 per cent, or 147 out of 362.) While type of offense had little effect on the probability of an active sentence, criminal history and income had very substantial effects, as significance tests confirm. Overall, the likelihood of a prison sentence was 53 per cent for low-income defendants and 26 per cent—half as great—for high-income defendants; this large and consistent difference persists when type of offense and criminal history are controlled for.

Table 5 shows that the low-income defendant was about twice as likely to be represented by a court-assigned

Graph 3. Proportion of Convicted Defendants Receiving Prison Sentence, Grouped by Offense, Income, and Criminal History



attorney, three-fifths as likely to be represented by a privately retained attorney, and twice as likely to be held in detention during his trial as the high-income defendant. Surprisingly, the likelihood of being *unrepresented* by any attorney was virtually the same for both income groups. This suggests that the assigned-counsel system was functioning properly in providing counsel to indigent defendants who desired it, and also that being unrepresented by an attorney was a matter not of income but of the defendant's choice. Probably most defendants who were unrepresented knew that their charges would be dropped or that the case against them was very weak; very few unrepresented defendants were convicted or received prison sentences.

Predictably, Table 5 shows that low-income defendants were much more likely than were high-income defendants to obtain no bail at all. In Mecklenburg County at the time of the study, the only alternative to pretrial detention for most defendants was bail bond, which meant depositing in cash the full amount of the bond set for the offense charged or obtaining a professional bondsman as surety in exchange for a nonreturnable fee. Obviously, the defendant's ability to do either of these things depended on his income.

To determine how the effect of income compared with the effect of attorney representation and bail status, the number of defendants who went to prison was tabulated for each combination of these variables: type of offense, criminal history, arrest promptness, bail status, attorney representation, and income. Using a statistic[17] designed to show the effect of one variable over many combinations of other variables, we found that income has a significant but very small effect when these other vari-

17. This statistic possesses a chi-square distribution and combines information with respect to the effect of a specific variable on whether a defendant goes to prison over all possible combinations of previously selected variables; it is discussed in Koch & Reinfurt, "An Analysis of the Relationship Between Driver Injury and Vehicle Age for Automobiles Involved in North Carolina Accidents During 1966-70" (Technical Report of the N.C. Highway Safety Research Center, Chapel Hill, N.C., 1973).

Table 5
Attorney Representation, Bail Status, and Income

	Income	
	High	Low
Privately Retained Attorney	193	147
	(53%)	(34%)
Court Assigned Attorney	68	158
	(19%)	(36%)
No Attorney	103	129
	(28%)	(30%)
TOTAL	364	434
	(100%)	(100%)
Detention (No Bail)	68	143
	(19%)	(33%)
Bail	296	291
	(81%)	(67%)
TOTAL	364	434
	(100%)	(100%)

ables are accounted for. Our conclusion was that most of income's influence on whether a defendant went to prison is explained by the low-income defendant's poorer opportunity for bail and his greater likelihood of being found indigent by the court and having a court-assigned attorney rather than one privately retained.

REDUCING THE DISADVANTAGE OF THE LOW-INCOME DEFENDANT

We have seen that the burglary or larceny defendant generally is more likely to go to prison if his income is low, that income does not affect his likelihood of being convicted of some offense but does affect his likelihood of going to prison once convicted, and that most of the effect of income can be explained by the low-income defendant's poorer opportunity for bail and for defense counsel. Assuming that the low-income defendant's disadvantage is undesirable, how can that disadvantage be reduced? Consideration should be given to the possibility of changing the present systems of bail and defense service, and perhaps also of modifying the way that sentencing decisions are made.

With regard to changing the bail system, Mecklenburg County's experience shows what can be accomplished when a conscious effort is made. Using figures based on cases begun by arrest in the City of Charlotte, we found that the proportion of defendants not released on bail was about 12 per cent in 1971, 9 per cent in 1972, and 8 per cent in 1973—in other words, the fraction not released was reduced by about one-third in a two-year period. These figures were taken from another study[18] that covered not only those arrested for burglary and larceny but all others arrested in Charlotte, including those charged with driving under the influence of alcohol but not including those charged with public drunkenness, traffic violations, and fish and game offenses. [The other study indicates that the percentage not bailed was 12 per cent in 1971, which is much lower than the 26 per cent figure given in Table 2 of this study. The reasons for the difference are: (1) many defendants in the other study were charged with very minor offenses; and (2) the other study included fewer nonresident defendants than the present study, which includes the persons arrested in suburban Mecklenburg County as well as in Charlotte.] Looking for information in the other study that is more nearly comparable with the data discussed here, we find that the percentage of those arrested in Charlotte and charged with *crimes against property* (primarily burglary, breaking and entering, and larceny) who were not bailed was about 16 per cent in 1971, 9 per cent in 1972, and 8 per cent in 1973. (Presumably, the defendants included in our study also would have had generally better bail opportunity had they been arrested in 1973 rather than 1971.) This improvement in bail opportunity can be attributed partly to increased releasing of defendants by magistrates and by the county's Pre-trial Release Program[19] without the need for a professional bondsman as surety and partly to more frequent use of "cash bond" release (release upon deposit of the full bond amount), which may have been indirectly attributable to the Pretrial Release Program.[20] The bail study also indicated that a good deal of improvement in bail opportunity can be accomplished using the present pretrial release powers of magistrates[21] without costly additions to staff.

Mecklenburg County's experience indicates that bail opportunity can be improved using resources available in most criminal courts. How can the low-income defendant's opportunity for defense counsel be improved? The present study distinguishes only between privately retained and court-assigned attorneys. We could not investigate measures of quality of defense service, such as the number of years of experience attorneys had and the amount of time they spent on each case. Therefore, although we know that defendants had a generally greater probability of going to prison when represented by court-assigned attorneys than when they were represented by privately retained counsel, the reason is not clear. Perhaps a public defender system, in which full-time salaried attorneys represented indigent defendants accused of crime or a combination of the public defender and assigned counsel systems, would have provided more effective defense service. Mecklenburg County did not have a public defender office at the time of this study, but the General Assembly recently authorized the creation of one effective July 1, 1975.[22] A year or two of experience will make it possible to determine whether the public

18. S. H. Clarke, "The Bail System in Charlotte, 1971-73" (National Technical Information Center, Publication No. PB-239827A S. Springfield, Va., 1975).

19. Information on this program is available from the Director, Mecklenburg County Pre-trail Release Program, Court Arcade Building, East Trade Street, Charlotte, N.C., or from the authors.

20. S. H. Clarke, *op. cit. supra* n. 18, at 16, 29-33.

21. *See* N.C. GEN. STAT. § 15-103.1 and the similar provision of the Criminal Procedure Act of 1974, N.C. GEN. STAT. § 15A-534 (effective September 1, 1975).

22. N.C. Sess. Laws 1975, C. 956 (House Bill 729).

defender system helps to reduce the disadvantage of the low income defendant.

Another aspect of improving defense service to the indigent defendant should be mentioned. The finding that income affects sentencing rather than conviction suggests that more attention should be paid to the defense counsel's function in helping the judge impose sentence—in particular, in presenting information to help the judge decide whether community treatment or supervision of the convicted defendant, rather than imprisonment, is a realistic possibility.

CONCLUSION: THE DECISION TO IMPOSE A PRISON SENTENCE

Even though criminal sentences are often the result of bargaining that involves the prosecutor, the defense attorney, and the defendant, the criminal court judge has the final responsibility for imposing the sentence. This awesome duty has usually been assigned to the judiciary by the legislature with very little or no guidance as to how it is to be carried out. For example, the judge sentencing a person convicted of felonious breaking or entering under North Carolina law is free to impose a fine of any amount and/or imprisonment not exceeding ten years or a suspended prison sentence with or without probation.[23] The legislature has probably reasoned that it is best to let the judge decide what sentence is best in each individual case. Perhaps this reasoning should be reexamined. As one judge has said,

> Like all good ideas allowed to bloom without pruning or other attention, the notion of individualized sentencing has gotten quite out of hand . . . .The ideal of individualized justice is by no means an unmitigated evil, but it must be an ideal of justice *according to law*. This means we must reject individual distinctions—discriminations, that is—unless they can be justified by relevant tests capable of formulation and application with sufficient objectivity to ensure that the results will be more than the idiosyncratic ukases of particular officials, judges or others.[24]

The study discussed here has provided some insight into the results of the present system of criminal penalties, as presently applied by sentencing judges. Present sentencing practices do not seem to provide a strong deterrent to crime. The probability of avoiding *any active prison time* was quite high—for example, about 47 per cent for convicted defendants whose original charge was felonious breaking and entering. Sentencing—specifically, the decision whether to impose an active prison sentence—also seems to involve substantial unfairness. The data indicate that although legally relevant factors such as the seriousness of the offense charged are important in determining the defendant's likelihood of going to prison, his income also has an important influence. The fact that such things as opportunity for bail and defense counsel are linked to income indicates not only that changes in the bail and defense service systems may be needed to improve the basic fairness of the criminal court but also confirms that sentencing decisions are allowed to be affected by factors that are legally irrelevant. For example, a defendant's inability to obtain bail has nothing to do, in the law, with whether he receives an active prison sentence if convicted, but does in fact affect his likelihood of going to prison, as the data analyzed earlier show.

What is meant by "legally relevant" in this discussion? This phrase can be defined as "relevant to stated policies upon which definitions of criminal offenses and penalties for them are based." Perhaps the fundamental problem in sentencing—and one that may partly explain why factors such as income affect the defendant's chance of going to prison—is that *legislatures usually state no such policies*. To develop clear and impartial policies, we need to ask such questions as: Which convicted defendants should be imprisoned as a deterrent to others? How long a term of imprisonment is needed to deter others? Which convicted defendants need to be imprisoned to protect society from the harm they may do? How long a term is needed for that purpose? Which defendants need to be *punished*, to support the idea that certain behavior will simply not be tolerated? How long a term is needed for that purpose? Here again, the judge just quoted has some advice:

> . . . [T]here is no valid reason for leaving to the individual judges their varying rules on what factors ought to be *material* [in sentencing] and to what effect. To say something is "material" means it is legally significant. We know what is legally significant by consulting *the law*. We do not allow each judge to make up the law for himself on other questions. We should not allow it with respect to sentencing . . . . The partial remedy I propose [for use by sentencing judges] is a kind of detailed profile or checklist of factors that would include, wherever possible, some form of numerical or other objective grading . . . . I suggest that "gravity of offense" could be graded along a scale from, perhaps, I to 5. Other factors [such as prior convictions] could be handled in the same way. The overall result might be a score—or possibly, an individual profile of sentencing elements—that would make it possible to follow the sentencer's estimates, criticize them, and compare the sentence in the given case with others.[25]

If legislatures would establish clear policies narrowing the judge's sentencing discretion to objective information about the offense committed and the offender's criminal history, perhaps much of the present unintentional discrimination against the low-income defendant could be eliminated.

Developing objective criteria for sentencing is a subject

23. N.C. GEN. STAT. § 14-2; N.C. GEN. STAT. § 15-197.

24. M. E. FRANKEL, CRIMINAL SENTENCES 10-11 (1972).

25. *Id.* at 112, 114. Judge Frankel also recommends that the legislature decide what are to be the bases for criminal sanctions (retribution, deterrence, incapacitation, rehabilitation, or any combination of these) and that sentencing decisions be subject to appellate review (*id.*, at 106-07, 75-85).

that can be addressed by the judiciary as well as by the legislature. Judges probably need to examine their widely differing patterns of sentencing, using empirical data, in order to achieve a greater degree of uniformity. The use of less discriminatory, more behavior-oriented standards of deciding who goes to prison and relying less on "judicial hunch" should not be seen as inconsistent with the cherished independence of the judiciary.

CAPITAL PLANNING (Continued from page 24)

ning and budgeting and how complete the procedures should be concerns the availability of investment funds and new sources of operating revenue for local governments in North Carolina. According to at least one authority, investment funds relative to demand are likely to be in short supply for meeting both private and state-local government capital needs in the future.[25] At the same time, it does not appear that new major revenue sources for meeting operating needs will become available to local governments in North Carolina in the foreseeable future. Indeed, most of the recent attention in Raleigh in regard to this has centered on taking away a revenue source, the personal property tax, and the same thing is occurring in Washington in reference to federal general revenue-sharing. The point is that resources for meeting local government capital and operating needs in the near future are likely to be relatively more limited than in the recent past, and in this situation, the need for a special process for capital planning and budgeting becomes more pronounced.

25. Murray L. Weidenbaum, "The Governmental Competition for Investment Funds" *Tax Review* (New York: Tax Foundation, November, 1973).

SEARCHES OF STUDENTS: Constitutional Questions

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UNTIL RECENTLY, the school's right to search a student's person or his locker has been little questioned.[1] The Fourth Amendment's prohibition against unreasonable searches and seizures, as applied to the states and their instrumentalities through the Fourteenth Amendment, has generally been thought inapplicable to school searches. The reason is that school officials have been considered private, not governmental, persons, and the Fourth Amendment's prohibition against unreasonable searches and seizures applies only to searches by governmental officials.[2] Courts have held that when a school official searches a student, he is acting in loco parentis and therefore assumes the private role of the parent to the student.[3] Thus, the Fourth Amendment's exclusionary rule has been held inapplicable to evidence discovered and seized by school officials during school searches, and the evidence has been admissible against the student in school disciplinary hearings and in criminal or juvenile court proceedings.

In recent years, however, courts have generally rejected the private-person distinction when an attempt is made to introduce evidence seized in a school search in a criminal proceeding. Courts have begun to recognize that the Fourth Amendment's prohibition against unreasonable searches and seizures applies to searches by school officials. But that prohibition has not been applied in the same way it is applied to police searches in a private home. This article will discuss its application and what actions school personnel should take before they search a student, or his locker, or other property.

The Fourth Amendment's prohibition against illegal searches has generally been construed to permit a search only when (1) a warrant has been issued authorizing it, or (2) there is probable cause and exigent circumstances are such that obtaining a warrant would frustrate the purpose of the search, or (3) a valid arrest has been made and the search is incident to the arrest. When a search is made that does not comply with these requirements, four consequences may result: (1) There may be a criminal prosecution for violation of privacy. (2) There may be a civil suit for violation of privacy. (3) The evidence may be declared inadmissible in a school proceeding. (4) It may be inadmissible in a criminal proceeding.

Of the four possible consequences, usually only the fourth one—inadmissibility of the evidence in criminal proceedings—is in issue. For example, no case has been found in which school officials have undergone criminal prosecution for violating a student's privacy because of a search. In a few cases, civil liability has been found. Recently a federal district court in Pennsylvania ruled that a civil suit against school and police officers brought by nine high school students seeking damages for deprivation of their Fourth Amendment rights should proceed to trial.[4] In this case, school officials looking for a ring reported missing by another student asked for police help after no student in the class in which the ring was first discovered missing came forward with it. The police made a strip search of the nine female students in the class but found no ring. The court held that though the search had been conducted by police, if it could be shown that school officials participated with the police in making statements and taking actions that coerced the students into submitting to the search, they could be held personally liable. The court overruled the defendant school officials' motion to dismiss for failure to state a cause of action and ordered the case brought to trial.

No case has been found in which courts have held evidence inadmissible in a school disciplinary proceeding on the basis that the method of its procurement violates the Fourth Amendment. Almost all of the cases that involve searches by school officials have grown out of criminal cases in which the student tried to exclude evidence, primarily drugs, seized during a school search and sought to be introduced in a criminal proceeding.

Clearly, the Fourth Amendment prohibits only "unreasonable" searches and seizures. The difficult question facing courts in school cases, which has been raised

1. *See, e.g.*, Buss, *The Fourth Amendment and Searches of Students in Public Schools*, 59 Iowa L. Rev. 739 (1974); Annot., 49 A.L.R. 3d 978 (1973).

2. *See, e.g.*, Burdeau v. McDowell, 256 U.S. 465 (1920).

3. *See, e.g.*, *In re* Donaldson, 269 Cal. App. 509, 75 Cal. Rptr. 220 (1969); People v. Stewart, 63 Misc. 2d 601, 313 N.Y.S. 2d 253 (1970); and Mercer v. State, 450 S.W.2d 715 (Tex. Ct. App. 1970).

4. Potts v. Wright, 357 F. Supp. 215 (E.D. Pa. 1973). *See also* Phillips v. Johns, 12 Tenn. App. 354 (1930). But *see* Marlar v. Bill, 181 Tenn. 100, 178 S.W.2d 634 (1944).

almost exclusively in criminal actions against students, has been the standard that should apply to searches made by school officials. Is the entire law of search and seizure as it applies in the criminal law incorporated into the school system, or are school officials limited by less stringent standards? In answering this question, the courts have considered several factors: Did the school officials act alone, or was the search made in concert with the police? Why was the search initiated? Was it made to enforce school discipline or to discover evidence for criminal prosecution? What was the nature of the place searched?

SEARCHES BY SCHOOL OFFICIALS ACTING ALONE

The "reasonableness" of searches by school officials acting alone has been raised as an issue by students seeking to exclude the fruits of these searches from admission in criminal proceedings. When searches have been conducted primarily by school officials to further school purposes, courts have found that the Fourth Amendment requires a less stringent standard to justify searches of students and their property. School officials need not obtain a search warrant or even show "probable cause that a crime has been committed" to justify a search initiated for proper school purposes when it is conducted primarily by school personnel. Balancing the right of students to be free from unreasonable searches and seizures with the state's compelling interest in maintaining discipline and order in the public school system, most courts now require that contraband seized by school officials without a search warrant may be introduced in a criminal trial only if the school official can show the existence of a "reasonable suspicion" when the search was made that school regulations or state laws were being violated by students.

In developing the less stringent "reasonable suspicion" standard, the courts have placed great weight on the in loco parentis doctrine. In most states, either expressly or implicitly, school officials are deemed to stand to a limited extent in loco parentis to the children entrusted to their care. Out of this relationship rise both the obligation to protect the students while in school from dangerous and harmful influences and the power to control and discipline students when necessary for school officials to perform their duties. Weighing the Fourth Amendment rights of students against the state's interest in the school official who stands in loco parentis, one court concluded: "The in loco parentis doctrine is so compelling in light of public necessity and as a social concept antedating the Fourth Amendment, that any action, including a search taken thereunder, upon reasonable suspicion should be accepted as necessary and reasonable."[5] The court found that school officials acting in loco parentis need greater flexibility in achieving the goals of public education than is allowed by the "probable cause" standard for reasonable searches by governmental officials in other situations.[6] Stressing that school systems are not "enclaves of totalitarianism," the court concluded that the "reasonable suspicion" standard protects the rights of students by requiring school officials to show at least "reasonable grounds for suspecting that something unlawful is being committed . . . before justifying a search of a student when the school official is acting in loco parentis."[7] The courts have not been explicit in setting out what facts would justify a "reasonable suspicion." However, they have indicated that the in loco parentis doctrine imposes on school officials an affirmative duty to investigate any suspicion that conduct or materials dangerous or harmful to the health and welfare of students is occurring or being harbored in the school. This affirmative obligation to investigate grows out of the reasonable expectation of parents that the school will protect their children from dangerous conditions such as the possession and sale of drugs on campus or the possession of dangerous weapons by other students. The fact situations discussed below on searches of students, their lockers, and their dormitory rooms shed light on the nature of the "reasonable suspicion" standard.Thus when a search is conducted, upon "reasonable suspicion" by school officials in furtherance of school purposes, the search is considered to be reasonable under the Fourth Amendment, and evidence seized when the search is made is admissible in criminal trials or juvenile court proceedings, as well as in school disciplinary proceedings.

JOINT SEARCHES BY SCHOOL OFFICIALS AND LAW ENFORCEMENT AGENTS

When the search of a student or his property is conducted jointly by school officials and a law enforcement agency, the Fourth Amendment standards applicable appear to depend on the place searched and who initiated the search. When school officials, seeking to maintain order and to determine whether a school regulation or criminal statute has been violated, have requested police aid in conducting a search, the lesser "reasonable suspicion" standard has been applied.[8] The courts have concluded that in these circumstances, the police may conduct the search based on the "reasonable suspicion" of school officials. It also should be noted that for searches of student lockers, which are discussed below, who initiated and conducted the search is not the crucial issue. Student lockers are considered to be property controlled jointly by the student and school officials, and therefore the cases have held that school officials have authority to consent to a warrantless search of a student's locker by police.

When the search of a student or his property is initi-

5. People v. Jackson, 65 Misc. 2d 903, 319 N.Y.S. 2d 731, 736 (1971), *aff'd*, 30 N.Y.2d 734, 333 N.Y.S.2d 167, 285 N.E.2d 153 (1972).

6. *Id* at 736.

7. *Id.*

8. *See, e.g., In re* C., 26 Cal. App. 3d 320, 102 Cal. Rptr. 682 (1972), discussed on page 41 *infra*

ated by the police and conducted jointly by school officials and law enforcement agents for the primary purpose of discovering evidence of a crime, a few courts have held that search and seizure standards applicable in criminal cases must be met. In *Piazzola v. Watkins*,[9] the court of appeals reversed the convictions of two students for possession of marijuana. A warrantless search of the two students' dormitory rooms had been conducted by university officials and police narcotics agents. The law enforcement agents had told the university that they had information that drugs were in the dormitory rooms of several students and asked permission to search the rooms. The university consented, relying on a university regulation reserving the right of school officials to enter students' dormitory rooms for "inspection purposes." The drugs discovered during the searches were presented as evidence in the trials of the two students over their objections that the evidence was the inadmissible fruit of an "unreasonable" search. In upholding the contentions of the students that the search violated the Fourth Amendment, the Fifth Circuit states that "clearly the University had no authority to consent to or join in a police search for evidence of crime." The court found that the university retained broad supervisory powers that permit it to adopt such a regulation, but the regulation must be limited in application "to further the University's function as an educational institution." The university regulation could not be construed to authorize the school officials to consent to a search for evidence "for the primary purpose of a criminal prosecution." The court found no exigent circumstances that would justify a warrantless police search and therefore held that the drugs seized from the dormitory room were inadmissable as evidence against the students in a criminal trial.[10]

In a recent New York case,[11] the court applied the "probable cause" standard required by the criminal law to a search of a high school student by a school security guard employed by the board of education. Although the school security officer was not classified as a law enforcement officer under state law, his primary duties were to maintain school safety and to control student crime and disturbances. The court found that the security guard had the status of a policeman and therefore concluded that he could not act on suspicion alone in investigating possible possession of drugs by a student. The security officer had stopped the student to question him about a stolen wristwatch when he noticed a slight bulge in the student's pocket and the top of a brown envelope protruding from the same pocket. At the security officer's request, the student emptied his pockets, and the officer found three brown envelopes containing marijuana. The court affirmed the exclusion of this evidence in the student's criminal trial for possession of drugs as the fruits of an unlawful search. Despite the security officer's claim that experience had taught him that students carried drugs in similar envelopes, the court found that the brown envelope could have contained any number of noncontraband items and therefore the search had been conducted on the "skimpiest of hunches." These facts did not meet the "probable cause" standard the court required to justify a warrantless search by the school security officer. Moreover, the court indicated that even if the "reasonable suspicion" standard had been applicable, a search based on such a "hunch" did not meet the requirements of that standard.

THE NATURE OF THE PLACE SEARCHED

In determining whether the Fourth Amendment is applicable to school searches and what standards should be applied, the courts have looked closely at the nature of the place to be searched. The cases have dealt primarily with three types of searches: searches of students' person; searches of student lockers; and searches of student dormitory rooms. It is helpful to look separately at each of these areas to determine what limitations the Fourth Amendment places on searches by school officials.

Search of a Student's Locker. In a recent California decision, *In re W.*,[12] the California Court of Appeals applied a variation of the "reasonable suspicion" standard to a search of a student's locker by a high school vice-principal. The vice-principal had been told by four students that a particular locker contained a sack of marijuana. Using a master key, he opened the locker and found a bag containing marijuana. The locker had been assigned to W. The marijuana was turned over to the police, and in a juvenile court proceeding, W. was adjudicated to be a delinquent. The student argued that the vice-principal's search violated the Fourth Amendment and the evidence obtained from it was therefore inadmissible in the juvenile court hearing. The court ruled that while the Fourth Amendment does place limits on school officials, the in loco parentis doctrine expands these officials' authority. Balancing the Fourth Amendment rights of students against the in loco parentis powers of the school, the court stated that the appropriate test for searches by high school officials is two-pronged: (1) the search must be within the scope of the school's duties, and (2) the search must be reasonable under the facts and circumstances. Although in loco parentis expands school officials' powers, the Fourth Amendment limits their power to act with these two requirements. The court found that preventing the use of marijuana

9. 442 F.2d 284 (5th Cir. 1971).

10. *See also In re* Donaldson, 269 Cal. App. 2d 509, 75 Cal. Rptr. 200 (1969), in which the court noted the rule that a search that is clearly part of a joint operation by police and a private individual is tainted with state action and consequently violates the Fourth Amendment's prohibition. In this case, however, the court found no joint operation by police and the school officials.

11. People v. Bowers, 72 Misc. 2d 800, 339 N.Y.S.2d 783 (1973).

12. 29 Cal. App. 3d 777, 105 Cal. Rptr. 775 (1973).

was clearly a school responsibility, and the search of the student's locker, based on specific information from four students, was reasonable.[13]

The balancing test employed by the court in that case contrasts with the approach most often taken by the courts in cases involving school searches of student lockers. In *Overton v. New York,*[14] the United States Supreme Court ordered a new hearing of a narcotics prosecution in which the conviction of a student was based on the discovery of drugs in his locker by police who were without a valid warrant but had permission from the vice-principal to search the locker. The New York Court of Appeals had upheld the search on the theory that the vice-principal had not been coerced to consent to the search but had acted under his independent duty to inspect a locker when suspicion arises as to its contents. A fact important to this decision is that the vice-principal had the combinations of all the locks and the students knew that they did not have exclusive possession of the lockers vis-à-vis the school authorities. On appeal, the Supreme Court remanded the case to the New York Court of Appeals for determination of whether the vice-principal had acted under duress. The Court of Appeals essentially restated its earlier decision, finding that the vice-principal had exercised an independent "duty" to search, a duty claimed by the vice-principal and tacitly approved by the court.

In another case, the Kansas Supreme Court upheld a burglary conviction based on the discovery of stolen goods in a bus station locker that was entered by a key removed from the defendant's school locker.[15] The defendant had consented to the principal's opening his school locker in the presence of the police. The court upheld the search on the basis of the defendant's uncoerced consent and the nature of the school locker. It said that although the student may control his locker in reference to fellow students, his possession is not exclusive against the school and its officials. As in *Overton,* the fact that the principal had a master list of all lock combinations and a key that would open all school lockers was important to the court's decision. The court considered the right of inspection inherent in the authority vested in school administrators to manage schools and protect other students.

These cases indicate that police may introduce evidence in a criminal trial that has been seized by a school official from a student's locker without a warrant or the student's permission when the school official had reasonable grounds for the search. Also, the school may authorize the police to conduct a search when they have reasonable grounds to believe that a crime has been committed and that evidence in reference to the crime may be within the locker.

Search of a Student's Person. The "reasonable suspicion" standard has also been used to test the legality of a search of the student's person. That standard has been accepted even when the evidence seized has been turned over to the police and introduced in a criminal or juvenile court proceeding. In a California decision in 1970, *In re G.,*[16] the court explained why a less stringent Fourth Amendment standard applied to school searches of a student's person. In this case a student had informed the dean of students that G. had taken a pill and was intoxicated. G. was brought to the principal's office and asked to empty his pockets. In his pockets was a film canister containing amphetamines. The court found the principal's action to have been proper, explaining that the principal could not properly have ignored the information that G. had dangerous drugs in his possession. The court said that it was in the best interest of both the student and the school system that such situations be handled informally among persons with whom the student was familiar, rather than to subject him to the adverse emotional impact of a search warrant and a hearing before a magistrate. The court pointed out that the principal's action required no intervention by law enforcement officers and little or no disruption of the school. Finding that "even in the areas of protected freedoms, the power of the state to control conduct of children reaches beyond the scope of its authority over adults," the court upheld that the principal's action was reasonable and not in violation of the Forth Amendment.

In another California decision, *In re C.,*[17] the court upheld as reasonable a search of a high school student's person conducted by school officials with the help of a police officer. In that case, school officials, after receiving a tip that C. was selling drugs, brought the student to the vice-principal's office for questioning. When the student resisted a search of his bulging pants pocket, the school officials requested the aid of a police officer, who removed drugs from the student's pocket. The court, in upholding the admissibility of this evidence in a juvenile court proceeding, adjudicated C. a delinquent and noted that school officials have a duty to protect students from the sale of drugs on campus. The court found that the school officials had "good cause" to search C. based on the tip they had received, the bulge in C.'s pockets, his possession of $20 (in the court's view a large sum for a student), and his refusal to allow a search of his pockets. When the purpose of the school official's search is within the scope of his official duties, the court said, the justification for the search will not be measured by the rules authorizing a police search of an adult. The court found

13. Although the court cited the earlier California decision, *In re* Donaldson, and the "private person" exception to the Fourth Amendment as a possible basis for its decision, it found that the Fourth Amendment was not totally inapplicable in the school situation and used the balancing test.

14. 20 N.Y.2d 360, 283 N.Y.S.2d 22, 229 N.E.2d 596, *vacated and remanded,* 393 U.S. 85 (1968), *original judgment aff'd* at 24 N.Y.2d 522, 301 N.Y.S.2d 479, 249 N.E.2d 366 (1969).

15. State v. Stein, 203 Kan. 638, 456 P.2d 1 (1969), *cert denied,* 397 U.S. 947 (1970).

16. 11 Cal. App. 3d 1193, 90 Cal. Rptr. 360 (1970).

17. 26 Cal. App. 3d 320, 120 Cal. Rptr. 682 (1972)

that there was no joint search by the school officials and the police, concluding that "the constitutional guarantee against unreasonable searches does not proscribe solicitation and use of professional assistance by school authorities in conducting an authorized search of a student for good cause." The mere fact that the professional assistance was from a policeman "did not render unreasonable that which was otherwise reasonable."

In a recent New Jersey case, *In re G.C.*,[18] the court also upheld the admissibility in a juvenile court hearing of evidence that was obtained in a school search of a female student's person. The school officials, acting on information that she had been selling pills on the campus that same morning, brought the girl to the principal's office. After she consented to a search of her person by a female school official, a bottle of amphetamines was found in the student's purse. Noting that there was insufficient evidence to determine whether her consent to the search was voluntary, the court considered whether school officials could constitutionally conduct such a search of a student without a consent. It concluded that: "The privacy rights of public school children must give way to the overriding governmental interest in investigating reasonable suspicions of illegal drug use by such students even though there is an admitted incursion of constitutionally protected rights — rights no less precious because they are possessed by juveniles."[19] Finding that the school officials were "duty bound to investigate reasonable suspicions of student criminality," the court held that they had acted responsibly and diligently under the circumstances and would have been "derelict" to have acted otherwise.

In three other school cases involving search of a student's person, the state court in Delaware,[20] Illinois,[21] and New York[22] have upheld the search.

Search of College Dormitory Room. The leading case in the area of searches of college dormitory rooms is *Piazzola v. Watkins*,[23] which was discussed above. In that case, the Fifth Circuit Court held that students occupying a college dormitory room enjoyed the protections of the Fourth Amendment and university officials had no right to consent to or join a police search for the primary purpose of obtaining evidence for criminal prosecutions. The court found that the search, instigated and in the main executed by law enforcement agents, was subject to the full criminal law requirements of the Fourth Amendment. Since there was no warrant, no probable cause for searching without a warrant, and no waiver or consent, the court concluded that the search violated the Fourth Amendment's prohibition of unreasonable searches.[24]

In *Piazzola*, the Fifth Circuit made it clear that although the university could not require as a condition of admission that students waive their Fourth Amendment right to be free from unreasonable searches and seizures, a university regulation that reserved the right to inspect student rooms was not unconstitutional per se.[25] If the regulation is construed and limited in application to furtherance of the university as an educational institution, it does not exceed university power.

In a federal district court decision arising from the same drug raid involved in *Piazzola*, the court upheld the expulsion of a student for possessing marijuana in a college dormitory. In *Moore v. Student Affairs Committee of Troy State University*,[26] the same district court judge who had originally reversed the *Piazzola* convictions upheld in a university disciplinary proceeding the admissibility of evidence seized in a joint school and police search. Stressing that the university has an affirmative obligation to promulgate and enforce reasonable regulations designed to protect campus order and discipline, the court pointed out that "the constitutional boundary line between the right of the school authorities to search and the right of a dormitory student to privacy must be based on a reasonable belief . . . that a student is using a dormitory room for a purpose which is illegal or which would otherwise seriously interfere with campus discipline." This standard of "reasonable cause to believe" was found to be lower than the traditional probable-cause standard because the "special disciplinary proceedings are not criminal proceedings in the constitutional sense."

Searching Other Places. Searches conducted by school officials to discover student violations of school regulations have been upheld in other situations. In *People v. Lanthies*,[27] college officials searched a student's briefcase when their efforts to find an offensive odor permeating the entire library study hall led to his carrel. The odor came from packaged drugs discovered in the briefcase. In upholding the admissibility of the evidence in the student's criminal trial, the court noted that school

18. 121 N.J. Super. 108, 296 A.2d 102 (1972).

19. *Id.* at 106.

20. State v. Baccino, 282 A.2d 869 (Del. Super. 1971). The case involved the search of a student's coat after a tug-of-war over the coat between the student and a school official who was taking the jacket to ensure that the student staved in class. Drugs were found in the jacket pockets

21. *In re* Boykin, 39 Ill. 2d 617, 237 N.E. 2d 460 (1968). Here the search, made by police officers at the school officials' request, resulted in discovery of a gun on a student's person.

22. People v. Jackson, 65 Misc. 2d 909, 319 N.Y.S 2d 731, *aff'd* 3 N.Y.2d 734, 333 N.Y.S 2d 167, 284 N.E.2d 153 (1971). The search of a student chased down by a school coordinator of discipline three blocks from the school was upheld by the court. The student, suspected by the school official of possessing drugs, had run out of the school while he was being taken to the principal's office for questioning. The court held that the in loco parentis powers of the school official did not in this case end at the school door.

23. 442 F.2d 284 (5th Cir. 1971).

24. *Accord*, People v. Cohen, 57 Misc. 366, 292 N.Y.S.2d 706 (1968); Commonwealth v. McCloskey, 217 Pa. Super. 432, 272 A.2d 271 (1970) (holding that for purposes of police searches, a dormitory room is analogous to an apartment or hotel room).

25. The university rule stated: "The college reserves the right to enter rooms for inspection purposes. If the administration deems it necessary, the room may be searched and the occupant required to open his personal baggage and any other personal materials which is sealed."

26. 284 F. Supp. 725 (1968).

27. 5 Cal. 751, 97 Cal. Rptr. 297, 488 P.2d 625 (1971).

officials periodically checked student carrels for overdue books, rotten food, and similar materials. In this case the discovery of drugs resulted from such a search based on complaints by students of an odor thought to come from rotting food. These facts, in the court's opinion, brought the search within the "emergency exception" to the warrant requirements of the Fourth Amendment.

In one case a federal district court has upheld the warrantless search by school officials of a student's car parked on the school campus.[28] The student, a cadet at the Marine Maritime Academy, was dismissed after a search of his automobile revealed drugs and alcohol in violation of the Academy regulations forbidding possession of such items on campus. Seeking readmission to the Academy, the student challenged the admissibility of this evidence in his expulsion hearing. The federal district court held that (1) the school officials had reasonable cause to believe that school regulations were being violated, and (2) the search of the car was a reasonable exercise of the Academy's authority to maintain order and discipline on the campus. It should be noted that the Academy is a quasi-military institution, the automobile was parked on campus in spaces provided by the school, and the contraband found was admitted in a school disciplinary hearing, not a criminal proceeding. Perhaps under other circumstances a search of a student's car by school officials would be subject to a higher standard.

SUMMARY

Neither the Supreme Court not the federal courts of appeal have decided any cases directly governing the Fourth Amendment rights of public school students.[29] Almost all the cases reviewed in this article come from state courts and have no value as precedents in other jurisdictions. The law as it relates to the balancing of students' constitutional rights and the state's interest in maintaining order and discipline in the public school is very fluid and has changed rapidly in recent years. The courts now recognize that the Fourth Amendment does protect students from "unreasonable" searches by school officials, but in defining "reasonableness" the courts have usually struck the balance in favor of order and discipline in the schools. Still, students clearly do not shed their constitutional rights at the schoolhouse gate. In developing regulations governing searches of students and their property, school officials should try to protect the student's right to privacy. Where the regulations govern searches of jointly controlled property, such as lockers or carrels, students should be made aware that the property is subject to periodic administrative searches for contraband and that school officials reserve the authority to consent to a search of such property by law enforcement officers. When possible, the student's consent to search should be obtained and he should be present when his property is searched. If the police seek permission from school authorities to search a student or his property for the purpose of obtaining evidence for a criminal prosecution, the school officials should require the police to obtain a search warrant unless the search comes within one of the exceptions to the Fourth Amendment's search warrant requirements. Whenever school officials conduct a search, a witness should be present.

Only in exceptional cases would the observance of these safeguards interfere with the school officials' affirmative duty to maintain order and discipline in the schools and protect the health, safety, and welfare of students in their charge. Because an unlawful search may result in the inadmissibility of evidence in criminal or school proceedings and, possibly, civil or criminal liability for school officials, incorporating these safeguards into school policies would seem wise. Moreover, the consequences for students of school searches may be very severe (criminal penalties, expulsion, or long-term suspension). In the other areas of student rights, courts have increasingly required that schools carefully observe procedural safeguards mandated by federal and state constitutions before subjecting students to such severe penalties. It seems likely that the federal courts will eventually subject school policies on search and seizure to similar scrutiny. By building these safeguards into school regulations, school officials can both teach students the values of our fundamental freedoms and avoid future conflicts in the courts.

28. Keene v. Rodgers, 316 F. Supp. 217 (D. Me. 1970).

29. The Fifth Circuit Court decision in *Piazzola v. Watkins*, 442 F.2d 284 (5th Cir. 1971), involved college students and a dormitory search.

THE NORTH CAROLINA ENVIRONMENTAL POLICY ACT: Neglected Planning Tool

Charles E. Roe

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THE NORTH CAROLINA ENVIRONMENTAL Policy Act of 1971[1] (NC-EPA) was born out of the environmental enthusiasm of the "earth day bloom" and in the mold of the National Environmental Policy Act of 1969 (NEPA).[2] NC-EPA required that state agencies comply with the goals of the state's environmental conservation policy and prepare statements assessing the impact of their actions that might significantly affect the environment. The act also permits local governments to require environmental impact statements (EIS) for "major development projects"[3] proposed in their jurisdictions. This authorization would seem extremely important for state purposes in advancing sound land uses, now emphasized by the Land Policy Act,[4] the Coastal Area Management Act,[5] and the proposed Mountain Area Management Act.[6] The North Carolina Environmental Policy Act provides a potentially powerful tool for environmental planning and open decision-making and can assist local governments concerned with land and resource management.

Although early drafts of the Scott Administration's bill would have made local environmental impact review of proposed private developments mandatory, as in a few other states,[7] political realities forced revision of the local provision to an authorization for voluntary adoption of the environmental-impact statement (EIS) requirement.[8] After the 1971 General Assembly enacted NC-EPA as the keystone of Governor Robert W. Scott's environmental program,[9] the State Administration made only limited efforts to encourage local adoption of the EIS disclosure requirements and has prepared no guidelines to help local governments interested in using the planning tool. Local governments have much flexibility, both individually and in combination, in implementing the law. The act, in the absence of state guidelines, offers little in terms of procedures, professional techniques, or management structures that local governments might use in executing the authorized requirements, so that a variety of administrative approaches could be adapted to local conditions.

PROVISIONS AND PROCEDURES OF NC-EPA

State EIS requirements generally have been modeled on section 102(2)(C) of the National Environmental Policy Act. NEPA initiated the widespread use of environmental impact analysis to achieve governmental responsiveness to environmental concerns. In part NEPA required that federal agencies comply with the goals of the national environmental policy and prepare statements assessing the impacts of their major actions significantly

1. N.C. GEN. STAT. §§ 113A-1 through -20 (1971).

2. 42 U.S.C. § 4321-4347 (1970).

3. N.C. GEN. STAT. § 113A-9(1). "Major Development Projects" include but are not limited to shopping centers, subdivisions, other housing developments, and industrial and commercial projects, but do not extend to projects of less than two contiguous acres.

4. N.C. GEN. STAT. § 113A-150 et seq. (1974).

5. N.C. GEN. STAT. § 113A-101 et seq. (1974).

6. SB 467 (1975 session of the N.C. General Assembly).

7. California, Massachusetts, Puerto Rico, and Washington [N. Yost, *NEPA's Progeny: State Environmental Policy Acts*, ENVIRONMENTAL LAW REPORTER 3(1973) 50093]

8. N.C. GEN. STAT. § 113A-8. "The governing bodies of all cities, counties, and towns acting individually or collectively, are hereby authorized to require any special-purpose unit of government and private developer of a major development project to submit detailed statements, as defined in 113A-4(2), of the impact of such projects."

9. NC-EPA originated out of Governor Robert Scott's administrative attempt to establish coherence to the diverse environmental concerns among the state agencies. An interagency task force produced the NC-EPA, along with a package of other proposed environmental legislation, submitted by the Governor to the General Assembly on April 18, 1971. NC-EPA passed through the General Assembly with little trouble

The Administration, however, encountered a barrier when in 1972 it recommended refinements to the act – none relating to the local adoption provision. It appears that many of the proposed procedural changes could have as easily been achieved by executive order through revised implementation directives to state agencies. Senate opposition was particularly provoked by the Administration's suggestion that the impact statement requirement be extended to private projects licensed or approved by any state agency (Governor Robert W. Scott, "The North Carolina Environmental Policy Act: A Report to the Legislative Research Commission on Experiences with the Act, with Recommendations for Refinements," July 1972). Private utilities rallied against state environmental assessment requirements on their projects, and in the acrimonious 1973 General Assembly contest, friends of NC-EPA could muster only a compromise merely to extend NC-EPA until September 1, 1977. NC-EPA is now operating on a short lease of life and can be extended or made permanent state policy only by act of the General Assembly.

affecting the human environment. Prompted by the Council on Environmental Quality and threat of citizen suits, federal agencies developed procedures for preparing impact statements, requiring similar analyses and statements from local governments and the private sector as a requisite for the award of federal permits or grants. Many states later adopted EIS requirements.[10] The states differ considerably, however, in their approaches. Some states applied the requirement to both local and state agencies, while others required impact statements for private actions for which a government permit is necessary. The states also vary in how they administer the EIS process.

The North Carolina statute obliges state agencies to follow the state policy of environmental conservation by requiring an EIS on any proposal "for legislation or actions involving expenditure of public moneys for projects and programs significantly affecting the quality of the environment."[11] The formulators applied the requirement to *any* state action—not necessarily a "major" action—that may have a "significant" environmental effect. Significant effect is not defined by the act and has not been clarified by administrative guideline. NC-EPA applies beyond state public works projects; it encompasses all agency and regulatory activities involving public funds and any activities of local government units subject to review, approval, or licensing by state agencies.[12] Local governments or special-purpose units are not otherwise required to prepare an EIS for their own activities. So far, state agencies have ignored the act's coverage of local public actions requiring state approval,[13] despite reinforcing opinions of the Attorney General.[14]

The impact statements prepared by state agencies are to be reviewed in cooperation with other state and regional agencies and made available to local governments and the public.[15] NC-EPA specifies that an EIS consider:

a. The environmental impact of the proposed action;
b. Any significant adverse environmental effects which cannot be avoided should the proposal be implemented;
c. Mitigation measures proposed to minimize the impact;
d. Alternatives to the proposed action;
e. The relationship between the short-term uses of the environment involved in the proposed action and the maintenance and enhancement of long-term productivity; and
f. Any irreversible and irretrievable environmental changes which would be involved if the proposed action should be implemented.[16]

After an impact statement had been reviewed, the Governor or his designated agency would weigh the alternatives and decide whether to proceed with a project detrimental to environmental quality. The Department of Administration issued a general procedural guideline for circulating and reviewing an EIS,[17] but no substantive guiding criteria have been provided for assessing an EIS once filed. No guidelines were issued to state agencies or local governments that would detail the content and format of impact evaluations or define the criteria for preparing an environmental statement. When local governments implement the authorization to require any special-purpose unit of government or private developer of a major development project to furnish an EIS, the statement's form is left to the local government's discretion, but the statement must include those same considerations defined in G.S. 113A-4(2).[18]

Governor Scott assigned authority to review state environmental statements to the Council on State Goals and Policy, an executive advisory board of prominent citizens created in 1972. The Council was to review the EIS for controversial environmental consequences before accepting the statement, requiring project modification, or recommending rejection by the Governor.[19] In reality, the Council has been ineffective in guarding compliance with NC-EPA. After reviewing and rejecting one EIS in 1972, the Council never again initiated a proposal review nor has been asked to do so by a sponsoring agency. Interviews with Council members and supporting staff from the Office of State Planning in the spring of 1975 revealed they did not recognize responsibilities to NC-EPA. The inattention to the act may reflect the absence of public support for the statute. Environmental groups have taken only limited advantage of NC-EPA to open up the government decision processes despite the successes achieved through NEPA. At this writing, no test of NC-EPA has been made in the state courts. In the absence of

10. Council on Environmental Quality, State Environmental Impact Statement Requirement, ENVIRONMENTAL QUALITY, THE FIFTH ANNUAL REPORT OF CEQ 401-09 (1974).

11. N.C. GEN. STAT. § 113A-4(2).

12. N.C. GEN. STAT. § 113A-9(3).

13. In light of an Attorney General's clarification of the statutory requirement, the Department of Natural and Economic Resources is preparing to require individual impact statements for projects involving the expenditure of public moneys by local governments when reviewed, approved, or licensed by DNER, such as water and sewer systems, dredging, or construction of waste treatment plants.

14. Attorney General's Opinion to Carroll L. Mann, Jr., State Property and Construction Officer "Environmental Policy Act of 1971," *North Carolina Attorney General Reports*, vol 43, no. 1 (13 July 1973), 26-36; Kenneth B Oettinger, Office of the North Carolina Attorney General. Memorandum, "Interpretation of N.C. Environmental Policy Act of 1971" (8 April 1974); John R. B. Matthis, Assistant North Carolina Attorney General. Memorandum, "Environmental Impact Statement" (3 Feb. 1975).

15. Announcements of the availability of state EIS to local governments and the public are made by the State Clearinghouse and Information Center, Department of Administration, through its twice-monthly publication of the NORTH CAROLINA ENVIRONMENTAL BULLETIN.

16. N.C. GEN. STAT. § 113A-4(2).

17. W. L. Turner, Secretary of Administration. Memorandum to State Agencies, "Implementation of the Environmental Policy Act of 1971: Guidelines" (Feb. 18, 1972).

18. N.C. GEN. STAT. § 113A-8.

19. Governor Robert Scott. Memorandum, "The N.C. Environmental Policy Act of 1971" (1 Feb. 1972), delegating authority to the Council on State Goals and Policy

guidance and overview, initiating agencies that may have chosen to prepare an EIS are free to ignore environmentally based criticism and proceed with their projects.

STATE AGENCY PERFORMANCE UNDER NC-EPA

The administration and regulatory agencies of North Carolina have shown little inclination to take affirmative steps in assessing the environmental impacts of state actions as directed by NC-EPA. The decision to prepare an EIS has been left entirely to the discretion of the initiating agency. Without pressure from either an active "watch-dog" monitoring body or the public, agency discretion to prepare an environmental statement has not often been exercised. Most state agencies appear to have ignored both the Attorney General's interpretation of NC-EPA as encompassing virtually every meaning of the word "environment" and his advice that the initiating state agencies responsible for making the threshold determination of the environmental significance of a proposed action ought to prepare written reports on any negative threshold decision.[20]

Only the Departments of Natural and Economic Resources and Transportation have been disposed to file environmental statements, and only DNER has filed the compliance reports required by section 113A-6 of NC-EPA. Undoubtedly, environmental assessments should have been conducted for many state projects but were not.[21] The Department of Administration since 1972 has been disinclined to support or comply with the act.[22]

Among the few notable applications of the North Carolina Act have been the following:

—As a result of passage of the act, the Mirex spraying program for fire ants in North Carolina was closely scrutinized and substantially curtailed.

—The Council on State Goals and Policy issued an opinion that a state highway project within Raleigh involving the Oberlin Road extension should be viewed in its entirety rather than in small increments that might individually escape NC-EPA review.

—The Board of Governors of the University of North Carolina retreated from a proposed razing of Old Main Building on Pembroke State University campus after being advised of possible litigation to establish that historical and cultural values were covered by the act, as well as the biological environment.

—The State Utilities Commission relied on the policy statement of the NC-EPA in adopting a requirement for environmental evaluation of electric generating plant proposals.

A decision to reinforce NC-EPA will require correcting past failures of enforcement and administration. The act may be rejuvenated by citizen pressure through legal action, by General Assembly resolution, or by executive order. The General Assembly must act to make NC-EPA permanent state policy, as it is now due to expire after September 1, 1977. Agency compliance with the public policy to assess actions significantly affecting the environment properly will not be forced without active monitoring by a body that has the Governor's confidence or without willingness of citizen groups to go to court to enforce the act. The merits of saving NC-EPA from oblivion are founded in its offer of positive and balancing effects on state governmental decisions and its complementary fit with state management efforts for sound land and resource use.

LOCAL UTILIZATION OF NC-EPA

The local authorization of NC-EPA has not been much used. Only the Town of Holden Beach and Transylvania County have adopted requirements for environmental impact statements for proposed "major developments"[23] by any special-purpose unit of government or by a private developer. Other local governments (for example, Forsyth County) have studied the utility of EIS disclosure requirements, but no state agency has promoted or fully apprised itself of local considerations. Several urbanizing coastal counties, among them Carteret and New Hanover, have considered and disregarded the concept in favor of citizen environmental advisory boards to local planning elements.

Carteret County considered and, in fact, adopted for a single housing project a local EIS ordinance but found that only unrevealing data and information were provided in compliance with the ordinance and ultimately repealed the ordinance. The attempt foundered upon a misconception that NC-EPA was useless for local purposes without specific statutory direction of what an EIS was to contain. Carteret County officials took a restricted view that they were not at liberty to define their own specifications for EIS format and procedure for a private developer. This misreading is contrary to the spirit of NC-EPA, which does not restrict local governments' options in utilizing and structuring impact disclosure requirements so long as the statements include the six areas of consideration defined in G.S. 113A-4(2). This unsatisfactory experience demonstrates that some local

20. Attorney General's opinion, *supra* note 14.

21. This statement is based on extensive interviews with staff members of the North Carolina Departments of Administration, Natural and Economic Resources, and Transportation and members of the Council on State Goals and Policy; and review of the budget to locate budgetary expenditures that might require environmental impact statements. For critical reviews of state performance under the act, see: Robert Finch, Department of Natural and Economic Resources. Memorandum, "Need for More Effective Implementation of the State Environmental Policy Act. of 1971" (30 Aug. 1973), for a critical review of state performance under the act, and Maynard Hufschmidt. *Environmental Statements and Water Resource Planning in North Carolina* (Water Resources Research Institute of the University of North Carolina, Report No. 94, June 1974): found projects that had not used an impact statement.

22. Perhaps the most glaring contravention of NC-EPA was the omission of an EIS of even a negative threshold report on the State Government Center by the Capital Planning Commission, Department of Administration, although strongly advised by the Attorney General.

23. N.C. Gen. Stat. § 113A-9(1).

governments may shy away from the latitude to innovate that the act provides, and it reaffirms the need for the state to take the lead by issuing suggested guidelines for localities to make the best use of their adoption of environmental-impact disclosure requirements.

The EIS disclosure requirement can be a valuable complement to the planning efforts of those local governments able to define their objectives for regulating land and resource development. A local government has a measure on which to evaluate the impacts of proposed developments once it has a feel for its community conditions and objectives in the areas of local economy, natural environment, aesthetic and cultural values, public and private services, and housing and social conditions. Such conceptualization will help a local government measure impacts and costs of proposed developments and thus balance tradeoffs. The EIS process can be of special value to political decision-makers by helping to identify the client groups potentially affected by development. It is important to emphasize that environmental impact measures are intended to complement, not replace, other applicable environmental standards and development codes in the community. The impact disclosure requirement is especially valuable when paired with environmental performance standards for development.

Adopting development impact measures has no point unless local decision-makers are ready to use the evaluations to arrive at better land-use decisions for their communities. A local decision to require environmental impact assessments and environmental performance standards has certain inherent risks. Environmental issues may be employed on occasion by special interests as a smoke-screen for other concerns—for example, when the motive is to block construction of low- and moderate-income housing on the basis of alleged harmful environmental impacts. Some smaller developers can not afford to finance expensive environmental analyses as well as larger developers. This situation may result in higher costs passed on initially to the consumers of development projects and can favor the larger corporations that can bear the added costs entailed by environmental studies.

The NC-EPA restriction of local EIS requirements to projects that are greater than two contiguous acres in extent probably was meant to direct impact assessment toward significant developments and not trivial projects. However, this constraint may work against evaluation of cumulative impacts of a collection of smaller projects that might on occasion have singularly dramatic impact.[24] The effect of the restriction may have administrative benefit in that not all proposed projects need to be screened on a case-by-case basis for potential impact, but the EIS requirement can be automatically demanded by merit of project size and type. The NC-EPA approach may result in nonevaluation of some potentially significant developmental impacts and overstudy of some unimportant ones.

The Town of Holden Beach accepted the NC-EPA authorization in 1972. The Holden Beach ordinance set no particular standards or policies for development but prescribed that a proposal for "major development" [defined verbatim as stated in G.S. 113A-9(I)] must submit an EIS to the town council for its finding and public hearing. The building inspector was not to issue any building or occupancy permits until the town council accepted the impact statement.

The Holden Beach ordinance raises questions whether such a requirement is viable unless the local government has the staff expertise to monitor accuracy of any statement, the political will to enforce the requirement for comprehensive statements, or adequate land-use standards. More recent adoption by the town of traditional land-use regulations—subdivision controls, zoning, and creation of a planning board—and appointment of a building inspector charged with reviewing the sufficiency of any environmental statement improved the likelihood that the town can use the innovative planning tool of environmental impact disclosure. Because of its small size and the infrequency of major development there, Holden Beach is not a good test of the utility of EIS requirements in larger urbanizing jurisdictions but does demonstrate how the ordinance may be used in a smaller community.

Transylvania County, in the southwestern mountain region of the state, has been the only county to adopt an EIS requirement for proposed major development, when stimulated by rapid subdivision and the pressure of development of recreational second homes on fragile mountain locations. The ordinance, enacted in 1973, proved to be a weak disclosure requirement that usually resulted in a disclaimer of adverse impacts. It in no way supplemented the county's subdivision controls, floodway zoning regulations, building codes, or strong sedimentation standards. Recognizing that an EIS ordinance without force is only a game in paper transmittal, the Transylvania county manager and the county planning board moved in 1974 to force developers to take the environmental assessment requirements seriously. The revised ordinance, adopted in August 1974, declared a county environmental policy to protect its mountain resources and set forth a series of stringent criteria that an impact statement must address, on penalty of a misdemeanor charge carrying fines and imprisonment for each day of violation.

Transylvania County has no procedural guidelines or specific impact statement report form. A prospective developer must submit an EIS with an application complying with county development regulations to the county manager (a planner) and the land-use subcommittee of the county planning board. Their decision on the adequacy of the EIS is subjective, for the assessment serves more as an informational report than as a basis for denying a building permit. However, projects may be

24. The measurement of cumulative impacts of smaller development projects receive emphasis in HUD-FHA environmental assessment procedures under NEPA-related standards.

modified during the review process, and the requirement may discourage the proposal of "bad" projects by encouraging developers to design their projects from the start to mitigate or avoid environmental damage. The strength of the impact statement ordinance is gained from its integration with other conventional land-use regulations that emphasize environmental standards.

The Transylvania County experience offers valuable lessons for other local governments or confederations of governments concerned with urbanizing pressures and protection of natural and cultural resources. To be successful, an environmental statement requirement must be backed by political commitment, planning expertise, and strong developmental standards and land policies. While the Transylvania experience indicates how the EIS can be used to implement local environmental objectives, the state could contribute much to support local efforts of this kind. The shortage of state agency manpower for technical assistance accentuates the difficulties of local governments, particularly in rural areas, that need expert advice and assistance for both the preparation and review of environmental assessments. The local need is heightened further by environmental assessment requirements of the U.S. Department of Housing and Urban Development for block grants and housing assistance.

CONCLUSIONS

Environmental analysis requirements for private development raise technical, legal, political, and economic issues. Although guidelines for impact assessments are being developed,[25] the infancy of the state of the art may hinder the establishment of clearly defensible environmental standards. Some courts may have difficulty accepting judgments made by local officials to refuse building permits on grounds of substantial environmental damage or "serious" problems. Yet, even in the absence of technically unassailable criteria and precise quantitative measurements, qualitative assessments are likely to improve community development and local decisions. Systematic evaluations, even if qualitative, will help public officials decide whether to accept development proposals, require modifications, and choose among alternatives. Also, developers—when aware of the evaluation criteria—are more likely to design proposed projects taking better account of community objectives, and concerned citizens will have greater access to their government's decisions on land-use matters.

Inadequate specifications for information required from a developer and inadequate techniques for analyzing the data will pose problems. The local government would be well advised to adopt standardized procedures and format for filing impact statements[26] and to make the measures widely known throughout the community. An initial screening of development proposals should be conducted before an EIS is prepared to familiarize a developer with community plans and standards and identify areas of serious concern. The local government would be wise to use a form of A-95 review procedure, similar to the practice for state and federal EISs.[27] To make the environmental impact disclosures a useful planning and control tool in rural regions will require strengthening technical and administrative expertise within local governments and heavy reliance on technical aid from the regional planning organization, university extension services, and district offices of state agencies.

The EIS requirement can be inadequate or counterproductive if applied without proper foresight of the local investment involved. The requirement will demand additional government staff time and may increase some costs to the developer that will be partly passed on to the consumer. Before adopting an EIS ordinance, local governments should be aware of the indirect costs and technical and political commitments demanded. If the local government is willing to make such commitments of will and resources, environmental impact analyses can usefully complement other standards. The costs of the EIS process can be well offset by the long-term economic benefits gained by the community in sound development patterns and reduced expenditures on public services. The public must recognize the benefits and costs of an environmental assessment program and should participate in the review and monitoring of the process. Much can be gained from adopting NC-EPA authorized impact-assessment procedures if local governments are prepared to define community objectives and create an experienced and professional staff to administer the procedures wisely and expeditiously.

The North Carolina Environmental Policy Act provides a powerful tool toward comprehensive environmental planning and open decision-making. It offers the state another means to establish the lead in guiding sound statewide development and protecting areas of environmental concern. NC-EPA can be a supporting aid for progressive local and regional governments concerned with land and resource conservation.

25. E.g., Schaenman and Muller, Measuring Impacts of Land Development (The Urban Institute; Prepared under HUD contract, 1974); Voorhees & Associates "Guidelines for Environmental Assessment of Community Development Activities" (under preparation for HUD).

26. The local government might adopt the report forms required of developers by HUD-FHA (ECO, applicant's environmental statement) or by the state A-95 clearinghouse (applicant's environmental assessment form, proposed draft, January 1975).

27. Morgenthaler, *A Neglected Environmental Assessment Tool Provides an Early Public Pressure Point*, 4 Environmental Law Reporter 50043 58 (OMB Circular A-95, 1974); N.C. Department of Administration, State Clearinghouse, Clearinghouse Procedures Manual (1974).

County Government in North Carolina

Edited by Joseph S. Ferrell 1975

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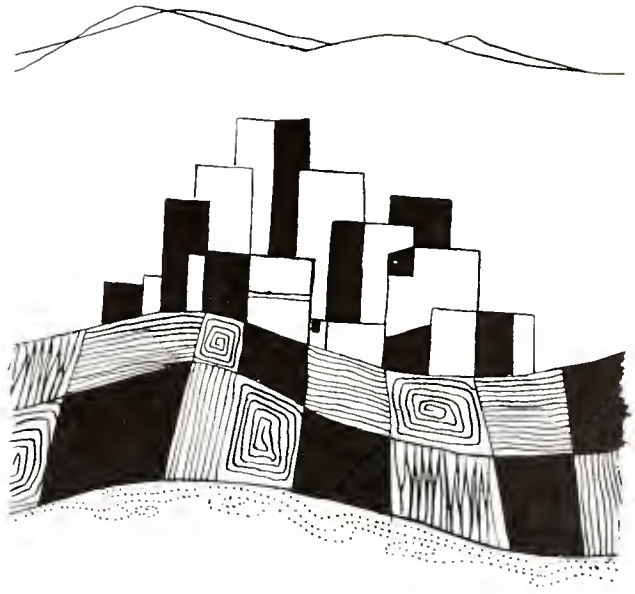

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