April 1982

Survey of Developments in the Fourth Circuit: 1981

Follow this and additional works at: https://researchrepository.wvu.edu/wvlr

Part of the Civil Rights and Discrimination Commons, Criminal Law Commons, Labor and Employment Law Commons, Legislation Commons, Litigation Commons, and the Tax Law Commons

Recommended Citation

Available at: https://researchrepository.wvu.edu/wvlr/vol84/iss3/7

This Student Material is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in West Virginia Law Review by an authorized editor of The Research Repository @ WVU. For more information, please contact ian.harmon@mail.wvu.edu.
STUDENT MATERIAL

SURVEY OF DEVELOPMENTS IN THE
FOURTH CIRCUIT: 1981

Tax ................................................................. 705
Employment Discrimination ............................... 727
Criminal Law .................................................... 756
Civil Rights ....................................................... 781

TAX

I. Bob Jones University v. United States

The Internal Revenue Code (IRC), § 501, provides that certain classes of organizations, including corporations "organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary or educational purposes," among others, "shall be exempt from taxation. . . ."\(^1\) Prior to 1970, the Internal Revenue Service (IRS or Service) granted exempt status to such organizations without consideration of their racial policies and practices. Beginning that year, however, the Service announced that it would no longer grant tax-exempt status to schools, including church-related schools whose admissions policies were racially discriminatory. Rules and procedures reflective of the new IRS policy were subsequently promulgated.\(^2\)

\(^2\) Rev. Rul. 71-447, 1971-2 C.B. 230; Rev. Proc. 72-54, 1972-2 C.B. 834; Rev. Rul. 75-231, 1975-1 C.B. 158; Rev. Proc. 75-50, 1975-2 C.B. 587. The rules, procedural guidelines and formal regulations governing eligibility for charitable tax benefits are promulgated pursuant to the Treasury Department's general power to promulgate rules essential to the enforcement of the IRC: "[T]he Secretary or his delegate shall prescribe all needful rules and regulations for the enforcement of this title, including all rules and regulations as may be necessary by reason of any alteration of law in relation to internal revenue." 26 U.S.C. § 7805(a) (1976). Considerable controversy has arisen with respect to whether this general rule making authority is broad enough to encompass the substantive changes worked by the Services' post-1970 interpretation of the congressional intent underlying § 501(c)(3).
Bob Jones University (Bob Jones or the University), founded in 1927 and located, since 1940, in Greenville, South Carolina, is one of the organizations which found itself at loggerheads with the newly formulated IRS policy. Bob Jones is both a religious and an educational institution. While it is not associated with any particular religious denomination, fundamentalist Christian dogma pervades every aspect of its many educational and extracurricular programs.\(^3\) The University has long interpreted the Bible as prohibiting interracial dating and marriage. Purportedly as a result of, and in furtherance of this belief, the University, from 1971 until May 29, 1975, refused to enroll unmarried blacks. Beginning in June, 1975, single blacks were admitted, but a strictly enforced rule proscribing interracial dating and marriage was adopted.\(^4\)

On January 19, 1976, the IRS revoked the University’s tax-exempt status, making the revocation effective from December 1, 1970. Bob Jones then filed FUTA (Federal Unemployment Tax Act) returns for the period covering December 1, 1970, through December 31, 1975, and paid a tax of $21.00 on one of its employees for 1975.\(^5\) When the University’s request for a refund

\(^3\) Bob Jones University v. United States, 639 F.2d 147, 149 (4th Cir. 1981) (reh. and reh. en banc den., April 8, 1981). The University’s Preamble, as contained in its certificate of incorporation, provides in part:

The general nature and object of the corporation shall be to conduct an institution of learning for the general education of youth in the essentials of culture and in the arts and sciences, giving special emphasis to the Christian religion and the ethics revealed in the Holy Scriptures, combating all atheistic, agnostic, pagan and so-called scientific adulterations of the Gospel. . . .

\(^4\) 639 F.2d 149. The change in the University’s policy after May 29, 1975, was prompted primarily by the Fourth Circuit’s decision in McCrory v. Runyon, 515 F.2d 1082 (4th Cir. 1975) (reh. den., May 29, 1975), aff’d 427 U.S. 160 (1976), holding that private, non-sectarian schools were prohibited, pursuant to the Civil Rights Act of 1871, 14 Stat. 27, 42 U.S.C. § 1981 (1977), from barring qualified students solely on the basis of their race. Prior to 1971, the University excluded all blacks.

\(^5\) Bob Jones University v. United States, 468 F. Supp. 890, 893 (D.S.C. 1978) (Chapman, J.J.). In 1971, following the first announcements by the IRS that it would revoke the tax-exempt status of discriminatory schools, the University sued to enjoin the Service from taking such action. In Bob Jones University v. Connally, 341 F. Supp. 277 (D.S.C. 1971), the district court rejected the assertion that such a suit was barred by the Anti-Injunction Act of the Internal Revenue Code, 26 U.S.C. § 7412(a) (1976). The Fourth Circuit reversed, Bob Jones University v. Con-
was denied, it sued to recover the sum of $21.00. The IRS
counterclaimed to recover approximately $490,000 allegedly due
on the returns filed by Bob Jones. The district court granted
the University's motion to sever, for a separate trial, the particular
tax status issue presented by its complaint. Thus, the district
court was concerned primarily with an examination of the pro-
priety of the Services' revocation of the § 501(c)(3) exempt status
of the University, in light of that institution's post-May 29, 1975
policy of forbidding interracial dating and marriage by its
students.

Bob Jones asserted that it qualified as an exempt organiza-
tion under I.R.C. § 501(c)(3) and I.R.C. § 3306(c)(8). It was alleged
that the IRS action exceeded the authority delegated to it by
Congress, and that the revocation was violative of the University's
rights under the first and fifth amendments to the United
States Constitution. The IRS, on the other hand, argued that
the legislative intent underlying § 501(c)(3) requires that in order
to qualify for an exemption, the organizations listed therein be
"charitable" in the broad common law sense. It was asserted
that such organizations, in order to properly be classified as
charitable, must serve the general welfare and be beneficial to
the community. Having concluded that the University's policies,
both before and after May 29, 1975, were racially discriminatory
and thus contrary to clearly defined public policy, the Service
asserted that it was compelled to revoke the school's § 502(c)(3)
exempt status.

Central to the district court's holding that the IRS revoca-
tion of the University's exempt status was unjustified, was its

---

6 468 F. Supp. at 893.
7 Id. at 895-96.
8 Id. at 896.
determination that Bob Jones is primarily a religious rather than an educational institution. It was observed that the Services' post-1970 policy was concerned only with the exempt status of discriminatory educational organizations. Moreover, inasmuch as there is no clearly defined federal policy against racial discrimination by religious organizations, the granting of exempt status to Bob Jones could not be viewed as being in derogation of public policy.9

The district court's constitutional analysis was largely confined to the University's post-May 29, 1975 policy of admitting blacks but barring interracial dating and marriage.10 The court held that the revocation of the University's exempt status after that date occurred as a direct result of the institution's practice of genuine religious beliefs, and that such revocation was violative of the University's rights under the free exercise clause of the first amendment.11 The IRS argument that it had a countervailing and compelling interest in seeking to discourage discrimination on the basis of the race of one's companions or associates was rejected.12

The government's interpretation of § 501(c)(3) was also found to violate the establishment clause of the first amendment because its primary effect was "the inhibition of those religious

9 Id. at 897.
10 "The Court need not rule on this constitutional claim in relation to plaintiff's admissions policy earlier that year, because the question is more sharply presented for the time period after May 29, 1975." Id. at 898.
11 Id. The court cited and relied upon the Supreme Court's decision in Sherbert v. Verner, 374 U.S. 398 (1963), where the Court ruled that: "Government may neither compel affirmation of a repugnant belief . . . nor penalize or discriminate against individuals or groups because they hold religious views abhorrent to the authorities . . . nor employ the taxing power to inhibit the dissemination of particular religious views. . . ." Id. at 402. The district court then held that: "Once plaintiff opened its doors to single blacks on May 29, 1975, regardless of whether it be classified as a religious or educational institution, the defendant's revocation of its tax exempt status violated plaintiff's First Amendment right to the free exercise of religion." 468 F. Supp. at 899.
12 The IRS cited the cases of McLaughlin v. Florida, 379 U.S. 184 (1964) (holding a Florida criminal statute prohibiting interracial cohabitation violative of the fourteenth amendment), and Loving v. Virginia, 388 U.S. 1 (1967) (striking down a Virginia miscegenation statute), as reflective of judicial recognition of the validity of such an interest on the part of the government. These cases were distinguished by the court because each was found to involve state action, an element which the court found lacking in the facts before it. 468 F. Supp at 899.
organizations whose policies are not coordinated with declared national policy and the advancement of those religious groups that are in tune with federal public policy." With respect to the issue of the "entanglement," the court endorsed what was perceived as the "benevolent neutrality" of across-the-board exemptions for religious organizations, and deplored the continuous monitoring of religious practices necessitated by the IRS policy.

Finally, the district court turned to the question of whether the formulation by the IRS of its policy for applying § 501(c)(3) went beyond the authority delegated to it by Congress. It was observed that the government had acknowledged that there was no support for its position in the language of the statute. The court pointed out that the word charitable, in the statute and in the Treasury regulations, is not used to modify the other classes of organizations enumerated there, but rather is itself one of a total of seven categories of organizations. Thus, the court held that to be exempt, a religious organization need not also be charitable in the common law sense. While recognizing that the courts have, on occasion, refused to read a statute literally when to do so would directly contravene public policy, the court held that: "The relationship between plaintiff's exemp-

---

13 Id. at 900. The court found that this governmental policy was in conflict with the second prong of the three prong standard established in Tilton v. Richardson, 403 U.S. 672 (1971): "First, does the Act reflect a secular legislative purpose? Second, is the primary effect of the Act to advance or inhibit religion? Third, does the administration of the Act foster an excessive government entanglement with religion?" Id. at 678. See Committee for Public Educ. v. Nyquist, 413 U.S. 756 (1973).

14 The Fourth Circuit relied upon the Supreme Court's decision in Waltz v. Tax Commission, 397 U.S. 664 (1970), which held "[T]here is no genuine nexus between tax exemption and establishment of religion." Id. at 675. The Supreme Court further ruled that "[t]he limits of permissible state accommodation to religion are by no means coextensive with the noninterference mandated by the Free Exercise Clause." Id. at 673.

15 468 F. Supp. at 901.


17 468 F. Supp. at 901-02.

tion and a national public policy against discrimination is simply too remote." Thus, it was held that the government's revocation of the University's exempt status was improper on both statutory and constitutional grounds.

On appeal to the Fourth Circuit, the decision of the district court was reversed. Judge Hall, writing for the court, first addressed the question of whether the IRS had the statutory authority to revoke the tax-exempt status of the University. Characterizing the district court's analysis as "simplistic," it was asserted that that court had torn § 501(c)(3) "from its roots." Relying for support largely upon the D.C. Circuit's opinion in Green v. Connally, Judge Hall was quick to embrace the argument that § 501(c)(3) cannot, and should not be divorced from "its background in the law of charitable trusts..." The court then quoted from one portion of the legislative history of the statute: "The exemption from taxation... is based upon the theory that the Government is compensated for the loss of revenue by... the benefits resulting from the promotion of the general welfare."  

Implicit in the court's reasoning is the proposition that organizations whose policies are in conflict with public policy to one extent or another are perforce of no benefit to society, and cannot be viewed as promoting the "general welfare." In response to this same argument, when made by the IRS below, the district court observed that the University, despite its policy forbidding racial mixing, was of considerable benefit to the community through its educational and other programs. Writing for the district court Judge Chapman viewed this argument as being especially persuasive in light of the University's post-May 29, 1975 policy which provided for the admission and

---

19 468 F. Supp. at 903.
20 Bob Jones University v. United States, 639 F.2d 147. The panel of the Fourth Circuit which considered the government's appeal consisted of Circuit Judges Widener and Hall and District Judge Merhige, sitting by designation. Judge Widener dissented.
21 Id. at 151.
23 639 F.2d at 151.
24 Id. (quoting H.R. Rep. No. 1820, 75th Cong., 3d Sess. 19 (1939)).
25 Id.
equal treatment of all blacks. The efficacy of the view that organizations whose policies are in any way out of tune with public policy are not charitable and thus not eligible for tax-exempt status, was questioned by Judge Widener who, in his dissent from the holding of the circuit court, joined Congressman Ashbrook in noting that the Service has chosen to leave "unhampered tax-exempt organizations which practice or promote witchcraft, homosexuality, abortion, lesbianism, and euthanasia...."27

In Judge Hall's opinion, two interrelated public policies were violated by the University's admission practices: First, the broad policy against racial discrimination generally, and second, the specific government policy against subsidizing racial discrimination in education.28 The district court, by viewing Bob Jones as primarily a religious organization, avoided the latter issue entirely. The former issue, of course, arises with more clarity in the University's pre-May 29, 1975 policy than in the policy existing after that date. Judge Chapman skirted the problem for the most part by focusing his analysis on the last seven and one half months of 1975.

The circuit court's treatment of the general discrimination issue is inadequate as well. After noting that the pre-May 29, 1975 practice violated public policy because it subjected blacks to restrictions not imposed on whites,29 the court turned to a consideration of the University's later policy which simply barred interracial dating and marriage. Adopting the government's argument which had been rejected below, the court held

26 469 F. Supp. at 904 n.8. "Defendant seems to imply that a change in plaintiff's policies to conform to defendant's guidelines would transform the religious organization from one that did not benefit the public into one that did, although the function and purposes of plaintiff remain unchanged throughout." Id.
27 639 F.2d at 161.
28 Id. at 161.
that the Supreme Court's decisions in Loving\textsuperscript{30} and McLaughlin\textsuperscript{31} were sufficiently analogous to be determinative of the case at hand. It was stated that these decisions were indicative of a broad public policy against discrimination "on the basis of racial affiliation or companionship...."\textsuperscript{32} The court was apparently not troubled by the fact that Loving and McLaughlin involved state statutes which imposed criminal sanctions for interracial marriage and cohabitation respectively.

Both the district court and the circuit court discussed the applicability to this case of the Supreme Court's decision in Tank Truck Rentals v. Commissioner.\textsuperscript{33} There it was held that allowing the taxpayer to deduct fines paid for violating state gross vehicular weight laws as ordinary and necessary business expenses would "frustrate sharply defined state policy...."\textsuperscript{34} The district court found that the nexus between Bob Jones' exemption and the frustration of public policy was too remote to bring it within the Tank Truck doctrine. Judge Hall, on the other hand, considered that so narrow an application of that doctrine was unjustified given the compelling nature of the public policy against racial discrimination.\textsuperscript{35}

The circuit court next considered the University's argument that revocation of its tax-exempt status violated the free exercise clause of the first amendment. Judge Hall stated that "the question remains one of balancing—giving due consideration to the weight of the interests asserted by the government and the extent and nature of the burden on the religious practice and the religion as a whole."\textsuperscript{36} Noting that the government interest in discouraging racial discrimination in any guise is one of the highest order, the court also found that any infringement of the

\textsuperscript{30} Loving v. Virginia, 388 U.S. 1 (1967).
\textsuperscript{32} 639 F.2d at 152.
\textsuperscript{33} 356 U.S. 30 (1958).
\textsuperscript{34} Id. at 31.
\textsuperscript{35} 639 F.2d at 152. In Tank Truck it was observed that: "This is not to say that the rule as to frustration of sharply defined national or state policies is to be viewed or applied in any absolute sense.... [T]he test of nondeductability always is the severity and immediacy of the frustration resulting from allowance of the deduction." 356 U.S. at 35. The Court noted that a flexible standard is essential in order to accommodate the competing interests.
\textsuperscript{36} Id. at 153 (citing Wisconsin v. Yoder, 406 U.S. 205 (1972)).
University's rights under the free exercise clause resulting from revocation of its tax-exempt status would be minimal. Judge Hall pointed out that revocation would not prevent Bob Jones from adhering to its policy, and that no individual would be forced to compromise his personal beliefs. The court held that "these factors tip the balance in favor of the Services' non-discrimination policy."37

The holding by the circuit court that the government interest at stake overshadowed the University's free exercise argument proved equally dispositive of the assertion that the IRS policy would lead to unconstitutional "establishment" of certain religions as well as impermissible entanglement in religious practices. While agreeing that "the Government must maintain an attitude of neutrality toward all religions," the court held that "certain governmental interests are so compelling that conflicting religious practices must yield in their favor."38 The court's analysis of the interplay between the free exercise and establishment clauses is abbreviated at best, and fails to come to grips with the conflict inherent in seeking to accommodate the interests protected in each of those clauses.39

Neither the district court nor the circuit court distinguished adequately between the constitutional issues raised by the University's pre- and post-May 29, 1975 policies. The government acknowledged that the proscription by Bob Jones of interracial dating and marriage resulted from a genuine religious belief.40 Thus, this case presented a conflict between the transcendent values protected by the first amendment, and the well established public policy against racial discrimination—but in two entirely different settings. Prior to May 29, 1975, when Bob Jones was excluding all unmarried blacks, the exercise of its religious beliefs resulted in a direct and substantial frustration of public policy. Subsequent to that date, however, blacks

---

37 639 F.2d at 153-54.
38 Id. at 154.
39 This conflict was recognized by the Supreme Court in Walz v. Tax Commission, 397 U.S. 664 (1970): "The Court has struggled to find a neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other." Id. at 668-69.
40 639 F.2d at 156.
were not barred from enrolling in the University. Rather, the institution adopted a formal rule which was the very embodiment of one of its religious tenets.

The circuit court, for purposes of its balancing test, apparently viewed the above institutional policies as equally incompatible with public policy. To equate each of the University's policies for the purpose of weighing them individually against the government interest involved here was arguably wrong. With respect to the policy after May 29, 1975, the first amendment issues were much more prominent, and the frustration of public policy correspondingly less significant than had existed with the policy preceding that date.

As was stated previously, the district court confined its analysis largely to the post-May 29, 1975 policy and to the issues raised by the University's claim for a refund of the tax paid by it for one employee during that year. Similarly, Judge Widener, dissenting from the holding of the Fourth Circuit, stated that the court need only be concerned with the University's adoption of the rule barring interracial dating and marriage, and the effect of enforcement of that rule on the school's tax-exempt status. In reversing the district court, however, the Fourth Circuit not only ordered that the University's claim for a refund of 1975 FUTA taxes be dismissed, but that judgment be entered for the government on its claim for the years 1971 to 1975. This holding, which goes far beyond the issues dealt with by the lower court, is further evidence of the court's failure to recognize that, for purposes of constitutional analysis, the issues raised by the University's claim were vastly different from those inherent in the government's counterclaim.

While much of Judge Widener's dissenting opinion tracks the arguments espoused by the lower court, he articulated much more forcefully the view that the IRS had overstepped the bounds of the authority delegated to it by Congress. It was argued that Bob Jones is primarily a religious organization; that the plain meaning of § 501(c)(3) is that such organizations are to

44 "In the case before us, we are immediately dealing only with whether or not Bob Jones' rule forbidding interracial dating and marriage may be enforced without losing its tax exemption." Id.
45 Id. at 155.
be granted tax exemptions; and that there is no persuasive authority to support the proposition that the service should be allowed to usurp congressional power by effecting substantive changes in the IRC indirectly, through enforcement, when congress has not seen fit to do so directly, through amendment or enactment of new legislation.\textsuperscript{43}

Additionally, Judge Widener pointed to the Ashbrook Amendment\textsuperscript{44} as the most recent statement of congressional intent with respect to the enforcement of § 501(c)(3). The amendment, passed in the wake of IRS proposals to promulgate new and more stringent rules and procedures for enforcing its non-discrimination policy, states in part:

Sec. 103. None of the funds made available pursuant to the provisions of this Act shall be used to formulate, or to carry out any rule, policy, procedure, ... which would cause the loss of tax-exempt status to private, religious, or church-operated schools under section 501(c)(3) of the Internal Revenue Code of 1954 unless in effect prior to August 22, 1978.\textsuperscript{45}

Judge Widener viewed this language as a mandate that the IRS cease doing, as of August 22, 1978, precisely what it did with respect to Bob Jones in 1976. He argued that, notwithstanding the prospective operation of the amendment, it provided a clear statement of the intent of Congress to initiate a moratorium on revocation actions such as that which was instituted against Bob Jones. This interpretation of the amendment is suspect. The only mandate contained therein is that the Service not use any of the newly appropriated funds to promulgate or carry out any rules and procedures not in effect as of August 22, 1978. Even a cursory examination of the procedural guidelines established by the IRS between 1972 and 1975\textsuperscript{46} reveals that they would support the Services' decision to revoke Bob Jones' exempt status at least for the period preceding May 29, 1975. There is nothing in the Ashbrook Amendment which would hinder enforcement of those measures.

\textsuperscript{43} Id. at 158

\textsuperscript{44} Treasury, Postal Service and General Government Appropriations Act, Pub. L. No. 96-74, 93 Stat. 559 (1980).

\textsuperscript{45} Id. at 562. See Note, The Judicial Role in Attacking Racial Discrimination in Tax-Exempt Private Schools, 93 HARV. L. REV. 378 (1979).

It is true, on the other hand, that the Amendment does reflect congressional disenchantment with the course being pursued by the IRS. Certain remarks by the House Committee on Appropriations demonstrate that the significance attached to the Ashbrook Amendment by Judge Widener was not entirely ill-advised:

The responsibility of the Internal Revenue Service is to enforce the tax laws. The purpose of the Internal Revenue Service procedures ought to be to clarify these laws, not to expand them. The issue of tax exempt status of private schools is a matter of far reaching social significance and the Service ought to issue revenue procedures in this area only when the legislative intent is fairly explicit.47

In summary, it bears repeating that the constitutional analysis by both the district court and the circuit court was inadequate. By treating the University's successive policies as one continuous and homogeneous entity, the Fourth Circuit ignored the very unique problems presented by the post-May 29, 1975 policy. The precedent established here is of considerable importance. Totally aside from the important constitutional questions which were left unanswered in this opinion, the court endorsed the IRS's somewhat grandiose concept of its own authority and power. Given the enormity of the Services' bureaucratic sprawl and the pervasive manner in which it affects virtually every facet of our lives, such an endorsement is of no small moment.

David D. Johnson, III

II. Daly v. Commissioner

Internal Revenue Code § 262,48 states that a taxpayer's personal, living, and family expenses are generally not deductible from gross income. It is equally well settled that the cost of traveling to and from work is a nondeductible personal expense.49

48 26 U.S.C. § 262 (1976), provides, "Except as otherwise expressly provided in this chapter, no deduction shall be allowed for personal, living, or family expenses."
49 Fausner v. Commissioner, 413 U.S. 838 (1972) (All taxpayers shall bear the cost of commuting to and from work without receiving a deduction for that expense); Accord Carragan v. Commissioner, 197 F.2d 246 (2d Cir. 1952). In Car-
However, § 162(a)(2) of the Code allows a taxpayer to deduct certain traveling expenses incurred while away from home on business. The purpose of this provision is "to mitigate the burden of the taxpayer who, because of the exigencies of his trade or business must maintain two places of abode and thereby incur additional and duplicate living expenses." The Supreme Court held in Commissioner v. Flowers, that three conditions must be satisfied to qualify a taxpayer’s traveling expenditures for a deduction under § 162(a)(2): (1) the expenditures must be reasonable and necessary; (2) they must be incurred while away from home; and (3) they must be incurred in pursuit of a trade or business. In Daly v. Commissioner the Court of Appeals for the Fourth Circuit was faced with deciding whether certain travel expenses were incurred "while away from home" with respect to a traveling salesman who maintained his residence at a place outside his assigned sales territory.

ragan Judge Frank explained why commuting expenses were personal expenditures:

A nation of city-hoppers and suburbanites though we may be, the Supreme Court has steadfastly refused to say that traveling expenses are incurred in pursuit of business when they stem from the petitioner's refusal to bring his home close to his job. The job, not the taxpayer's pattern of living, must require the travel.

Id. at 249.

Sec. 162(a) In general—there shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including—

(2) traveling expenses (including amounts expended for meals and lodging other than amounts which are lavish or extravagant under the circumstances) while away from home in the pursuit of a trade or business;

... Kroll v. Commissioner, 49 T.C. 557, 562 (1968).

326 U.S. 466 (1945).

Id. at 470. Flowers involved an attorney who resided in Jackson, Mississippi but had his place of employment in Mobile, Alabama. The Court held that a taxpayer could not establish his home in one city, accept permanent employment in another, and then deduct as business expenses while away from home his traveling expenses incurred going to and from his place of employment. In so holding the court explained that, under the circumstances, the expenses incurred were not connected with his employer's business but instead were personal living expenses because they resulted from taxpayer's decision to maintain his residence in a place other than that in which his employer's business was located. Id. at 472-74.

631 F.2d 351 (4th Cir. 1980).
Lee E. and Rosemarie H. Daly, husband and wife, have been residents of McLean, Virginia since 1960. In 1965 Lee Daly accepted a position as a furniture salesman for the Myrtle Desk Company of High Point, North Carolina. His assigned sales territory was the tri-state area around Philadelphia, which included Delaware, New Jersey, and eastern Pennsylvania. The Myrtle Desk Company did not require Daly to live within his sales district. Thus, to avoid the loss of Mrs. Daly's job and the inconvenience of moving, Daly and his wife continued to reside in McLean. There Daly maintained an office where he prepared sales reports and other incidental paperwork. By far, however, the greater part of his working time was spent in his sales territory; more particularly, the Philadelphia vicinity.

Daly's employer did not reimburse him for his expenditures incurred while traveling between McLean and his sales region. On his 1975 tax return Daly deducted these costs under § 162(a)(2). The Commissioner of Internal Revenue disallowed most of the deductions based on the determination that Philadelphia was Daly's "home" for purposes of § 162(a)(2). Thus, the expenditures were not incurred while away from home as contemplated by that provision. Daly's deductible travel expenses, if any, said the Commissioner, had to be computed with Philadelphia as the point of departure rather than McLean.

Daly disputed the Commissioner's ruling before the Tax Court, where the position of the Commissioner was upheld. The court defined "home" as used in § 162(a)(2) (hereinafter referred

---

55 Id. at 352.
56 Id.
57 Id.
58 Id. Mrs. Daly was employed as a manager of the Georgetown Uniform Company in Washington, D.C.
59 Id. Neither Daly nor his employer maintained an office in the Philadelphia area. Daly's business card listed his McLean residence as his business address.
60 Daly testified that selling was 85 percent of his job. Daly v. Commissioner, 72 T.C. 190, 196 (1979). "[Daly's] usual weekly business itinerary in 1975 was to leave McLean early Tuesday morning, stay overnight in his territory for two nights (Tuesday and Wednesday) and return to McLean late Thursday night." Id. at 193.
61 631 F.2d at 352.
62 72 T.C. at 194.
63 Id.
64 Id. at 190-98.
to as tax home) to mean, "the vicinity of a taxpayer's principal place of employment [or business] and not the place where his personal residence is located, if different from the principal place of employment." The court found that Philadelphia was Daly's principal place of business based on the concentration of his sales activity there. Thus, the Tax Court agreed with the Commissioner that Philadelphia was Daly's tax home.

The court next considered whether the additional travel expenses caused by Daly having his residence at a location away from his principal area of employment were necessitated by the demands of his business or whether they resulted from Daly's personal choice to maintain his residence in one area while working in another. The court deemed the maintenance of an office in McLean to be unnecessary to the performance of Daly's primary job of selling furniture. It found that Daly's reasons for residing in McLean were personal and "unrelated to the exigencies" of his and his employer's business. Thus, the court determined that the added cost of travel to and from McLean was a nondeductible personal expense.

On appeal to the Fourth Circuit, the Tax Court's decision was reversed. Judge Hall, writing for the majority of a three judge panel, restricted the court's inquiry to whether Philadelphia should be considered Daly's principal place of business and thus his tax home. The Fourth Circuit concluded

---

65 Id. at 195.
66 Id. The court explained the conduct of Daly's business:
Out of a total of 126 trips to locations in his sales territory in 1975 ... 44 percent (55 of 126) were to Philadelphia itself or locations within 28 miles of Philadelphia, 66 percent (83 of 126) were to locations within 88 miles of Philadelphia. In contrast, only 6 percent (7 of 126) of his sales trips were to locations as near as 85 miles from McLean, Va ... [Daly's] McLean office work was no more than incidental to the other, more important part of petitioner's job (making sales solicitations of customers), and we have not been shown why all of the paperwork could not have been performed in the Philadelphia area, which can fairly be characterized as the center of [Daly's] commission-producing business activities.
67 Id. at 195-96.
68 Id. at 196.
69 Id.
70 Id. at 198.
71 631 F.2d 351.
72 Id. at 353.
that concentration of business activity in a particular area is insufficient by itself to create a principal place of business. The court distinguished the cases relied upon by the Commissioner and Tax Court to support their holdings by the fact that they all involved taxpayers who had an office or other means of conducting business in the area deemed to be their principal place of business. Since neither Daly nor his employer maintained an office in Philadelphia, that city could not be considered as Daly's principal place of business. Furthermore, the court held that Daly had no principal area of employment and was therefore entitled to designate McLean as his tax home.

The problem of determining the location of a taxpayer's tax home has been the source of much litigation. Because of the absence of any clarification from Congress as to the meaning of "home" as used in § 162(a)(2), there is much disagreement among the courts over its proper definition, and the controversy will undoubtedly remain until the Supreme Court decides to hear an appropriate appeal. Nevertheless, the Fourth Circuit adhered to the Tax Court's definition that a taxpayer's home is the vicinity of his principal place of business. The rationale is that Congress, by enacting § 162(a)(2), expected a taxpayer to maintain his home at or near his place of employment and only when he is required by his business to travel away from such place are his expenses for lodging deductible. In Barnhill v. Commissioner, the Fourth Circuit explained:

---

73 631 F.2d at 353.
74 Id.
75 Id. at 354.
77 Id. The Supreme Court has consistently refused to define the meaning of "home" as used in § 162(a)(2). In Commissioner v. Flowers, the Court avoided the question by deciding the case under the "pursuit of business" requirement. 326 U.S. 465 (1945). Later, in Commissioner v. Peurifoy, 358 U.S. 59 (1958), the Court again skirted the issue by saying it had not been raised in the lower courts. See also Commissioner v. Stidger, 386 U.S. 287 (1968).
78 Barnhill v. Commissioner, 148 F.2d 913 (4th Cir. 1945) (a state supreme court judge may not deduct travel expenses incurred while traveling between residence and the state capital sixty miles away).
79 Id.
[It is not reasonable to suppose that Congress intended to allow as a business expense those outlays which are not caused by the exigencies of the business but by the action of the taxpayer in having his home, for his own convenience, at a distance from his business. Such expenditures are not essential to the prosecution of the business and were not within the contemplation of Congress which proceeded on the assumption that a business man would live within reasonable proximity to his business.]

There is a language in Barnhill to the effect that the court was not willing to equate "home" with "principal place of business." The court, perhaps recognizing the potential for unique factual situations, may have intended to leave room for exceptions in the future; or perhaps the court was merely recognizing the fact that most persons do not reside on the premises of their place of business. Although the court was reluctant to equate the two terms for the purpose of determining the tax home, the court did say in most cases the result would be the same.

The determination as to where a taxpayer's principal place of business or tax home is located is a question of fact and, while the cases exhibit no easily discernible pattern, two considerations weigh heavily in judicial analysis. First, when a taxpayer has more than one place of employment in a particular tax year, the courts distinguish those places where the employment is of a temporary duration from those that are of a permanent or indefinite nature. When a taxpayer accepts temporary employment away from his residence, his residence is considered to be his tax home because it would be unreasonable to expect him to move his residence to his place of employment given its temporary nature. On the other hand, when a taxpayer has employ-

---

80 Id. at 917.
81 Id.
82 Id.
84 Employment is temporary if its termination can be foreseen within a reasonably short period. Id.
85 See, e.g., Burns v. Gray, 287 F.2d 698 (6th Cir. 1961). In Burns the taxpayer resided in Williamstown, Ky. and was employed as a racehorse starter. His employment contract required him to work various race tracks throughout the country at the direction of his employer. During the tax year in question taxpayer spent 155 days in Wheeling, West Virginia and 72 days in Hot Springs, Arkansas.
ment of a regular, permanent or indefinite nature in a particular location, it is reasonable to expect him to have his residence close to such place of employment; therefore, his place of employment is considered to be his tax home or principal place of business. Second, when a taxpayer has more than one regular (permanent or indefinite) place of employment in a particular tax year the courts look to the taxpayer's "center of income-producing business activity" (hereinafter referred to as "business center") to determine his principal place of business or tax home. Factors relevant to this determination include: (1) the length of time a taxpayer spends in each place of business, (2) the degree of a taxpayer's business activity in each place, and (3) the relative proportion of a taxpayer's income derived from each place. Again, once the location of a taxpayer's "business center" is determined, the question is whether it is reasonable to expect him to have his home close to that location. In Daly the Tax Court applied the foregoing "business center" test to hold that Philadelphia was Daly's tax home.

In a prior tax year taxpayer had worked tracks in Louisville and Keeneland (both in Kentucky), Cascog, Rhode Island and Wheeling. The Court of Appeals for the Sixth Circuit held that taxpayer's employment at each location was seasonal and therefore temporary. It was thus unreasonable to expect taxpayer to move his residence close to his place of employment. See also Schreiner v. McCrory, 185 F. Supp. 819 (D. Neb. 1960).

See, e.g., Tucker v. Commissioner, 55 T.C. 783 (1971). Tucker involved a school teacher who resided in Knoxville, Tennessee with his family but accepted a teaching position first in Alabama and later in North Carolina. The court held it would be reasonable to expect him to move his family closer to his employment where the nature of the job was not temporary and where the post of duty or the principal place of employment was chosen by the employee himself rather than his employer. See also Foote v. Commissioner, 67 T.C. 1 (1976); Kroll v. Commissioner, 49 T.C. 557 (1968); Wills v. Commissioner, 48 T.C. 303 (1967), aff'd, 411 F.2d 537 (9th Cir. 1969); Green v. Commissioner, 35 T.C. 764 (1961), aff'd, 298 F.2d 890 (6th Cir. 1974).

See, e.g., Markey v. Commissioner, 490 F.2d 1249 (6th Cir. 1974). In Markey, the taxpayer traveled between Warren, Michigan, and Lewisberg, Ohio each week. He maintained his home and spent his weekends in Lewisberg, where he had established a consulting business and held several investments. He spent the weekdays in Warren, using the facilities at General Motors' Technical Center. The court reviewed the length of time the taxpayer spent in the two places, the degree of his business activity in each place, and the relative proportion of his income derived from each. It deemed Warren his principal place of business and tax home.

See cases cited note 86 supra.
The Fourth Circuit's opinion did not disavow the Tax Court's "principal place of business" definition of tax home. In fact, it applied it to hold that Philadelphia did not fit that definition. In so doing, however, the court failed to consider seriously the elements necessary to establish a principal place of employment. For no apparent reason the court of appeals rejected the Tax Court's "business center" test as insufficient. Instead, as previously mentioned, it considered the presence or absence of an office to be the decisive factor. Such a holding is seemingly wrong in light of the fact that Daly's job did not require an office. Had the performance of Daly's sales duties required an office it stands to reason the Myrtle Desk Company would have provided him with one. More importantly, the court's reliance on an office or headquarters can produce some absurd results, under the circumstances presented, as Judge Sprouse noted in his dissenting opinion:

The majority's solution would just as well permit Daly to reside in Nassau as in McLean. So long as he maintained no fixed business address within his sales territory in the Northeast, he could deduct the expenses of his travel to and from the Caribbean. I do not believe that Congress intended so to subsidize the personal lifestyle of selected taxpayers.

Judge Sprouse's illustration manifests the fallacy of the majority's holding that Daly had no principal place of business whatsoever. At a minimum, it would seem, Daly had a principal place of business consisting of his entire sales region.

To support its holding, the majority incorrectly relied on Schreiner v. McCrory. That case involved an insurance consultant who had his home in Omaha, Nebraska, where his company's home office was located but spent most of his work time and earned a greater portion of his income in Denver, Colorado. Both Nebraska and Colorado were within the taxpayer's sales district which also included Iowa, Missouri, and Kansas. As in

\[\text{[References]}\]
Daly, the taxpayer had no office or headquarters in Denver.\textsuperscript{85} The District Court for the District of Nebraska held deductible the taxpayer's cost of travel between Omaha and Denver.\textsuperscript{87} There are two key facts in Schreiner. however, that make it inapplicable to Daly's situation. First, a close reading of Schreiner discloses that Denver was merely taxpayer's temporary place of employment.\textsuperscript{88} Although the taxpayer spent most of his time there during the tax year in question, he did not return to that area every year. His company was in control of his sales assignments which were subject to change at anytime. Daly's sales assignments, however, remained the same each year. He had 125 regular customers, most of whom were in the Philadelphia vicinity.\textsuperscript{89} His business activity in that city was of a more permanent nature. Thus, where it was not reasonable to expect the taxpayer in Schreiner to move his home to Denver given the temporary nature of his employment there, it was reasonable to expect Daly to move his home to Philadelphia.

Second, the taxpayer in Schreiner resided within his sales territory and in the same town as his employer's home office. Omaha, for all practical purposes, was the taxpayer's principal place of business in light of the uncertainty as to his travel assignments. Daly, however, resided outside his sales district. The majority overcame this problem by simply holding that Daly had no principal place of business.\textsuperscript{90} Such reasoning blinds

\textsuperscript{85} Id.
\textsuperscript{86} Id.
\textsuperscript{87} The following passage from Schreiner manifests the temporary nature of the taxpayer's business in Denver:
The evidence is not disputed that Mr. Schreiner's work was that of a field consultant, policyholders' service, soliciting insurance, assisting in the conservation of insurance and aiding in the obtaining of new insurance agents whenever and wherever he was assigned by his company. During the year in question Mr. Schreiner was directed to work in the states of Colorado, Iowa, Missouri, Nebraska and Kansas. During the year 1954, Mr. Schreiner worked 248 days in the State of Colorado, 61 days in the State of Nebraska, and 20 days in the State of Iowa. The evidence shows that ... his work was on a temporary basis in these locations; that he registered as a guest with sleeping accommodations on a daily basis only; and that he checked out of the particular hotel or motel where he was staying when he returned to Omaha, Nebraska, on business or for the weekend.

\textsuperscript{88} Id. (emphasis added).
\textsuperscript{89} 72 T.C. at 191.
\textsuperscript{90} 631 F.2d at 354.
itself to the fact that Daly at least had a principal place of employment represented by his entire sales region.

Once it is recognized that Daly's principal place of employment was, at the very least, his designated sales territory, the true nature of his travel expenditures becomes clear. Daly's situation is no different from that of a taxpayer who works in downtown Philadelphia but for personal reasons chooses to reside in an adjacent suburb. The latter's cost of commuting to and from work is clearly a nondeductible personal expense under § 262 of the Code.¹⁰¹ Daly's circumstances, by virtue of his residing at a greater distance from his place of business, do not change the personal nature of his traveling expenditures. The Fourth Circuit should have regarded those costs as nondeductible commuting expenditures.¹⁰²

By way of summary, the Fourth Circuit adheres to the rule that a taxpayer's tax home is the vicinity of his principal place of employment. The determination of the location of one's principal place of employment is a question of fact. In Daly the Fourth Circuit rejected the Tax Court's "business center" test as insufficient in itself to establish a principal place of business. The court, ruling that an office or other means of conducting business was a necessary requirement, held that Daly had no principal place of business. Such a holding is untenable in a situation like Daly's for it permits a salesman to reside anywhere outside his sales territory and still be able to deduct the added costs of traveling to and from his business area. The

¹⁰¹ See 326 U.S. at 470. In distinguishing commuting expenses from business travel expenses the Supreme Court said in Flowers that "the exigencies of business rather than the personal conveniences and the necessities of the traveler" must require the travel. Id. at 474. Daly's desire to reside in McLean was solely out of personal convenience, as the Tax Court correctly found. 72 T.C. at 196.

¹⁰² Bunevith v. Commissioner, 52 T.C. 837 (1970), aff'd, 25 A.F.T.R. 70-935 (1st Cir. 1970), is virtually indistinguishable from Daly. Bunevith was a field agent for the public school system in Massachusetts. His job was to inspect lunch programs of schools in the Northeastern district of the state. Bunevith resided in central Massachusetts outside his assigned territory. Like Daly, Bunevith had no office or fixed locale within his district, nor did his employer require him to live within it. Responding to a claim by Bunevith for the additional travel expenses attributable to his living outside the Northeast district, the Tax Court disallowed such deductions on the basis that the expenditures constituted commuting expenses. 52 T.C. at 842.
holding disregards that Daly, at the very least, had a principal place of business consisting of his designated sales territory, and the holding conflicts with the rule that commuting expenses are nondeductible personal expenditures.\textsuperscript{103}

\textit{Thomas C. G. Coyle, Jr.}

\textbf{ADDENDUM}

\textit{Subsequent to the writing of the above section on Daly the Fourth Circuit in Daly v. Commissioner, 48 A.F.T.R. 2d 81-6008 (1981) \textit{(en banc)}, upheld the earlier Tax Court holding. Judge Sprouse, who wrote the dissent in the three judge panel decision, wrote the majority opinion for the en banc court.}

\textsuperscript{103} For an able analysis of Daly and justification of its holding on social policy grounds see Comment, 34 Tax Law. 829 (1981).
EMPLOYMENT DISCRIMINATION

I. RULE 23 STANDING UNDER TITLE VII

Title VII of the Civil Rights Act of 1964¹ allows for persons aggrieved by discrimination to sue in their own right. While Title VII does not expressly provide for class actions, the courts, however, have allowed them. In the landmark case of East Texas Motor Freight Sys. v. Rodriguez² the Supreme Court held that discrimination is usually a class problem by definition. The requirements of Rule 23 of the Federal Rules of Civil Procedure which deals with class actions in general must be met in every case. The Court stated that a class representative must “possess the same interest and suffer the same injury” as the members of the class.³ This concept has become a separate Rule 23 “standing” requirement in Title VII cases.

Thus, in a Title VII case it becomes an issue whether the named plaintiff has Rule 23 standing to represent the class when class certification is sought in the early stages of the trial. A split of authority has emerged on the proper standards for Rule 23 standing.⁴ The trial court must apply Rodriguez and require that the plaintiff pass the “same interest-same injury” test. However, this phrase is not defined in Rodriguez and the formulation is without substantive content. For example, the same interest may be defined as narrowly as the interest in promotions or as broadly as the interest in working in an environment free of discrimination. Rodriguez did require that the plaintiff pass the “same interest-same injury” test. However, this phrase is not defined in Rodriguez and the formulation is without substantive content. For example, the same interest may be defined as narrowly as the interest in promotions or as broadly as the interest in working in an environment free of discrimination. Rodriguez did not settle the conflict.

The Fourth Circuit first wrestled with this problem in Hill

³ Id. at 403.
⁴ See 2 A. Larson, EMPLOYMENT DISCRIMINATION. § 49.51 (1980).
v. Western Elec. Co., 5 In that case the named plaintiffs were employees who alleged discrimination in promotions and job assignments. A three judge panel 6 held that these named plaintiffs could not represent a class of victims of discrimination in hiring. The court based the decision on Rodríguez, finding that the interests of employees and job applicants were not the same. The court also held that these named plaintiffs could not represent employees in a different facility who were drawn from a different labor market. Even though the injury may be the same, employees in the Service Shop do not have a community of interests with employees of the Installation facility.

Although Hill read Rodríguez as requiring a restrictive approach to Rule 23 standing, the issue is not settled in the Fourth Circuit. Three cases decided in 1981 have used markedly different analyses and interpretations of Rodríguez and Hill.

In Abron v. Black & Decker, 7 the court, in a 2-1 decision, took an extremely narrow view of the Rule 23 standing requirement. A black woman brought a Title VII action alleging discriminatory treatment by her employer. She alleged that she was denied a routine temporary transfer to light work when she returned from medical leave. She also alleged across-the-board employment discrimination and sought certification as a class representative. The district court found racial discrimination against the plaintiff and granted her relief on her individual claim.

The district court also certified a class including all black persons discriminated against by Black & Decker in "recruitment; job classification; hiring; assignment; promotion; transfer; discipline; discharge; benefits; apprenticeship training programs; compensation; terms, conditions and privileges of employment." 8 The plaintiff introduced statistical evidence to show a class-wide impact of discrimination. Based on this

5 596 F.2d 99 (4th Cir. 1979).
6 Before Judges Haynsworth, Lay, sitting by designation, and Russell. Judge Haynsworth wrote the opinion, while Judge Lay concurred on the issue of standing.
7 654 F.2d 951 (4th Cir. 1981), before Judges Russell, Butzner and Murnaghan.
8 Id. at 952.
evidence, the district court ordered the defendant to develop an affirmative action program.

On appeal to the Fourth Circuit, the court affirmed the relief granted to the plaintiff on her individual claim but set aside and voided all class relief. In a per curiam decision, the court held that Hill required that class members suffer precisely the same injury as the class representative: Hill "is dispositive against class certification in this case on any ground other than that for which plaintiff claims to have suffered injury (i.e., temporary assignment for medical reasons to lighter work)." 9

The court characterized Abron's claim as unique and solitary. Such a claim cannot support class certification. In fact, the class as certified by the district court did not even include an injury of the type suffered by Abron, denial of temporary transfer. Therefore, the court held that the class was erroneously certified and any relief based on such certification was void. 10

Judge Murnaghan, in a robust dissent, argued that the right to act as a class representative in a Title VII action should be in-

---

9 Id. at 954.
10 The problem of the "headless" class is closely related to Rule 23 standing. The United States Supreme Court has approached this problem in terms of Article III mootness. In Sosna v. Iowa, 419 U.S. 393 (1975), the Court held that when a class is certified it acquires a separate legal status apart from the named plaintiff. The mootness of the named plaintiff's claim after a class has been duly certified does not render the class action moot.

In a footnote to Rodriguez the Court limited its holding in that case: Obviously, a different case would be presented if the District Court had certified a class and only later had it appeared that the named plaintiffs were not class members or were otherwise inappropriate class representatives. In such a case, the class claims would have already been tried, and, provided the initial certification was proper and decertification not appropriate, the claims of the class members would not need to be mooted or destroyed because subsequent events or the proof at trial had undermined the named plaintiffs' individual claims. (citations omitted).

431 U.S. at 406 n.12 (1977). Thus, the holding in Abron appears ill-advised. Judge Russell's position is that when the class is erroneously certified in the first place, because the injury to the plaintiff is not the same as the the injuries to the class members, then the court cannot grant relief to the class claims. But this reasoning conflicts with the language in Rodriguez which strongly implies that class certification is not improper merely because the named plaintiff is later found to not be a class member.
interpreted in a "highly remedial fashion." The dissent stated that the majority's argument was flawed because the court focused on the factual content of "injury" when all that is required is that each injury give rise to the same legal theory. The dissent interpreted Hill as merely requiring that all class members be employees, excluding applicants. The fact that the class representative was never denied a promotion is not critical. If the named plaintiff suffered some legal injury she has Rule 23 standing to represent other employees that were discriminated against in promotions. Moreover, the dissent argued that even if Abron was an improper representative, the class had a separate legal status and whether class relief was proper was a distinct issue.

The same three judge panel decided Brown v. Eckerd Drugs. However, an opposite result was reached. This time Judge Murnaghan wrote the majority opinion and Judge Russell filed a dissent. The plaintiffs, Brown and Black, claimed that they had been discriminatorily terminated. In addition, they were certified as representatives of a class of past and present employees claiming racial discrimination in promotion and transfer. Brown prevailed on her individual claim, Black did not. The district court found against the defendant on the class claims and rejoined the discriminatory promotion and transfer practices.

On appeal to the Fourth Circuit, the defendant contended that the plaintiff did not have standing to represent a class concerning claims other than discriminatory discharge. The court stated that Hill "did not preclude an employee who suffers some particularized employment discrimination grievance from representing other employees who present factually differing claims that, nevertheless, proceed on the same legal theory of race discrimination." Applying the same injury test, the court stated that all employees suffer similar injury when employment practices expose them to a discriminatory work environment and the risk of denial of employment benefits.

---

11 654 F.2d at 962.
12 Id. at 968.
14 Id. at 16.
15 Id. at 18.
ally, all employees have the identical interest in redressing such discriminatory employment practices. Thus, the court adopted a position directly contrary to the court in Abron. Since both plaintiffs, at the time of certification, showed individual claims and their subjection to discriminatory employment practices, the court held that they were appropriate representatives of an employee class.

In his dissent, Judge Russell argued that, since the individual claims were discriminatory discharge and the class claims were discriminatory promotion, allowing the individual plaintiffs to represent the class violated the rule of Hill. The dissent interpreted Hill as requiring that the injury of the named plaintiffs be precisely the same type as the injuries to the class members. The dissent recognized that there are two lines of authority interpreting Rodriguez. One line allows “across-the-board” class actions, in which an injured employee may represent all persons affected by the employer’s discriminatory policies. The other view is that only those suffering the “same impact” from discrimination as the plaintiff could be members of the plaintiff’s class. However, Judge Russell urged that Hill committed the Fourth Circuit to the same impact approach. The dissent also argued that the class claim should be dismissed since it was improperly certified in the first place.

A third case, International Woodworkers of America v. Chesapeake Bay Plywood Corp., was decided by a different three judge panel which rendered a unanimous decision. The analysis used by the court falls somewhere between the two extremes represented by the foregoing cases. Four named plaintiffs, including the Union, sought to be representatives of a class of all blacks and females who were victims of discriminatory employment practices. The district court denied class certification, entered summary judgment against the individual plaintiffs and held that the Union did not have Article III standing to litigate the claims of its members.

16 Id. at 19.
17 See supra note 10.
18 No. 79-1821, slip op. at 73.
19 See supra note 10.
On appeal to the Fourth Circuit the court held that the Union did have Article III standing under the rule in Warth v. Seldin allowing an association to litigate the claims of its members. The court went on to hold that since the Union had Article III standing to represent its members, it would be a proper class representative under Rule 23. The court stated that Rodriguez does not prevent Rule 23 standing for the Union, and although the Union as an entity is not injured it may seek to redress the injuries to its members.22

The court denied Rule 23 standing to a white male plaintiff because he obviously did not suffer any sex or race based discrimination. However, the court noted that he was not claiming that he had been denied the benefits of interracial associations, or that he had suffered any form of retaliation. The court also denied Rule 23 standing to a black female who admitted in her deposition that she had never been injured by discriminatory practices.

A second black female, Dennis, alleged that she had been discriminated against in her initial assignment and three other separate incidents involving disparate treatment. The court held that her initial assignment claim was time-barred,23 but reversed the summary judgment below on the other three claims. In discussing whether she was a proper class representative, the court stated:

While it is true that a named plaintiff may not represent persons whose injuries resulted from employment practices different in kind or origin from those to which the plaintiff was subjected . . . where the interests of the representative plaintiff coincide with those of the class members, Rule 23 does not require precise, mirror-image identity respecting the injuries caused by a single practice or policy at a single facility. Rodriguez did not 'destroy the utility of the class action device by requiring separate suits on an episodic basis.' . . . Obviously,

---

22 It should be noted that the possibility of Union class representation is important in those courts that narrowly apply Rodriguez to individual class representatives. In such courts, an organization may be the only private entity that could bring an across-the-board employment discrimination suit.
23 No. 80-1162, slip op. at 28.
a single, unitary policy of disparate treatment might not injure every affected person in exactly the same manner or degree.\textsuperscript{24} The court found that this case involved a unitary employer policy in a single plant and held that Dennis' injuries were not "so different from those of other blacks and women employed at the same facility that she may not represent them in a class action."\textsuperscript{25}

This holding seems to place the court among those who take a permissive view of Rule 23 standing. However, the court went on to hold that because Dennis' claim of initial assignment was time-barred, she was not a proper class representative as to this injury. The court ordered that on remand the district court allow a proper plaintiff who claims such an injury to come forward. This analysis seems to place the court in the restrictive camp as to Rule 23 standing.

In conclusion, there is much debate and confusion within the Fourth Circuit concerning the scope of Rodriguez and Hill. Litigants may get somewhat differing results depending on which judges hear their cases. It is to be hoped that the Fourth Circuit will make a definitive statement of its position on this issue in an en banc decision. In the meantime it must be said that no firm consensus exists in the Fourth Circuit as it relates to standing under Rule 23.

Thomas R. Michael

II. PROBATIVE VALUE OF STATISTICAL PROOF

A. Introduction

In reviewing employment discrimination cases based on Title VII of the Civil Rights Act of 1964 (the Act) the United States Court of Appeals for the Fourth Circuit has attempted to clarify issues concerning the use of statistical proof. In both \textit{EEOC v. American National Bank}\textsuperscript{26} and \textit{Patterson v. American Tobacco Co.}\textsuperscript{27} the court considered the probative value of various forms

\textsuperscript{24} Id. at 24 (citations omitted).
\textsuperscript{25} Id. at 26.
\textsuperscript{26} 652 F.2d 1176 (4th Cir. 1981).
\textsuperscript{27} 634 F.2d 744 (4th Cir. 1980), \textit{cert. granted}, 101 S. Ct. 8078 (1981).
of statistical proof in relation to the establishment and rebuttal of a prima facie case.

1. EEOC v. American National Bank

In *American National Bank (ANB)*, the Equal Employment Opportunity Commission (EEOC) charged American National Bank (ANB or Bank) with engaging in a pattern or practice of racially discriminatory hiring practices.\(^28\) The Eastern District Court of Virginia found that EEOC had established a prima facie case through the use of static work force statistics which revealed a continuous underrepresentation of blacks in ANB's work force generally and in the specific categories of office and clerical employees, and managers. However, ANB successfully rebutted this evidence by use of applicant flow data\(^29\) and a standard deviation analysis.\(^30\) In addition the court examined the allegedly discriminatory hiring practices and evaluated thirty-one claimed examples of discrimination. The district court found that the practices were legitimate and non-discriminatory in effect and that the employer, ANB, had not denied any of the thirty-one individuals employment because of race.

The Fourth Circuit reversed the decision ruling that ANB's standard deviation analysis was incorrect and the applicant flow data was not specific as to the job categories in question because it included service workers as well as clerical and managerial employees. Thus the court of appeals held that, with the exception of one job category,\(^31\) the defendant's evidence was not sufficient to rebut the plaintiff's prima facie case.

\(^{28}\) There are two types of Title VII cases: disparate treatment and disparate impact. In a disparate treatment case a plaintiff must prove intent to discriminate. Proof of intent is not, however, required in establishing a prima facie case in a disparate impact case. To prove discriminatory employment practices under a disparate impact theory, a plaintiff must establish that a facially neutral employment policy or practice has a disproportionate impact or discriminatory effect on members of a protected class. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

\(^{29}\) The Bank compared the percentage of black applicants for all job categories and the percentage of blacks hired with the percentage of white applicants and white hires.

\(^{30}\) See *infra* note 62 and accompanying text.

\(^{31}\) The prima facie case was rebutted with respect to managers at the Suffolk branch.

In Patterson the court reviewed the district court's assessment of statistical evidence in light of Hazelwood School District v. United States.\(^{32}\) The circuit court concluded that the district court should reconsider the plaintiffs' use of general work force statistics in establishing their prima facie case. However, in order to determine whether general or special work force statistics are probative for a given job category, the court ruled that the district court must first determine whether the job category in question requires special skills.

B. Prima Facie Case under Title VII.

In both ANB and Patterson the plaintiffs relied heavily on statistics to establish a prima facie case.\(^{33}\) One common method for establishing a prima facie pattern or practice in either a disparate treatment or a disparate impact case is by presenting statistical data indicating the employer's work force has a racial or sexual composition significantly different than the relevant work force in the community.\(^{34}\) A case based on such data may be bolstered by introduction of other evidence such as discriminatory hiring practices or criteria or individual instances of discrimination.\(^{35}\) A prima facie case is not, however, the equivalent of a finding of discrimination. It merely raises the inference that the defendant's actions, if not otherwise explained, were more likely than not based on a consideration of impermissible factors.\(^{36}\)

In a disparate treatment case the employer may rebut a prima facie case by articulating a legitimate, nondiscriminatory

---


\(^{33}\) The analysis of date may take many forms including standard deviation or regression analysis. See Sullivan, Zimmer & Richards, Federal Statutory Law of Employment Discrimination § 1.8 (1980).


reason for a refusal to hire or promote or by showing that the plaintiff's proof is "inaccurate or insignificant." The plaintiff then has the opportunity of demonstrating that the reasons offered were mere pretext. But at all times the burden of proof remains with the plaintiff who must show by the preponderance of the evidence that the employer intentionally discriminated in hiring or promotion on the basis of race, sex, or national origin.

Intent, however, is not an issue in establishing a prima facie disparate impact case. Once the plaintiff has established a prima facie case, the burden then shifts to the employer to show that the employment decisions which had a disparate impact on a protected class were based on a business necessity or a factor permissible under the Act. Moreover, the employer must also demonstrate that there are no less discriminatory practices available to accomplish the stated purpose.

1. The Relevant Work Force

Determining the relevant work force statistics is key to establishing, or rebutting, a prima facie case based on statistical proof. Under Title VII, if the job category requires skills not possessed or readily acquired by the work force in general, the court may hold that statistical disparities between the employer's work force and that of the community are not probative. In such cases, an employer's statistics making the relevant comparisons between the percentage of the work force

See, e.g., International Bhd. of Teamsters v. United States, 431 U.S. at 360.

McDonnell Douglas Corp. v. Green, 411 U.S. at 804.

See, e.g., Texas Dept. of Community Affairs v. Burdine, 101 S. Ct. at 1095 (1981); Board of Trustees of Keene State College v. Sweeney, 439 U.S. 24, 25 n.2 (1978); Page v. Bolger, 645 F.2d at 231.


with the skills needed and the employer's actual work force may rebut a plaintiff's prima facie case based on general work force statistics. 44

Both ANB and Patterson presented questions concerning relevant work force statistics. The Fourth Circuit turned to the Supreme Court's decision in Hazelwood for guidance. In Hazelwood the Court, in reviewing the hiring of teachers, stated: "When special qualifications are required for particular jobs, comparison to the general population... may have little probative value." 45 There, the Court required a comparison of the racial composition of the relevant portion of the defendant's work force and the racial composition of qualified workers in the relevant labor market. The Fourth Circuit has consistently applied this principle. 46 Thus, when confronted in ANB with the plaintiff's comparison of blacks in the work force qualified for management positions and the number of black managers employed by ANB, the court concluded that the defendant's undifferentiated applicant flow data was not sufficient to rebut the plaintiff's prima facie case as to that job category.

Patterson, however, presented a more complex situation. One aspect of the controversy centered on whether the skills required by supervisors at American Tobacco Co. (American) were analogous to those of teachers in Hazelwood or the truck drivers in Teamsters. If American's supervisors possessed skills held or easily acquired by the work force at large, the plaintiff's statistical comparison could not be rebutted by American's data which compared the percentages of women and blacks categorized as supervisors in the Standard Metropolitan Statistical Area (SMSA) figures compared with the percentages of women and black supervisors in American's work force. 47

44 The proper comparison was between the racial composition of Hazelwood's teaching staff and the racial composition of the qualified public school teacher population in the relevant labor market.
45 433 U.S. at 308 n.13.
47 Since 1950 the U.S. census bureau, as part of the decennial census has compiled additional information about the nation's metropolitan areas. This information includes labor force statistics which are divided into twelve general occupa-
In *EEOC v. Radiator Specialty Co.* the Fourth Circuit discussed the relationship between procedures for assessing statistical data and the existence of special job classifications. The court divided the cases into three categories. Categories one and two include cases where the special qualifications do or do not exist. These qualifications will be “manifest as a matter of law from the mere identification by the plaintiff of the job positions in question.” In these cases the proper work force statistics for comparison should be obvious. In cases which fall into the third category, where the existence of special qualifications are not “manifest as a matter of law,” the burden is on the defendant to establish the position does in fact require such qualifications.

The court found that the supervisory positions in *Patterson* fell into the third category. Both the district court and the court of appeals accepted the appropriateness of the plaintiff’s general work force statistics under a pre-*Hazelwood* analysis. As a result, there was no basis in the record for assuming that the district court properly considered, and then rejected, American’s contention that special qualifications existed. The case was remanded to the district court for further proceedings on this issue.

In a concurring opinion Judge Winter opposed the remand on the basis that American permitted the Union to nominate candidates for promotion, imposed no educational requirements, required no showing of employee interest in the job, and had no written guidelines for selecting supervisory personnel. Moreover, he noted that American was given full opportunity on the first remand to tender proof as to the special qualifications it believed necessary, but continued to support its position with statistical data with little relevance to the tobacco industry, i.e.,

---

6 *Id*. at 185 n.8. The burden of proof remains with the party with most ready access to the relevant information.
statistics derived from construction craftsmen, mechanics, repairmen and machinists.

Regardless of the decision on remand, allowing an employer to argue that a job with no educational requirements and no objective criteria does in fact require special skills will have implications for Title VII litigation. This notion, if extended, could have been applied to the job category of the truck drivers in Teamsters under the rationale that not everyone in the general work force has or can easily acquire truck driving skills. An employer may raise the issue of special qualifications to complicate and delay already complex and lengthy litigation.

Furthermore, the subjectivity of the factors used in hiring and promotion may easily serve as masks for underlying discrimination. In ANB, for example, it would be costly and difficult, if not impossible, to determine what percentage of workers in the clerical category of the general work force possess the ability to work with numbers, deal with the public and have the integrity necessary to work as a bank teller. If it is necessary to make such a determination in order to compare the percentages of minorities and women in the relevant work force, the burden of establishing a prima facie case would increase significantly in class actions and pattern of practice cases.

2. Applicant Flow Data

In ANB and Patterson the court discussed the use of applicant flow data. Generally, applicant flow data is another means of establishing or rebutting a prima facie case under Title VII; it compares the percentages of minority or women applicants hired with the percentage of white or male applicants hired. Applicant flow data is usually considered highly probative of an employer’s actual labor pool. It has two advantages over static work force statistics. First, the applicant flow data clearly excludes pre-Act hiring and promotion decisions. Both the Supreme Court and the Fourth Circuit have emphasized that an employer may not be held liable for pre-Act employment decisions even if such decisions were based on intentional

---

discrimination and resulted in an all-white or all-male work force.\textsuperscript{53} Thus, pre-Act decisions must be excluded in an analysis of work force statistics. Second, the use of applicant flow data circumvents the necessity of determining the proper work force categories to use in a comparison with an employer's static work force statistics.

The court cautioned that applicant flow data must be sufficiently reliable. In \textit{ANB}, for example, the court declared that the defendants's applicant flow data failed to rebut the plaintiff's prima facie case, citing two factors. First, the data did not reflect all of the relevant applications. Only one year's statistics were available for one of the branches and the number of applications from the other branch varied so greatly from year to year that there was an inference that not all applications were part of the data base. The second factor was that the Bank's data did not separate applicants for service worker positions from other job categories. The use of applicant flow data is further restricted if minority or female applicants are discouraged by the employer's known discriminatory hiring practices or by opening that are made known only by word of mouth.\textsuperscript{64}

C. Statistical Significance

After a court has determined what statistical comparisons are proper, the next step is to determine their significance. There are two concepts relevant to the decisions in \textit{ANB} and \textit{Patterson}. The first is standard deviation analysis. The second is sample size.

1. Standard Deviation

Standard deviation\textsuperscript{65} analysis is one method of determining whether the disparity between general work force and an employer's work force statistics is large enough to support an


\textsuperscript{64} See Dothard v. Rawlinson, 433 U.S. at 330; Hazelwood School Dist. v. United States, 433 U.S. at 313 n.21; United States v. County of Fairfax, Va., 629 F.2d at 940 n.9.

\textsuperscript{65} See \textit{infra} note 62 and accompanying text.
inference of discrimination. The Supreme Court’s decision in Casteneda v. Partida created judicial confusion in the assessment of statistical evidence. In Casteneda the Court reviewed data indicating extreme disparity between white and minority members on jury panels and concluded: “As a general rule for such large samples if the difference between the expected number and the observed value is greater than two or three standard deviations, then the hypothesis that the jury drawing was random would be suspect to a social scientist.”

The Fourth Circuit in EEOC v. United Virginia Bank (UVB) literally applied what it termed a “Casteneda-Hazelwood analysis” of standard deviations. Relying on Casteneda, the court characterized a standard deviation of 2.02 as insignificant. However, in ANB, the Fourth Circuit corrected its misuse and misunderstanding of the standard deviation analysis applied in UVB.

In ANB, the district court had applied the standard deviation analysis to specialized workforce figures, recording generalized values for the number of standard deviations. Because the number of standard deviations in the bank officials and managerial employees category for any branch was never above one or two and not above two or three in the clerical category, except at the Portsmouth branch. The court found that a prima facie case was established only for clerical workers at the Portsmouth branch where the observed values, i.e., ANB’s workforce statistics, were four to five standard deviations from the expected values based on general workforce statistics.

On appeal, Judge Phillips clarified the issue by defining and explaining standard deviation.

Standard deviation is a measure of the predictable fluctuation in a random selection process. The difference between the actual (“observed”) numbers of the pro-

---

55 See, e.g., note 33 supra and accompanying text; BALDUS & COLE, STATISTICAL PROOF OF DISCRIMINATION (2d ed. 1979).
58 615 F.2d 147 (4th Cir. 1980).
59 Id. at 152.
tected group in such a sample and the number that would be "expected" in a perfectly proportional process of selection from the appropriate pool can then be expressed in numbers of standard deviations. In turn, standard deviations can be expressed in terms of mathematical probability that chance is the cause of the disparities measured. As standard deviations increase numerically, the probability of chance as the cause of revealed underrepresentation of course diminishes.  

More specifically a standard deviation of ±1.96 indicates the probability that the statistical disparity resulted from chance is not more than 5%. At ±2.58 standard deviations the probability is 1%. Thus, the court concluded, in accordance with Casteneda, courts should be extremely cautious in drawing any conclusions from standard deviations in a range of one to three. However, where statistical disparities exist in this range a court still may determine that a prima facie case of discrimination has been established.

2. Sample Size

The inferences which can be reasonably drawn from any statistical analysis are partially dependent on the sample size. In the employment context, sample size refers to the number of hiring or promotion decisions made. Generally, the larger the sample size, the greater the degree of confidence that may be placed in the inferences drawn from the analysis. The Supreme Court in Mayor of Philadelphia v. Educational Equality League cautioned that small samples may not support an inference of a pattern of discrimination in employment decisions. Several courts have refused to find that the plaintiff has established a prima facie case when the sample included a small number of employees or few employment decisions. But, these courts have offered no guidance as to how small is too small. That question is left to the "best judgment" of the lower courts.

---

62 652 F.2d at 1191.
65 652 F.2d at 1194.
In exercising that judgment in ANB, the Fourth Circuit did not choose a technical approach. Nor did the court determine which statistical analysis is most appropriate for the data available or what sample size is relevant to the analysis and facts of the case. Instead, it adopted a balancing approach. The danger of unfairness to the employer in resting inferences of discriminatory employment practices upon proof involving a small number of employment decisions was weighed against the problem of precluding proof of discrimination in circumstances involving local employers with small work forces.66 The court then found that ANB's hiring of two managers at the Suffolk branch over a seven year period was too small of a sample to support an inference of a pattern and practice of discrimination. However, it did find the number (35) of hiring decisions in the clerical category to be "quite sufficient."

D. Probative Value of Statistical Evidence

Once the statistical significance of the employment data has been determined, the court must then determine the weight given to this evidence. In order to correctly assess the probative value of statistical data it must be viewed with an understanding of its technical meaning and underlying assumptions as well as an awareness of other evidence. In a discrimination case statistical analysis merely indicates the probability that the sexual or racial composition of an employer's work force did not result from random selection. The underlying assumption is that if sex or race were not a factor in employment decisions, over time the employer's work force would probably mirror the relevant work force in the community.67

Generally, the legal analysis applied is compatible with this statistical approach. In disparate treatment cases the statistics may create an inference that the employment practices of an employer utilized race or sex as a factor. Although statistics alone can be used to establish a prima facie case, the Supreme Court in Furnco Construction Co. v. Waters68 cautioned that

66 Id.
67 International Bhd. of Teamsters v. United States, 431 U.S. at 340 n.20; United States v. County of Fairfax, Va., 629 F.2d at 939.
68 See supra note 35 and accompanying text.
establishing a prima facie case is not the equivalent of a finding of discrimination. Rather it raises a rebuttable inference of discrimination.69

Pattern or practice cases involving disparate treatment such as ANB raise unique questions of proof. Proof of disparate treatment requires a showing of intentional discrimination.70 The nature of statistical proof, with its emphasis on probabilities rather than the outcome of any specific event, is not entirely compatible with the individual determinations inherent in employment decisions and the need to prove intent. In ANB, for example, the court declared that the plaintiff had proven a pattern and practice of discrimination without a showing that any of the thirty-one persons identified as individual victims of discrimination had, in fact, been discriminated against. Theoretically, under the court's analysis, it would be possible to conclude that, even if there were no proven acts of intentional discrimination, ANB could be held liable for intentional discrimination on the basis of statistical inferences.

The court in ANB discussed the relevance of non-statistical evidence of discrimination. EEOC alleged that ANB used subjective hiring standards in interviews conducted by an all-white staff, relied extensively on friends and relatives of employees for word-of-mouth recruiting, and gave preference to those who were friends or relatives of bank employees. Although the district court found that these hiring practices alone or taken together were not discriminatory, the court of appeals found that, as a matter of law, the lower court's analysis was in error. It found that if there is a statistical showing of a racially unbalanced work force, the use of hiring practices are to be assessed, not in isolation, but for their tendency to perpetuate that imbalance. This is consistent with findings in both Teamsters and Hazelwood where the Court viewed the statistical evidence against the background of teacher hiring

---

69 See supra note 39 and accompanying text.
practices in Hazelwood\(^{11}\) and instances of specific discrimination in Teamsters.\(^{12}\)

**Kathleen Abate**

### III. Section 703(h) Seniority Exemption

The decision in Patterson involved not only statistical proof in a Title VIII disparate impact case, but the definition of bona fide seniority plan under § 703(h) of the Act.\(^{23}\) The American Tobacco Co. had two plans which they contended fell within the scope of § 703(h). The first was a branch seniority system.\(^{24}\) The second was a lines of progression policy.\(^{25}\) The district court had originally granted relief to a class of black employees which, with some modifications, was approved on appeal.\(^{26}\) Following the entry of this judgment the Supreme Court decided International Brotherhood of Teamsters v. United States\(^{27}\) and United Airlines v. Evans\(^{28}\) The defendants, American Tobacco Co. and

\(^{11}\) In Hazelwood the school principal had almost complete discretion in hiring. Subjective factors such as ability to deal with people, personality, poise, voice and articulation were given great weight.

\(^{12}\) In Teamsters, government testimony included over forty personal accounts of individual discrimination.


> Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority system ... provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin....

\(^{24}\) Under the branch seniority system employees lost their seniority if they transferred to another branch or department. Seniority was determined by the length of service on a departmental rather than on plant-wide basis.

\(^{25}\) An employee becomes qualified for a job near the top of a given line of progression by first holding a job nearer the bottom of that line. For example, in order to become an adjuster it is necessary to be an operator then a learner adjuster. American had nine such lines that were identified as exceptions to the branch seniority system.

\(^{26}\) The district court ordered: (1) the posting of more definite written job descriptions when vacancies occurred; (2) elimination of the lines of progression policy in six out of nine categories; (3) blacks must be permitted to transfer between branches without loss of seniority; (4) back-pay awards to employees unlawfully denied promotions; and (5) development of objective criteria for appointing supervisors. 634 F.2d at 747.

\(^{27}\) 431 U.S. 324 (1977).

the Tobacco Worker's International, asserted that these decisions constituted significant intervening changes in the law and moved under Fed. R. Civ. P. 60(b) for appropriate equitable relief from the judgment.

The Fourth Circuit reviewed American's branch seniority system and lines of progression policy to determine if either or both were bona fide seniority systems with the meaning of § 703(h). The court held that the branch system, if it was "bona fide" came within the exemption, but the lines of progression policy did not.

A. The Branch Seniority System—The Question of Bona Fide

The Fourth Circuit remanded the issue of whether the branch system was "bona fide" and suggested the district court look to the Fifth Circuit decision in James v. Stockham Valves & Fittings Co. for guidance. In order to determine whether the seniority system was bona fide under § 703(h) the court in Stockham, like the Court in Teamsters, focused on the issue of intent and articulated four factors:

1. Whether the seniority system operates to discourage all employees equally from transferring between seniority units;
2. Whether the seniority units are in the same or separate bargaining units (if the latter, whether that structure is rational and in conformance with industry practice);
3. Whether the seniority system had its genesis in racial discrimination; and
4. Whether the system was negotiated and has been maintained free from any illegal purpose.

In Teamsters the Court held that a facially neutral system that did not have its genesis in a discriminatory purpose and was not negotiated or maintained to intentionally discriminate did not violate Title VII. The branch seniority system in Teamsters was clearly originated and maintained for a legitimate business reason. In Stockham, however, the seniority system was adopted when racial segregation was standard practice in the South and continued until 1974 in a context of com-

559 F.2d 310 (5th Cir. 1977).

60 Id. at 351-53.
pany policies promoting segregated facilities. Furthermore, the branches of the racially segregated seniority system did not reflect traditional industry bargaining units.

The situation in *Patterson* lies between the clearly bona fide system in *Teamsters* and what the court deemed as Stockham's "intransigent adherence to widespread segregated facilities at the plant." American's branch seniority system originated before 1963 when the departments of its two branches were racially segregated. In 1963 the departmental but not the branch seniority system was abolished. The record is not clear on the issue of whether the branch system was originated and maintained free of purposeful discrimination. In *Stockham* the court concluded the facts of a particular seniority system and a case by case determination are critical. Both *Stockham* and *Patterson* were remanded to the district court. Although *Stockham* was appealed, certiorari was denied. In *Patterson* it was granted.82

B. *Line of Progression—Definition of a System*

The Fourth Circuit rejected American's assertion that its lines of progression policy fell within the scope of § 703(h). Because the policy was adopted after 1965 and thus not within the § 703(h) exemption, the court held that the lower court properly applied a disparate impact test which focused on discriminatory effect. Writing for the majority, Judge Phillips stated "whether or not [the policy] be considered a 'seniority system'... the policy was not in effect at American in 1965."83 But in his dissent Judge Widmer held the view that this policy was in fact initiated before 1965, the effective date of the act. If the policy existed prior to 1965, the next step in the inquiry is to

---

81 Id. at 353.
82 101 S. Ct. 3078 (1981). The Court has also granted certiorari in Swint v. Pullman-Standard, 624 F.2d 525 (5th Cir. 1980), cert. granted, 101 S. Ct. 1972 (1981). In *Swint* the Fifth Circuit held that an employer's departmental seniority plan was not a bona fide seniority system within the meaning of § 703(h). The lower court ruling was based on the rationale that the seniority system locked employees into a particular department, but it did so equally for both blacks and whites and was based on industry practice. The court of appeals rested its decision on the determination that the employer had maintained segregated departments with no apparent reason except to separate the races.
83 634 F.2d at 748-49.
determine whether that policy, as it existed before 1965, constituted a seniority system.

There have been few decisions defining the scope of personnel policies which may constitute a seniority system under § 703(h). The most recent Supreme Court case addressing this issue is California Brewers Association v. Bryant. Bryant, a black worker, alleged that the requirement that an employee work 45 weeks within one year in order to attain permanent status operated to preclude him and other class members from achieving or from a reasonable opportunity of achieving permanent status. Under the Brewers’ multi-employer bargaining agreement an employee with permanent status scheduled for lay-off could “bump” temporary employees at any local plant. New hirees were thus prevented from acquiring the time needed to attain permanent status. Under this system no black had ever attained permanent status in the California brewing industry.

The Court held that the 45 week requirement was a component of a seniority system within the meaning of § 703(h). The collective bargaining agreement was interpreted as creating two seniority ladders: one for permanent and one for temporary employees. Citing both Teamsters and Evans, the Court emphasized that the routine application bona fide seniority plan was lawful under Title VII even if it operated to freeze the status quo of prior discriminatory employment practices.

Before California Brewers, a seniority system appeared to be limited to policies directly relating to length of service. In California Brewers the Court, in a 4-3 decision with Justices

---

45 The statutory definition of system appears to include employer initiated as well as union negotiated plans. This is based on the rationale that an employee’s expectations and vested rights are not diminished because the plan was adopted through the employer’s initiative. See Alexander v. Machinists Aero Lodge No. 375, 555 F.2d 1364 (9th Cir. 1977), cert. denied, 436 U.S. 946 (1978); EEOC v. E.I. duPont Nemours & Co., 445 F. Supp. 223 (D. Del. 1978).
47 444 U.S. at 600.
Powell and Stevens abstaining, found that a seniority system could shelter more than mere length of service. It reasoned: “In order for any seniority system to operate at all it has to contain ancillary rules that accomplish certain necessary functions but which may not themselves be directly related to length of employment.” Industry custom was a factor in this determination. Because the decision was not made by the entire Court and the difficulties inherent in applying the industry practice standard, California Brewers offers few guidelines for defining the limits of a seniority system.

Since certiorari has been granted, the Supreme Court may use Patterson and American’s line of progression policy to clarify what type of policies constitute a seniority system and the degree of formality required before those policies are designated as such. If American’s “lines of progression” policy is a seniority system, the issues before the Court may include the question of whether a seniority system which had its genesis in racial discrimination violates Title VII although the system may have not been maintained in a manner which intends to discriminate.

Kathleen Abate

IV. REMEDIES UNDER TITLE VII: TERMINATION OF EMPLOYERS’ LIABILITY

The awarding of back pay is the remedy most often applied in employment discrimination cases. An integral part of any back pay award is determining when an employer’s liability will terminate. The Fourth Circuit confronted this issue in Ford Motor Co. v. EEOC. The case involved two separate acts of discrimination under Title VII: one occurring in 1971 and involving three women, the other occurring in 1973 and involving seven women.

In both instances, the district court found that if the women had been hired they would have worked until the time of trial. Back pay was therefore awarded for the entire time. Ford, however, attempted to terminate its back pay liability at several

---

69 444 U.S. at 607.
70 645 F.2d 183 (4th Cir. 1981).
points and also requested that unemployment compensation be subtracted from the award. The Fourth Circuit rejected all of Ford's contentions, thereby allowing back pay to continue until the time of trial. Not only did the court allow back pay when it arguably could have ended, but it also remanded for the consideration of additional relief.

With regard to the 1971 occurrence, Ford initially argued that back pay should have ended when the women were recalled (subsequent to Ford's discrimination) by their former employer, General Motors (GM) in 1973. The circuit court held that since the women were laid off from GM after one year, the job was only a temporary one and therefore precluded the termination of Ford's back pay liability. The court reasoned that victims are to be made whole, and that limiting back pay to the time when a temporary job was accepted would not accomplish this since the back pay period would be shorter than the hypothetical work history. "It would be unjust to require [the discrimination victim] to mitigate his damages to the greatest extent possible but then to penalize him for substantial but short-lived success." Thus, if back pay were to end completely upon the acceptance of equivalent employment, whether temporary or permanent, a victim would be discouraged from mitigating damages. By holding that back pay liability did not end when the plaintiffs accepted employment, the court reemphasized the underlying policies of Title VII of making victims whole, encouraging mitigation, and eliminating discrimination in the work place.

Judge Hoffman, however, disagreed. In his dissent, he noted that it is well established that employment elsewhere cuts off back pay if it is substantially equivalent and permanent. In the present case, since the employment with GM was intended to be permanent, it should have cut off Ford's liability. No evidence indicated that the job was temporary, and the fact that

---

91 Interim earnings, however, were deducted.
92 The hypothetical work history was determined by the length of time that the males, who were actually hired, had been employed. In the present case the males were still employed at the time of trial.
93 645 F.2d at 201 (citing NLRB v. Mastro Plastics Corp., 354 F.2d 170, 179 (2d Cir. 1965), cert. denied, 384 U.S. 972 (1966)).
the women were offered a job with GM in another city establishes that the positions were permanent. According to the dissent, the determination of when back pay should end hinges on whether the job taken was intended to be permanent, not the actual result. Under this analysis, the goal of making victims completely whole is outweighed by the possible heavy monetary burden placed on the employer in employment discrimination cases.

Ford's next contention was that its back pay liability should have ended in 1973 when it offered permanent positions to the women during the time they were employed by GM. In rejecting this argument, the Fourth Circuit fully accepted the district court's reasoning that the job offer would have forced them to abandon their seniority at GM, and this they were not obligated to do. "[A] refusal to commit seniority suicide is not an acceptable reason to deny back pay."\(^{95}\) Moreover,

Ford's job offer was tainted by the effects of the discrimination it had practiced in 1971. [The women] could accept the offer only by forfeiting the seniority they had accumulated at [GM] and without a compensating offer of seniority at Ford to alleviate the effects of discrimination against them in 1971.\(^{96}\)

The court is not alone in this respect as this principle is followed by three other circuits.\(^{97}\) In short, if an offer does not rectify the effects of post-discrimination, the plaintiffs are under no duty to accept it.

The dissent, however, points out that if Ford had offered retroactive seniority rights to the women, the collective bargaining agreement would probably have been violated. As Judge Hoffman viewed the issue, neither Title VII nor the National Labor Relations Act (NLRA) require back pay and retroactive seniority in an offer of initial employment for the offer to be valid. The reason for this is that as long as the employer does not condition the offer on the employee's giving up back pay or seniority, the employer is under no duty to prom-

\(^{95}\) 645 F.2d at 192 (citing UTU v. Norfolk & Western Ry., 532 F.2d 336, 340 (4th Cir. 1975), cert. denied, 425 U.S. 934 (1976)).

\(^{96}\) 645 F.2d at 192.

ise such things, since the employee can accept the offer and then pursue his other claims through judicial or administrative channels. Therefore, the employer would be released from back pay liability when an offer is rejected.

Furthermore, Judge Hoffman contended, an award of back seniority would be unfair to present employees and would frustrate employer-employee relations. While *Franks v. Bowman Transportation* held that courts are not precluded from ordering retroactive seniority, the dissent went on to assert that this does not obligate an employer to voluntarily include such an offer. A problem with this approach is that an employee may not be aware that she can accept the offer and then pursue other means of receiving lost seniority. It would be logical for her to conclude that it is an all or nothing situation; that is, she must take what is offered and no more.

Moreover, there is no practical difference whether the employee obtains her lost seniority up front with the job offer or later pursuant to either judicial or administrative means. The concern of Judge Hoffman, that retroactive seniority is unfair to current employees, is not quieted by the award of retroactive seniority after the employee is hired, rather than before.

There also seems to be little reason why the employee should bear the continued burden of obtaining back seniority. The dissent does, however, make a strong argument that the failure of the discriminatees to object or complain to Ford about the lack of seniority at the time of the offer indicates that they turned down the offer for other reasons. For this reason they should have been estopped from relying on this excuse.

Ford also argued that its back pay obligation should have ended when the women plaintiffs entered a CETA nursing training program for the unemployed in 1975. The Fourth Circuit held that the district court did not abuse its discretion when it refused to terminate back pay. The court reasoned that the workers still remained in the labor market and were "ready, willing and available for employment." The CETA program was treated as though it were employment since the women

---

645 F.2d at 194.
received a salary for time spent in the program. The court found that the women had signed up for the program only because they were urged to do so by the unemployment office, and but for Ford's discrimination, they would not have been referred to the CETA program.

Once again a dissent was filed. Judge Hoffman, in citing a Tenth Circuit decision, asserted that a commitment to full-time schooling was analogous to acceptance of a permanent job. Schooling also displayed a definite intention to seek permanent employment in the nursing field. Thus, Judge Hoffman would have terminated the back pay award upon entry into the training program, if not sooner.

The Fourth Circuit also upheld the district court's holding that unemployment compensation benefits received by the plaintiffs should not have been deducted from the back pay awards. While noting that there is a split of authority over this issue, the court reasoned that money received as unemployment compensation is part of an independent social policy. The court cited a 1951 Supreme Court case, which held that there should be no such deduction under the NLRA. "Since no consideration has been given to collateral losses in framing an order to reimburse employees for their lost earnings, manifestly no consideration need be given to collateral benefits which employees may have received." Moreover, the Fourth Circuit concluded that to allow the deduction would undercut the corrective force of the back pay award.

The dissenting opinion agreed with this in part, but opposed the majority's per se rule prohibiting such deductions. Judge Hoffman asserted that courts should be free to exercise their discretion in determining this issue.

The district court also found that Ford had discriminated against seven other female applicants in 1973. However, since

102 Again, interim earnings were deducted from Ford's back pay obligation.
103 Id. at 209 (citing Taylor v. Safeway Stores, Inc., 524 F.2d 263, 267-68 (10th Cir. 1975)).
only one position was available at the time, the court awarded each woman one-seventh of the back pay amount calculated from the date of discrimination to the time of trial. Ford, in objecting to the length of this back pay period, based its argument on the fact that the male who was actually hired for the job was laid off in 1974 and never recalled. Since in his place Ford hired a female, the company contended its back pay liability should have ended at that time. The Fourth Circuit, in affirming the lower court, disagreed with the defendant's contention. In order to accomplish the goal of making victims whole, hypothetical employment histories are constructed to determine the appropriate back pay period. Although the employment history of the person actually hired is a good guide, it is not controlling. As the court stated, "[T]he focus is on the probable job career of the victim, who is to be made whole, not on the career of the actual employee, who is of course not a party to the Title VII case." Because the failure to recall the male employee was out of the ordinary, his work history was not an accurate indicator of the probable work history that one of the females would have had.

Judge Hoffman would have terminated back pay when the actual person hired was laid off. Hypothetical work histories may be formulated when the actual successful applicant cannot be specifically identified; for instance, in class action suits involving large-scale discrimination over a long time. But when the identity of the worker is known, the dissent noted that hypothetical work histories are unnecessary.

However, the dissent seems to overlook that basing the back pay award solely on the length of service of the successful employee may not be entirely fair to the discrimination victim. For instance, the male actually hired may have been laid off due to inadequate job performance. This certainly should not militate against the victim since it would have no bearing or relation to the length of time that the individual discriminated against may have held the job.

The Fourth Circuit remanded the case for consideration of further remedies. The court stated that not only do district courts have broad discretion in formulating remedial orders, but

---

103 645 F.2d at 199.
they are also obligated to grant the fullest relief possible to insure that the effects of discrimination are totally removed.\textsuperscript{106} If no other remedies are granted, then the district court must articulate its reasons. The appellate court also offered some suggestions on additional remedies such as granting the women hiring preference status with retroactive seniority.\textsuperscript{107}

\textit{Robert Goldberg}

\textsuperscript{106} \textit{Id.} at 206 (citing Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975)).

\textsuperscript{107} 645 F.2d at 200-01. The district court's duty is to grant victims of discrimination the fullest relief possible "to insure that the effects of discrimination are totally removed from the lives of discrimination victims." \textit{Id.} (citing 422 U.S. at 418).
CRIMINAL LAW

I. SEARCH AND SEIZURE

In *United States v. Ramapuram*, the Fourth Circuit Court of Appeals, by expanding the "open field" doctrine, validated a warrantless search of the unlocked trunk of a "junked" automobile parked in a farm field. An agent of the Bureau of Alcohol, Tobacco and Firearms (ATF) received a report from a state police detective that Ramapuram was responsible for the theft of approximately one hundred sticks of dynamite earlier that month, and that Ramapuram intended to blow up certain public buildings. The detective's son had observed Ramapuram and another individual load the dynamite into Ramapuram's automobile.

The agent interviewed the accomplice in the alleged theft who told the agent that the dynamite was in the trunk of a Chevrolet, which was parked in a farm field owned by Ramapuram's father. Two agents from the ATF and two state troopers found it parked in an open field at about 200 feet from the main road. The car's license plate had expired, the doors were unlocked and the trunk lock had been removed. The agent opened the trunk and found eighty-eight sticks of the stolen dynamite. No search warrant was obtained, and no effort was made to contact a judge or magistrate to apply for a warrant.

At trial, photos of the "junker" and the agent's testimony regarding the seizure were admitted over Ramapuram's objection that the evidence was obtained in violation of the fourth amendment prohibition of unreasonable search and seizure. The district court held that Ramapuram possessed a reasonable expectation of privacy as to matters in the trunk of the car, but it concluded that the warrantless search was justified by exigent circumstances, relying on cases involving warrantless searches and seizures of weapons and explosives.

---

1 632 F.2d 1149 (4th Cir. 1980).
2 Under the doctrine of *Hester v. United States*, 265 U.S. 57 (1924), fourth amendment protection does not extend to open fields.
3 *Id.* at 1151.
4 *Id.* at 1152.
5 *Id.*
On appeal, the circuit court noted that "nothing in the record sufficiently established a high volatility and grave potential of explosion for the stolen dynamite." If the dynamite were in the car it could be kept from Ramapuram and the exigency of the search was reduced. The court, however, declined to decide whether such "exigency once removed" sufficed to render a warrant unnecessary.7

Instead, the court found a "more direct and established ground" which validated the warrantless search and seizure. That is, Ramapuram had no reasonable expectation of privacy in the trunk of the automobile. The fourth amendment prohibition of a warrantless search does not apply to locations in which one cannot reasonably expect materials to be accorded privacy. However, even though he had decided to keep secret the stolen dynamite, thus giving rise to a subjective expectation of privacy, Ramapuram’s expectation was not a reasonable, legitimate or justifiable one.

The court looked to the totality of circumstances to find the privacy expectation was not reasonable. First, under the Hester doctrine,8 the fourth amendment protection does not extend to open fields.9 The fact that the dynamite was enclosed in the junker’s trunk rather than left uncovered in the grass was not important. "[W]hatever expectation of privacy attends a closed but unsecured ‘effect’ generally is diminished where the ‘effect’ itself is placed in an area totally without the protection of the fourth amendment such as in an open field."10 Second, the "automobile exception" did not apply since the auto was not functioning as a vehicle capable of transporting people or property.11 Moreover, in noting that an automobile was involved ac-

---

6 Id.
7 Id. at 1153.
8 265 U.S. at 59.
9 Exigent circumstances permitting a warrantless search of an automobile are found when the car is stopped on the highway and probable cause exists. Coolidge v. New Hampshire, 403 U.S. 443 (1971). In the present case, the majority found that the automobile exception did not apply as the car was not operational.
10 632 F.2d at 1155 (citing United States v. Jackson, 585 F.2d 653, 658-59 (4th Cir. 1979)).
11 Id. at 1156; Cf. United States v. Newbourn, 600 F.2d 452, 454, 457-58 (4th Cir. 1979).
ually lessened the expectation of privacy. The court went on to determine the issue based on the "actual characteristics" of the container in the present case, not other containers which may present themselves in other cases. Finally, the court considered the character of the invaded place. Ramapuram failed to lock the trunk; he did not live on the farm; the farm was leased to others; and the farm was used by persons who were not family members or farm residents. All these factors combined to further diminish Ramapuram's expectations of privacy.

A strong dissent emphasized the Supreme Court's preference that law enforcement officials secure warrants before searching private property, and the presumption that a warrantless search of private property is per se unreasonable. The majority failed, the dissent charged, to find that the search in Ramapuram fell within one of the clearly delineated exceptions to the warrant requirement.

The majority relied on the Hester "open-field" doctrine to lessen Ramapuram's expectation of privacy in an auto parked in a field. The Supreme Court has cited Hester to support the plain-view doctrine. However, the Hester open-field exception had not before been used by the courts to permit a police officer to search an object in an open field, the contents of which are secluded from his view. Under a straight-forward reading of Hester a visual search of the exterior of the car in the field and of other parts in plain view could have been searched without a warrant, while the enclosed trunk could not have been.

The dissent found the Ramapuram facts analogous to those in United States v. Bradshaw. There, officers approached the

---

12 632 F.2d at 1156; United States v. Vasquez, 612 F.2d 1338, 1346 (2nd Cir. 1979).
13 632 F.2d at 1157.
15 In United States v. Brown, 487 F.2d 208, (4th Cir. 1973), cert. denied, 416 U.S. 909 (1974) agents were permitted, under Hester, to search the field around the barn, but not inside the barn itself. In United States v. Williams, 581 F.2d 451 (5th Cir. 1978), cert. denied, 440 U.S. 972 (1979), the court held that open fields surrounding a house are not protected under the fourth amendment, while the curtilage, the home, and its immediate appurtenances are protected.
defendant's home and smelled whiskey coming from a truck parked near the house. They peered through a crack in the rear doors of the truck and spotted jugs containing moonshine. The court held that the defendant had a reasonable expectation in the contents of the truck bed, as the truck was parked on defendant's premises and the contents could not be viewed except by someone who deliberately peered through the crack.\(^7\)

The court concluded that there were no circumstances that would have dispensed with the warrant requirement as two agents could have guarded the truck while the third obtained a warrant.\(^8\)

Similarly, Ramapuram's vehicle was on his private, rural property and the contents of the truck were not visible to the casual passerby. And, as in Bradshaw, there were enough agents to stand guard while others went to secure the warrant.

Therefore, because of the strong presumption in favor of search warrants and the lack of circumstances which would mandate dispensing with a warrant, the dissent concluded that the search and seizure of Ramapuram's property was unreasonable, and the evidence thus obtained should have been suppressed.\(^9\)

*United States v. Muhammad*\(^20\) also involved a warrantless search and seizure of evidence found in the trunk of a car. FBI agents suspected Muhammad of bank robbery and set up a surveillance of his vehicle which was parked near his apartment. Muhammad and his wife approached the car and Muhammad opened the trunk. When he saw the agents approaching, he quickly closed the trunk.

The agents arrested Muhammad and several hours later, impounded his car. The agents, who were concerned that an accomplice could have been concealed in the trunk, forced open the lock and found a gun, ammunition and a bag of the stolen money. The evidence was introduced at Muhammad's trial.

In denying the motion to suppress, the district court found that because there was probable cause at the scene of the crime

\(^{7}\) *Id.* at 1101.

\(^{8}\) *Id.* at 1103.

\(^{9}\) 632 F.2d at 1161.

\(^{20}\) 658 F.2d 249 (4th Cir. 1981).
to make the warrantless search, the agents could have delayed the search until the car had been taken to headquarters.\textsuperscript{21} Moreover, the possibility of a hidden accomplice justified the warrantless search of the trunk.

The circuit court affirmed. When a moving car is stopped by law enforcement officials who have probable cause to search the car, under \textit{Chambers v. Maroney},\textsuperscript{22} both an immediate warrantless search and a subsequent warrantless station house search are permitted. When the car is stationary at the time of arrest, \textit{Coolidge v. New Hampshire}\textsuperscript{23} requires the presence of exigent circumstances to justify a warrantless search.

The court found exigent circumstances present in \textit{Muhammad}: the police had probable cause to believe the car contained contraband; there may have been confederates available or alerted to move the evidence; and there may have been an accomplice hiding in the trunk.\textsuperscript{24}

In his dissent, Judge Murnaghan, who wrote the majority opinion in \textit{Ramapuram}, noted that the exigent circumstances required to excuse the failure to obtain a warrant were not present here. During the time the car was guarded at the parking lot, the agents could have obtained a search warrant.

The dissent emphasized the “risk” factor that must be present to justify immediate action. If waiting for a warrant would risk the destruction, disappearance or removal of the objects of the search, or would increase the risk of harm to policemen or innocent bystanders, then an immediate warrantless search is justified.\textsuperscript{25}

Here, the car was immobilized by agents so confederates could not have moved it. The expressed fear of the agents that an accomplice could be hiding in the trunk was “far-fetched,” and “implausible,” as the agents had no reasonable grounds for such a suspicion. “Adopting such a basis for avoiding the fourth amendment’s stringent warrant requirements is an open invita-

\textsuperscript{21} \textit{Id.} at 251.
\textsuperscript{22} 399 U.S. 42 (1970).
\textsuperscript{23} 403 U.S. 443 (1971).
\textsuperscript{24} 658 F.2d at 253.
\textsuperscript{25} \textit{Id.} at 254.
tion to riots of imagination, at the expense of facts and of reality."\(^\text{26}\)

The court of appeals reversed the district court's denial of motions to suppress evidence gathered in a warrantless search and seizure in a consolidated case, *Sharpe v. United States*.\(^\text{27}\) The court found that a vehicle stop based on less than probable cause must be brief, or will be considered an unreasonable seizure under the fourth amendment.\(^\text{28}\)

In *Sharpe*, an agent of the Drug Enforcement Administration (DEA) tailed an obviously overloaded pickup truck with an attached camper which was being followed by a Pontiac. The agent radioed for aid, and a highway patrolman joined the procession. The state patrolman stopped the truck, while the DEA agent went after the car. The patrolman gave the driver, Savage, no reason for the stop, but told Savage he could not leave until the DEA agent arrived.

The agent arrived 15 minutes later after having stopped the Pontiac. The agent went to the rear of the truck, said that he detected the odor of marijuana, and unlocked the camper with keys he removed from the ignition. Inside there were several well-wrapped bales. Sharpe and Savage were arrested, and the truck was taken to the federal building. Two or three days later, without a warrant, the agent unloaded the truck, opened the bales and found marijuana.

On appeal, the circuit court considered whether the vehicle stops and the detention of the defendants were unlawful seizures. It found that the investigatory stops of the vehicles were justified by the agent's "articulable and reasonable suspicion" that Sharpe and Savage were engaged in drug trafficking.\(^\text{29}\) to justify investigatory stops of the vehicles.\(^\text{29}\)

However, the stops failed to meet the brevity requirement of vehicle stops based on less than probable cause. The court emphasized the Supreme Court's reliance on the short length of a stop on the street to frisk for weapons, and in vehicle stops to

\(^{26}\) *Id.* at 256.

\(^{27}\) No. 79-5314, slip op. (4th Cir. September 4, 1981).

\(^{28}\) *Id.* at 7-8.

\(^{29}\) *Id.* at 6-7.
justify the elimination of the probable cause requirement.\textsuperscript{30} For example, in \textit{United States v. Brigoni-Ponce},\textsuperscript{31} the border investigatory stop was justified on the ground that the intrusion was of modest duration, usually no more than one minute, and involved only a question or two.

Here, Sharpe was detained without probable cause for thirty-five minutes, while Savage was held for fifteen. The length of these detentions transformed them into de facto arrests without probable cause, and were thus viewed as illegal seizures.\textsuperscript{32}

The court went on to conclude that because the defendants were illegally detained, the marijuana found during the search should have been suppressed as fruits of the illegality. Had the truck not been stopped for longer than the permissible period, the agent would not have smelled the marijuana.

The court found an equally compelling ground for suppressing the bales of marijuana based on the recent Supreme Court decision in \textit{Robbins v. California}.\textsuperscript{33} In \textit{Robbins}, the Court held that a warrantless search of packages of marijuana wrapped in opaque green plastic and stored in the recessed luggage compartment of a station wagon was unconstitutional. The Court rejected the proposal that the nature of the container may diminish the constitutional protection to which it would otherwise be entitled, or that a distinction should be drawn between sturdy luggage and flimsy cardboard boxes. “What one person may put into a suitcase, another may put into a paper bag... [No] court, no constable, no citizen, can sensibly be asked to distinguish the relative ‘privacy interests’ in a closed suitcase, briefcase, portfolio, duffle bag, or box.”\textsuperscript{34}

In \textit{Sharpe}, the well-packaged bales were “closed containers” within the meaning of \textit{Robbins}, and since their appearance did not manifest their contents, the warrantless searches were unconstitutional.

\textit{Mary Lou Hill}

\textsuperscript{30} 422 U.S. 873 (1975).
\textsuperscript{31} No. 79-5314, slip op. at 8-9.
\textsuperscript{32} 101 S.Ct. 2841 (1981).
\textsuperscript{33} Id. at 2846.
\textsuperscript{34} No. 79-5314, slip op. at 12.
II. PROSECUTORIAL VINDICTIVENESS AS DENIAL OF DUE PROCESS

The Fourth Circuit, evaluating the validity of an earlier ruling in light of a recent Supreme Court decision, found the two compatible in holding that prosecutorial vindictiveness had effected a denial of due process to the petitioner in United States v. Goodwin.

Goodwin had been convicted in the District Court for the District of Maryland of the felony of forcible assault on a federal officer, but was indicted and tried for the offense only after exercising his right to insist on a jury trial of "petty offense and misdemeanor charges originally lodged against him for the same conduct."

The charges against the defendant stemmed from an encounter with a United States Park policeman on the Baltimore-Washington Parkway in the District of Columbia. After checking the defendant's license and registration the officer observed, with a flashlight, a clear plastic bag in the defendant's car. When asked to surrender the bag, the defendant instead sped away, and in so doing the accelerating car struck the officer and knocked him to the highway. Although a high-speed chase ensued, the defendant eluded the officer in heavy traffic.

The next day the officer filed a complaint charging the defendant with various petty offenses and misdemeanors, including assault, and a federal magistrate issued a warrant for the defendant's arrest. The defendant was arrested, and released on his own recognizance, but failed to appear on the date set for trial; shortly thereafter the defendant was apprehended elsewhere and returned to Maryland.

At that time the government's attorney and defendant's counsel entered into plea negotiations. The prosecutor did not then mention that the defendant could be indicted, or otherwise suggest that he might seek an indictment, under the felony-

---

37 637 F.2d 250 (4th Cir. 1981).
39 637 F.2d at 251.
assault statute.\textsuperscript{40} Thus, at the time the defendant declined to plead guilty, and insisted on a jury trial, he was charged only with misdemeanor violations under various “fleeing and eluding” statutes.\textsuperscript{41}

After transfer of the case to the district court, necessitated by the defendant’s refusal to plead guilty, the government’s attorney sought a felony assault indictment\textsuperscript{42} and filed a supporting affidavit.\textsuperscript{43} The defendant subsequently stood trial, and was convicted of both the felony and the Maryland “fleeing and eluding” misdemeanors.\textsuperscript{44}

At conclusion of the trial the defendant moved to set aside the felony conviction, alleging prosecutorial vindictiveness. The trial judge however, found the prosecutor’s affidavit sufficiently demonstrated good cause to excuse his delay in seeking the indictment.\textsuperscript{45} When the issue was presented on appeal, however, the Fourth Circuit ordered reversal of the felony conviction.\textsuperscript{46}

\begin{footnotes}
\item 18 U.S.C. § 111 (1976) The government attorney involved was a Justice Department trial lawyer on a two-week special assignment to try petty offenses and misdemeanors before the magistrate. This may explain why an indictment was not sought initially, since this would have required that the case be transferred to the district court, with some delay inevitable; it may also explain, in part, the prosecutor’s decision to seek the indictment once the defendant insisted the case be transferred. Cf. infra note 43. The court’s opinion noted, however, that one of the purposes of the law in this area is to “spare courts the unseemly task of probing the actual motives of the prosecutor.” 637 F.2d at 255.
\item The prosecutor’s affidavit listed several reasons for belatedly seeking the indictment: 1) the serious nature of the defendant’s conduct in the incident; 2) the defendant’s lengthy history of violent crime; 3) the defendant’s conduct was suspected of being linked to major narcotics transactions; 4) the defendant had advanced a false alibi at the preliminary hearing; and 5) the defendant had failed to appear for trial. It did not allege that these factors were unknown or undiscoverable prior to the preliminary hearing or the plea negotiations. 637 F.2d at 252; see FED. R. CRIM. P. 12(b)(1), and infra note 45. Cf. supra note 40.
\item See supra note 41.
\item Ordinarily a motion for indictment must be filed before trial unless good cause is shown to excuse failure to do so. See FED. R. CRIM. P. 12(b)(1). Note that a date for trial had been set and had passed with the defendant failing to appear.
\item The Fourth Circuit affirmed, however, the defendant’s misdemeanor “fleeing and eluding” conviction. The defendant argued for reversal on two
\end{footnotes}
The Fourth Circuit had previously gone further than other circuits in recognizing denials of due process resulting from prosecutorial vindictiveness. In United States v. Johnson, the court found "vindictiveness" requiring reversal where a second indictment, alleging more serious offenses, had been obtained only after the defendant had succeeded in setting aside guilty pleas to an earlier indictment. Although lacking any evidence that the prosecutor had in fact acted maliciously, Johnson reasoned that a defendant's right to due process is violated whenever circumstances show that a fear of prosecutorial retaliation may have a chilling effect on a defendant's decision to exercise fundamental constitutional rights. If a defendant's decision to remain silent, request a jury, or test a conviction by appeal is compromised by a fear of retaliation, the chilling effect is clearly the same regardless of the presence or absence of actual vindictiveness in the prosecutor's decision. While a degree of prosecutorial discretion is essential to the criminal justice system, the importance of safeguarding fundamental constitutional rights requires that the focus of inquiry be the effect of the prosecutor's actions on the defendant, gauged by objective theories: first, that the warrant was defective because it failed to allege all the elements of the Maryland statute; second, that the Maryland statute had been pre-empted by Federal regulations governing traffic offenses in the District of Columbia. Neither issue was discussed extensively by the court, and a detailed analysis here would exceed the scope of this article. 637 F.2d at 255-57.

637 F.2d 250; United States v. Johnson, 537 F.2d 1170 (4th Cir. 1976). However, the balancing or "shifting presumption" tests are employed by the Fifth and Sixth Circuits. See Jackson v. Walker, 585 F.2d 139, 145 (5th Cir. 1978); Hardwick v. Doolittle, 558 F.2d 292 (5th Cir. 1977), cert. denied, 434 U.S. 1049 (1978); and United States v. Andrews, 633 F.2d 449 (6th Cir. 1980). The immediately preceeding decisions differ from the Fourth Circuit's rule in strenously refusing to recognize a due process denial solely on a defendant's showing that circumstances presenting a risk of prosecutorial retaliation existed; they hold that such a showing merely requires further inquiry, placing the burden on the prosecutor to objectively prove a legitimate reason for the additional charges. The Goodwin court noted that nothing in its holding prevented rebuttal by a prosecutor through objective proof, but stated that "[t]o the extent that [these cases] permit a more far-reaching inquiry into the actual motivation of prosecutors, we are not persuaded that they comport with the prophylactic rule set forth in Blackledge [417 U.S. 21 (1974)]," 637 F.2d at 254 n.1. The Fourth Circuit has yet to specify what might constitute sufficiently objective proof in such situations. But see supra note 43.

537 F.2d 1170 (4th Cir. 1976).
proof of the circumstances of the case, rather than reliance on discovering the subjective motivations of the prosecutor. The court interpreted this to be the rationale expressed by the Supreme Court in Blackledge v. Perry, the leading case on the subject at that time.

In Goodwin, however, the government urged that a mere apprehension of vindictiveness was no longer sufficient to establish a due process violation, and that the Johnson opinion had been abrogated by the Supreme Court's subsequent decision in Bordenkircher v. Hayes. In Bordenkircher the Court found no due process violation when a prosecutor threatened to increase charges against a defendant during plea negotiations and later made good that threat after negotiations had broken down.

The majority in Goodwin rejected this contention on several grounds. Initially noting its great reluctance to overrule an earlier decision without an en banc hearing, it further observed that actual vindictiveness may have been present in Goodwin's case. Bordenkircher was construed as limited to its facts, that is, when the "risk" of increased charges is made known to the defendant during plea negotiations. In Goodwin, as noted earlier, no prior mention was made of the prosecutor's intention (or ability) to obtain a felony indictment if the defendant refused to plead guilty to the misdemeanor charges. The court considered this a basic factual distinction making Bordenkircher inapplicable; the earlier Johnson rule was considered as limited only within the specific factual situation of Bordenkircher (where the risk of increased charges is made known to the defendant prior to his decision to exercise constitutional rights).

49 417 U.S. 21 (1974). Blackledge recognized a denial of due process in a case where a prosecutor brought more serious charges against a defendant who had requested a trial de novo in a court of record after being convicted of a misdemeanor in magistrate court. It held such additional charges constitutionally impermissible when a realistic likelihood of vindictiveness, rather than actual vindictiveness, was shown.


51 637 F.2d at 253-55.

52 Id. at 254; see supra note 40.

53 637 F.2d at 253-54 (citing Bordenkircher v. Hayes, 434 U.S. at 362 (1978)), wherein the Court emphasized that its holding in Bordenkircher was limited to the facts of that case.
Judge Widener's dissenting opinion complained that the majority's rule required "that a prosecuting attorney must see to it that formal charges are initially filed for the most serious offense of which defendant might be guilty or else forever forfeit the right to prosecute. . . ."54 It should be noted, however, that Goodwin limits the prosecutor's discretion only after a defendant chooses to exercise a fundamental constitutional right; this may, as here, occur during plea negotiations or may not occur until appeal after trial. Indeed, requiring that the most serious charges possible be brought prior to plea negotiations would seem to work to the prosecutor's advantage in bargaining. With due deference to the need for prosecutorial discretion, the "evil" perceived by Judge Widener might be argued to impose nothing harsher than due diligence, in thorough preparation, on a prosecutor.

Focusing further on the problems of the prosecutor, the dissent claimed the majority's result inconsistent with Bordenkircher: "While an expressed threat of retaliation will not suffice to set aside a conviction because of Bordenkircher, merely a general risk of retaliation without the expressed threat will. . . ."55 This observation ignores the majority's underlying rationale, which considered the effect of such a risk on a defendant's decision to exercise a constitutional right; it does, however, recognize the rule's practical effect on a prosecutor conducting plea negotiations: when in doubt, threaten early and often.

Kenneth P. Simons, II

III. SPEEDY TRIAL

The U.S. Court of Appeals for the Fourth Circuit has apparently given its final word in the epic saga of Dr. Jeffrey MacDonald, accused of the brutal murder of his pregnant wife and two daughters over a decade ago. In the most recent proceeding to be styled United States v. MacDonald,56 the Fourth Circuit denied a government request that an en banc panel be convened for a rehearing. Although the per curiam denial was without an

54 637 F.2d at 257.
55 Id.
56 635 F.2d 1115 (4th Cir. 1980).
opinion, it was accompanied by a brief dissenting statement by Chief Judge Haynsworth; another, relatively lengthy dissent, representing the views of four other judges of the circuit, and a statement by the author of the panel opinion as well. This is one of many extraordinary aspects of what Chief Judge Haynsworth labeled a "very extraordinary case;" the opinions of the dissenting judges have, however, taken on a still greater significance: the Supreme Court has, on the government's petition, granted certiorari to review the case.

At issue is the propriety of the Fourth Circuit's interpretation of the sixth amendment's speedy trial guarantee; the appeals court has twice held that MacDonald was deprived of that right due to the government's delay in prosecution. The unique facts of the case illustrate the difficulty in resolving it under the relatively limited jurisprudence generated by the speedy trial clause.

At the time of the crimes involved, Dr. Jeffrey R. MacDonald was an Army surgeon, commissioned as a Captain and stationed with his family at Ft. Bragg, North Carolina. In the early morning hours of February 17, 1970, the military police received a call from MacDonald, went to the family's quarters, and found MacDonald's pregnant wife and two daughters had been clubbed and stabbed to death. MacDonald told them that he had been asleep on a couch when he was awakened by his wife's screams; had himself been attacked, stabbed, and knocked unconscious by three or four intruders in "hippie" garb, and had summoned help upon regaining consciousness.

The Army's Criminal Investigation Division (CID), the Federal Bureau of Investigation, and the local police immediately began investigating the crime. No direct evidence

---

57 Id. at 1116.
59 Id. at 1123 (Murnaghan, J.)
60 Id. at 1116.
62 "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial." U.S. CONST. amend. VI.
of the purported intruders was found, however, an analysis of several items of physical evidence cast further doubt on MacDonald's initial statement. On April 6, 1970, MacDonald was informed he was suspected of having committed the murders, relieved of his medical duties, and restricted to quarters by his commanding officer. On May 1, 1970, the Army formally charged him with the murders.

Shortly thereafter the Army held an Article 32 hearing, the military procedure for determining whether an accused should be held for a general court martial. After hearing extensive testimony from both sides, the presiding officer recommended the charges against MacDonald be dismissed; MacDonald was subsequently granted an honorable discharge in December 1970, moved to California, and began the private practice of medicine.

Investigation of the crime continued. The Justice Department urged the Army's CID to continue its investigation; over the next year and a half the CID conducted nearly 700 interviews, examined physical evidence from the crime, and forwarded that evidence to the forensic laboratories of the FBI and Treasury Department. Though practicing medicine in California, MacDonald cooperated with these efforts, even offering to submit to additional interviews, while personally and through his attorneys repeatedly requesting that some final decision be made by the Justice Department to end the protracted investigation of his case. When Justice Department attorneys finally began presenting the case to a grand jury, in August of 1974, the FBI made still further investigatory efforts, including exhumation of the victims. Although MacDonald waived his right to remain silent, testifying before the grand jury for more than five days, a true bill was returned against him on January 24, 1975.

64 U.S.M.J. art. 32, 10 U.S.C. § 832 (1976). See generally E. Byrne, Military Law §§ 319-20 (1976). The difficulty of accurately analogizing this hearing and other Army action in the MacDonald case to civilian criminal procedure is a major point of contention in the opinions in this case.


66 MacDonald was indicted for violation of 18 U.S.C. § 1111(b), which extends federal jurisdiction to cases of murder committed on federal property.
In a pre-trial motion MacDonald sought to have his indictment dismissed, contending, inter alia, that he had been denied his right to a speedy trial; the district court denied the motion, and MacDonald took an interlocutory appeal to the Court of Appeals for the Fourth Circuit. In a split opinion, the Fourth Circuit found that MacDonald had been deprived of that right, and ordered that the indictment be dismissed with prejudice. The Supreme Court, however, reversed the Fourth Circuit's ruling, holding that a pre-trial motion for dismissal on speedy trial grounds was not an appropriate subject for interlocutory appeal. MacDonald's next effort, appealing denial of another pre-trial motion to dismiss, grounded in double jeopardy, was rejected by the Fourth Circuit, and the Supreme Court denied certiorari.

When subsequently tried for the murders of nine years before, MacDonald was convicted of the first-degree murder of one child and second-degree murder of his wife and other daughter; he was sentenced to three consecutive life terms.

Following the verdict MacDonald again appealed to the Fourth Circuit; he alleged several errors in the rulings at trial, but also contended, predictably, that the delay prior to indictment had deprived him of his sixth amendment right to a speedy trial, as well as his rights to due process. Acknowledging that "[o]n MacDonald's sixth amendment claim, we do not write on a clean slate," the Fourth Circuit, reiterating much of the reasoning and conclusions of its earlier opinion, reversed his convic-

68 531 F.2d at 209.
69 The Court did not address the merits of the claim but, recognizing the elements of such a claim, stated "[t]he resolution of a speedy trial claim necessitates a careful assessment of the particular facts of the case . . . and are best considered only after the relevant facts have been developed at trial." 435 U.S. at 858.
71 The district judge's views as to the merits of MacDonald's sixth amendment claim may be found in his denial of a motion for admission to bail pending appeal. United States v. MacDonald, 485 F.Supp. 1087, 1089 (E.D.N.C. 1979).
72 United States v. MacDonald, 632 F.2d 258 (4th Cir. 1980).
73 Id. at 260.
tion. A motion by the government for an en banc rehearing was denied; as noted earlier however, the Supreme Court has accepted the case for review.75

The sixth amendment's first clause states simply that "[i]n all criminal prosecutions the accused shall enjoy the right to a speedy and public trial."76 It was not until 1967, however, that this directive was recognized as a fundamental constitutional right.77 In the years since the Supreme Court has attempted to define its parameters.

The Court's first exposition of relatively specific guidelines was in 1972, in Barker v. Wingo.78 There the Court recognized the interest of the accused in avoiding lengthy pre-trial incarceration, anxiety, and prejudice to his ability to defend himself caused by the passage of time; the Court also recognized a societal interest in speedy administration of the criminal justice system. Noting that any attempt to compare these interests with the need to accord wide latitude to prosecutorial discretion would necessarily require an ad hoc balancing approach,79 the Court stated:

We can do little more than identify some of the factors courts should consider in determining whether a particular defendant has been deprived of his rights . . . we identify four such factors: length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant.80

---

74 United States v. MacDonald, 635 F.2d 1115 (4th Cir. 1980). See infra note 75.
75 The questions presented in the petition for certiorari may be summarized as: 1) Does the Speedy Trial Clause apply to period during which a person is not under arrest or formally accused of a crime? and 2) Were defendant's constitutional rights violated by delay between commission of crime and return of indictment? 49 U.S.L.W. 3842 (May 12, 1981). Insofar as space limitations of the Federal Overview prevent a more thorough treatment which would include an analysis of sixth amendment decisions as well as the history of this case, this discussion will focus on the questions presented in the petition for certiorari.
76 U.S. CONST. amend. VI.
79 Id. at 530.
80 Id.
The Court stated that the first factor, length of delay, "is to some extent a triggering mechanism." This seems merely to acknowledge that some substantial or unusual delay should be shown to merit further consideration of a speedy trial claim, but the Court added that the delay shown must be "presumptively prejudicial." Although the Court expressly declined to set any particular period of time that would be considered presumptively prejudicial in every case, it did suggest an analysis should be based on the nature of the crime. The lower federal courts however, have frequently attempted to quantify the length of delay that must be shown.

The reason for the delay, the second factor considered under Barker, is usually not so troublesome. Of course, if the defendant's actions were the sole reason for the delay, he has not been deprived of his right. If the delay is attributable to prosecutorial inaction, vindictiveness, or desire to gain a tactical advantage over the accused, the delay will weigh heavily against the government. Any delay caused by overcrowded dockets, or similar reasons, is considered "neutral," weighing against the government but seldom given much effect.

In discussing when a defendant has sufficiently asserted his right to a speedy trial, the Barker court disapproved the "demand-waiver" rule then in effect in many jurisdictions. Under that rule, any delay alleged by a defendant could be considered only from the date the defendant complained of it, whether by demanding trial or moving to dismiss his charges on that ground. The Court considered such a requirement "insensitive to a right which we have deemed fundamental," but still insisted that an accused in some way affirmatively assert the right to sustain a claim of its denial.

The final factor, prejudice to the defendant, was explained as representing three interests of the defendant. Those interests included "(i) to prevent oppressive pre-trial incarcera-

---

81 Id.
82 Id.
83 Id.
84 See Note, Right to Speedy Trial in Civilian Prosecution Denied By Delay Following Dismissal of Military Charges, 17 Wake Forest L. Rev. 89, 97 n.77 (1981).
86 Id. at 529-30.
tion; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired.37 Moore v. Arizona,38 decided the following year, held that a showing of possible, rather than actual, prejudice to the defense was sufficient to sustain the burden of proof.39 Barker's guidelines are to be employed in determining when an accused has not "enjoy[ed] the right to a speedy . . . trial;"40 what moved the five judges of the circuit to dissent from the denial of en banc rehearing, however,41 was their insistence that the delay in MacDonald's case occurred during a period when he was not sufficiently "accused" for sixth amendment purposes. The majority in both MacDonald opinions42 ruled that the date of the indictment was not determinative of the length of delay when the defendant had been arrested for the crime prior to his indictment.

Relying on United States v. Marion,43 the Supreme Court's most detailed examination to date of when the speedy trial right attaches44 the majority observed that "the Court carefully avoided adopting a simplistic rule that pre-indictment delay is always immaterial. Instead, referring to the values which the speedy trial provision safeguards, the Court explained that arrest furnishes an alternative starting point for determining the length of delay."45 The prevailing majority went on to hold that

37 Id. at 532; the third interest was regarded as the most significant of the three.
39 Barker v. Wingo held that possible rather than actual prejudice was sufficient to sustain the burden of proof. But see United States v. Lovasco, 431 U.S. 783 (1977) (showing of actual prejudice required under due process analysis for lengthy pre-trial delay). United States v. MacDonald, 632 F.2d 258 (4th Cir. 1980) (Bryan, J., dissenting) (MacDonald was not able to demonstrate at trial that his defense had actually been prejudiced by the passage of time, but had raised the due process issue on appeal).
40 U.S. Const. amend. VI.
41 Which apparently also moved the Supreme Court to grant certiorari. See supra note 75.
42 See supra note 63.
44 See also Dillingham v. United States, 423 U.S. 64 (1975).
45 United States v. MacDonald, 531 F.2d 196, 202 (1976). The specific language from United States v. Marion, 404 U.S. 307 (1971), cited by the MacDonald I court is:

[It] is readily understandable that it is either a formal indictment or information or else the actual restraints imposed by arrest and holding to
MacDonald's initial military arrest had satisfied the *Marion* standard for beginning the length of delay.

Both the dissent in the *MacDonald II* opinion and the five judges dissenting from denial of the motion for rehearing objected to the majority's beginning date.\(^9\) The interval between MacDonald's discharge from the Army\(^7\) and his indictment, they argued, should not have been included in determining the length of delay. They reasoned that, as no formal charges were then pending against MacDonald there was no trial, or even a hearing he could demand, as there is no right to demand arrest or indictment;\(^8\) thus no right to a speedy trial had attached. Equating the Article 32 proceedings with dismissal of an indictment, the dissenting judges asserted that "in assessing the length of delay under a sixth amendment claim it is not appropriate to take into account periods during which a defendant was under no accusation."\(^99\)

The dissent based this conclusion on the holding of the Sixth Circuit in *United States v. Martin*,\(^100\) that of the Ninth Circuit in *Arnold v. McCarthy*,\(^101\) and provisions of the Speedy Trial Act.\(^102\) As to the latter, its "legislative imprimatur"\(^103\) notwithstanding, the majority in *MacDonald I* observed that "the Act does not purport to mark the bounds of the sixth amendment's speedy trial clause,"\(^104\) a point apparently conceded sub silentio by the dissent.

---

\(^9\) *See* United States v. MacDonald, 632 F.2d 258, (4th Cir. 1980); United States v. MacDonald, 635 F.2d 1115, (4th Cir. 1980).


\(^8\) *See* Hoffa v. United States, 385 U.S. 293, 310 (1966).

\(^9\) *See* 635 F.2d at 1116.


\(^100\) 566 F.2d 1377 (9th Cir. 1973).


\(^102\) 635 F.2d at 1118.

\(^103\) 531 F.2d 196, 204 n.15 (4th Cir. 1976).
Assuming the accuracy of the dissent's characterization of the Article 32 proceedings as the equivalent of an indictment, the cited cases would require that the pre-indictment (1975) period be excluded from calculation of the length of delay; the authority of these cases, however, seems open to question.

This can be seen initially in the statement of Judge Murnaghan, author of the MacDonald II opinion:

Few, if any absolutes exist in our judicial system. Each case presents its peculiar difficulties. While in U.S. v. Martin the court said that the interval should not count, it did not say that it would never count. . . . For authority applicable to this particular case, the decision in [MacDonald I] is more compelling than a decision on different facts in another circuit.103

Judge Murnaghan's emphasis of the unique factual aspects of MacDonald's is not without basis; unlike the defendants in Martin and Arnold v. McCarthy, MacDonald enjoyed the dubious distinction of being the first person ever tried in a civilian court after being cleared by the military of charges arising from the same conduct.106 Perhaps most importantly, neither Martin nor Arnold v. McCarthy advanced any direct authority for their determination that upon dismissal of an indictment a defendant is no longer "accused," notwithstanding the fact that the defendant is then at the mercy of the prosecutor's discretion in seeking reindictment.107

Proper calculation of the length of delay in MacDonald's case was regarded as critical by the dissenting judges: under their reading of Barker v. Wingo, elimination of the pre-indictment period from the calculation would be "completely dispositive"108 of his sixth amendment claim. It is doubtful,

103 Id. at 199.
106 Id. (citation omitted).
107 However, the use of nolle prosequi in Klopfer v. North Carolina, 386 U.S. 213 (1967) was disallowed. Although one of the deficiencies of North Carolina's use of the device in Klopfer was its effect in tolling the statute of limitations, no such limitation protected MacDonald in this case, as Congress has declared there shall be no limitation of time on a prosecution for murder. 18 U.S.C. § 3281 (1948). See also United States v. Narcisco, 446 F. Supp. 225 (E.D. Mich. 1977) (definition of "capital offense" under 18 U.S.C. § 3281 not dependent on current constitutionality of death penalty).
108 635 F.2d at 1116.
however, that such a position could be justified upon a careful reading of *Barker*, despite the tendency of some lower courts to attempt to impose quantitative analyses upon the length of delay.\footnote{See Note, *Right to Speedy Trial in Civilian Prosecution Denied By Delay Following Dismissal of Military Charges*, 17 WAKE FOREST L. REV. 89, 97 n.76 (1981).}

The dissenting opinion places heavy reliance on the length of delay as a "triggering" factor, asserting that "[u]nless such delay is sufficiently lengthy to be assessed as 'presumptively prejudicial,' the claim of constitutional violation must fail and it is unnecessary for the court to consider any of the other factors listed in *Barker.*"\footnote{635 F.2d at 1116 (citing *Barker* v. Wingo, 407 U.S. 514 (1967)) (footnote omitted).} This observation is based on *Barker*'s language that states "[t]he length of delay is to some extent a triggering mechanism. Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance."\footnote{407 U.S. at 530.}

Such an inflexible interpretation by the dissent overlooks the Court's prefacatory remarks in *Barker* immediately preceding the passage quoted above, as well as further qualifications later in the opinion:

> A balancing test necessarily compels courts to approach speedy trial cases on an ad hoc basis. We can do little more than identify some of the factors which courts should assess in determining whether a particular defendant had been deprived of his right. . . . We regard none of the four factors identified above as either a necessary or sufficient condition to the finding of a deprivation of the right to a speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant. In sum, these factors have no talismanic qualities; courts must still engage in a difficult and sensitive balancing process.\footnote{Id. at 530, 533 (emphasis added).}

The language above would seem to indicate that, at least in theory, a presumptively prejudicial delay is not always a necessary condition to finding a deprivation of the right. Moreover, the extraordinary amount of national publicity generated by MacDonald's case, as well as the interference in
his professional life caused by the protracted investigation
would seem to clearly be other circumstances that may be relevant, and that must be considered together with the four Barker factors.

Finally, further evidence that the length of delay, or any other of the Barker factors, were not intended to be so unswervingly applied can be found by the Court's approving citation of an opinion by then-District Judge Frankel. 13 In United States v. Mann14 Judge Frankel observed that if the absence or insufficiency of any one factor "could by itself defeat the defendant in every case, it would certainly not be aptly described as being merely one of four 'factors' to be weighed together." Thus it appears that the length of delay should have been accorded the initially-determinative, "threshold" status attributed it by the dissenting judges.

By their citation of Martin, Arnold v. McCarthy, and the Speedy Trial Act, perhaps the judges who dissented from the denial of rehearing were actually making an unspoken point: that the majority opinion, like Martin and Arnold v. McCarthy, was really supported only by differing interpretations of the "arrest or holding to answer" language of United States v. Marion.15

Regardless of whether this was their intention, it seems a valid criticism of the majority's holding. The majority might have better supported its conclusion by looking to a case with facts more closely resembling MacDonald's case. An alternative basis for concluding that MacDonald's right to a speedy trial attached before his indictment, regardless of the fact that no charge was technically pending against him, might be found in a decision of the First Circuit.

13 Id. at 533 n.36 (citing United States v. Mann, 291 F. Supp. 268 (S.D.N.Y. 1968)).
15 In Mann the defendant appealed the denial of his motion to dismiss his indictment for tax evasion when he faced trial nine years after the date of the indictment and sixteen years after the alleged criminal acts; the motion was sustained on the basis of a sixth amendment speedy trial claim, with the court emphasizing the length of delay as one of the factors to be weighed, not merely as a triggering mechanism; the court also found that the delay had actually prejudiced the defendant's ability to meet the charges due to loss of records and recollections, but found none of the other factors that would later be set forth in Barker to be present.
In *United States v. Cabral,*¹⁷⁷ where the defendant appealed his possessory firearms conviction,¹⁷⁸ the court held that Cabral had become an "accused" for sixth amendment purposes on the date the firearm was delivered to a federal officer; this notwithstanding the fact that no federal arrest had been made and no federal indictment had been returned at the time. Cabral had been arrested by a Maine state police officer investigating Cabral's possible involvement in auto theft. When initially taken into custody, however, the officer told Cabral that he was being arrested for possession of a sawed-off shotgun, "as openers."¹¹⁹ Immediately thereafter Cabral was told he was also under arrest for grand larceny; he was arraigned on the state grand larceny charge, and held for past parole violations in another state; he was never formally charged by the state for possession of the illegal firearm, and the state grand larceny charge was dismissed sometime later. Although the firearm was delivered to federal authorities three days after Cabral's arrest by the state officers, no indictment was returned until some fifteen months later.

In determining when Cabral had become an "accused" for sixth amendment purposes, the court stated:

[T]he testimony of [the state police officer] unequivocally demonstrates that he arrested appellant for possession of the illegal firearm. The government's prosecution of this charge was initiated only three days later when [the federal authorities received the gun]. Under these circumstances . . . it is clear that appellant's right to a speedy trial crystallized at the time of his initial arrest.¹²⁰

Thus, the failure of the state to pursue the firearms violation beyond the initial, warrantless arrest apparently did not prevent Cabral from being sufficiently "accused" when federal agents received the weapon three days later.

If the analysis in *Cabral* is applied to MacDonald's case, the exact character, or indeed the result (dismissal), of MacDonald's

¹⁷⁷ 475 F.2d 715 (1st Cir. 1973).
¹²⁰ 475 F.2d at 718.
¹²⁰ *Id.*
military charges may no longer be as problematical in determining the beginning date of his delay. MacDonald and Cabral were both initially arrested for acts later charged as crimes by federal indictment; Cabral’s violation of the Maine firearms statute was never pursued beyond arrest, and MacDonald’s military charges were dismissed prior to the convening of a general court martial, but in both cases the defendants were subject to federal prosecution after their arrests, jurisdiction being present from the time the crimes were committed. Cabral recognized that once arrested, a defendant can be considered “[held] to answer”\(^{121}\) the federal charge, for speedy trial purposes, when evidence of the crime is brought to the attention of the federal authorities. If this rule is applied to the facts of MacDonald’s case, all that would remain to be determined is whether MacDonald’s “prosecution . . . was initiated”\(^{122}\) at the time of the initial FBI involvement (in February of 1970) or upon the forwarding of the CID report to the Justice Department (in June of 1972).\(^{123}\)

It is obvious that, at least in Cabral’s case, and at the point of initial FBI involvement in MacDonald’s case, the federal action at the time Cabral’s “right to a speedy trial crystalized”\(^{124}\) was far more investigatory than prosecutorial in nature. Nonetheless, in both cases the formal federal charges were brought only after the arresting authorities had failed to pursue their charges to conviction; the very basis of the speedy trial guarantee is prompt resolution of charges a defendant has been held to answer.

The unique factual aspects of United States v. MacDonald probably had an inordinate effect on the decisions of both the majority of the Fourth Circuit’s judges and the judges dissenting from denial of the motion for rehearing en banc. The heinous nature of the crime MacDonald was convicted of, the

---

122 475 F.2d 715, 717 (1st Cir. 1973).
123 Use of the later date would not affect the majority’s conclusion, since after the CID report reached the Justice Department “there were still more than two years in which essentially all that the government did was debate, in a desultory way, whether to press for prosecution or to drop the case. That delay was unreasonable and inexcusable.” 632 F.2d at 263 n.2.
124 475 F.2d 715, 718 (1st Cir. 1973).
immense amount of publicity surrounding his subsequent legal entanglements, and an apparently lackadaisical investigation by the Justice Department made MacDonald both an unusual and difficult case.

In determining whether a defendant may be considered an "accused" for sixth amendment purposes during the period between successive indictments, or at least following dismissal of military charges, it seems that the only guidance available to courts is their subjective interpretation of when the defendant has been "[held] to answer."\(^{125}\) The proper significance to be accorded the length of delay in assessing a sixth amendment claim is also to some extent an unknown quantity. Perhaps, having granted certiorari, the Supreme Court will clarify what the sixth amendment's speedy trial guarantee means in the present case, as well as future ones.

*Kenneth P. Simons, II*

---

CIVIL RIGHTS

I. SECTION 1983—CONDUCT OF A PRIVATE ACTOR

In Lugar v. Edmonson Oil, the Fourth Circuit held that "merely invoking a state's judicial process and thereafter participating in it solely as private litigant . . . with the state officials who then independently conduct and enforce that process" is not sufficient to satisfy the "under color of state law" element in a 42 U.S.C. § 1983 Civil Rights action.²

Lugar operated a truck stop in Pittsylvania County, Virginia, and was indebted to Edmondson Oil. Edmondson Oil commenced a civil action to recover on the debt in Virginia state court, and ancillary to that action petitioned for a prejudgment attachment and levy of certain of Lugar's property to prevent its dissipation as a judgment satisfaction source.³ This petition was granted. Pursuant to the Virginia statute, a hearing was held on the propriety of the attachment and levy. A state trial judge dismissed the attachment on the basis that Edmondson Oil had failed to carry the burden imposed by the state law to establish by evidence the grounds for attachment as alleged in the petition. Subsequently Lugar brought a § 1983 action against Edmondson Oil alleging that Edmondson Oil's actions were maliciously inspired and that such use of state officials and procedures resulted in damages and a deprivation of his property under color of state law. The constitutionality of the Virginia attachment statute and procedures were not raised as an issue in the action by either party. The district court concluded that Lugar had failed to state a claim upon which relief could be granted under § 1983 and dismissed the complaint, whereupon Lugar filed an appeal.⁴

In affirming, the Fourth Circuit analyzed "the three basic patterns into which § 1983 litigation has tended to fall." The first pattern, which makes up the bulk of § 1983 litigation,  

---
² Id. at 1069.  
³ Id. at 1061.  
⁴ Id.  
⁵ Id. at 1063.
scrutinizes the conduct of state officials acting in their official, legislative, or executive capacities. The second pattern scrutinizes the conduct of private actors where such action can be attributed to the state through practical compulsion by the state, a symbiotic state-actor relationship, or through a delegation or abdication to the actor of an exclusive sovereign function. The court viewed a § 1983 action as possessing two interdependent elements: 1) state action, and 2) under color of state law. If either of these elements are deficient the § 1983 action must fail. In an analysis of the first two patterns it is unnecessary to separate the two elements as by their nature they are satisfied. Such is not the case with the third pattern of § 1983 actions. This pattern scrutinizes the "conduct of a private actor [when it] is alleged to have combined with the acts of state officials at the enforcement or operational level to cause deprivation of a secured right."

The court notes that the analysis of the instant case falls into the third pattern of conduct. Thus the court analyzed the contributing conduct of Edmondson Oil and its relationship to the conduct of the state. Viewing that it is the state's conduct, whether action or inaction, not the private conduct, that gives rise to a possible § 1983 cause of action, the court adopted a totality of conduct approach. The product of this analysis was a court developed test.

'Joint engagement or participation' of private actor with state official implies such a usurpation or corruption of official power by the latter that the independence of the enforcing official has been compromised to a significant degree and the official powers have become in practical effect shared by the two.

Thus the court held that although an attachment and levy satisfy the state action element of a § 1983 action, a complaint alleging only the invoking of a state's judicial process fails to allege that Edmondson Oil acted under color of state law.

---

6 Id.
7 Id. at 1063-64.
8 Id. at 1064 (emphasis added).
9 Id.
10 Id. at 1069.
11 Id.
Judge Butzner, Winter and Murnaghan dissented, on grounds that the state attachment proceeding allowed a private party to enlist the services of state officials for private advantage before judicial action, and therefore acting under color of state law, thus satisfying one element of a § 1983 action. They also believed that the Supreme Court’s decision in Fuentes v. Shevin\(^\text{12}\) established a right to a hearing in attachment cases, and that the second element of § 1983 was satisfied. Dismissal of the action was, therefore, improper.\(^\text{13}\)

II. INTERSTATE AGREEMENT ON DETAINERS

In Bush v. Muncy,\(^\text{14}\) the Fourth Circuit, in an opinion written by Judge Phillips, held that procedural violations of federal rights secured to a prisoner by the Interstate Agreement on Detainers (IAD)\(^\text{15}\) do not entitle the prisoner to habeas corpus relief under 28 U.S.C. § 2254, but does support a cause of action for injunctive and monetary relief under a civil rights action through 42 U.S.C. § 1983.\(^\text{16}\)

In June 1975, Bush was charged with unlawful possession of drugs in Virginia. Later the same month, Maryland authorities, in two separate county jurisdictions, filed detainers against Bush stemming from unrelated drug charges. Bush pleaded guilty to the Virginia charge and was sentenced to Virginia cor-


\(^{13}\) 639 F.2d at 1070-72.

\(^{14}\) 659 F.2d 402 (4th Cir. 1981).

\(^{15}\) Id. at 404 n.1:

The IAD was promulgated by the Council of State Governments about 1957. See Davidson v. State, 18 Md. App. 61, 61 n.1, 305 A.2d 474, 476 n.1 (1973), and has since been adopted by forty-eight states and by Congress on behalf of the United States and the District of Columbia. See 84 Stat. 1397 (1970). The purpose of the IAD is to provide a common procedure for the disposition of detainers between states to avoid, as much as possible, the disruption of a prisoner’s course of rehabilitation and a prisoner’s anxiety with regard to charges pending against him in other states. See, e.g., United States v. Bryant, 612 F.2d 806, 809-10 (4th Cir. 1979); Hoss v. State, 266 Md. 136, 142-44, 292 A.2d 48, 52-53 (1972); State v. Lippolis, 107 N.J. Super. 137, 143-44, 257 A.2d 705, 709-10 (App. Div. 1969).

See also MD. CODE ANN. art. 27, §§ 616K-616R, (1957), and VA. CODE §§ 53-304.2-53-304.8 (1970).

\(^{16}\) Id. at 404.
rectional facilities. In November of 1975, Bush was taken to Maryland for trial on only one of the county's pending charges against him. Bush was returned to Virginia to await trial. In February of 1976 he was returned to Maryland, tried and acquitted. At this time there was no disposition of the other pending Maryland charges. In July 1976, Bush was transferred, over his protest, to Maryland to face the second set of charges. At this trial he was convicted.

Bush maintained that in transferring him to Maryland to face the first set of charges, Virginia authorities failed to comply with IAD article IV(b) which required notification of "all other officers and appropriate courts in the receiving State who have lodged detainers against the prisoner." The record supported Bush's contention. Bush argued that the second set of charges, upon which he was convicted, should have been dismissed as violative of IAD article IV(e) requiring a defendant to be tried on all charges pending in the receiving state prior to his return to the sending state. Bush unsuccessfully pursued relief through state court. The state court held that a "supplementary" provision in the Maryland IAD requiring "actual notice" by Maryland authorities of a prisoner's request to have all pending charges adjudicated controlled. Thus, since no actual notice was given by Bush to Maryland authorities, Maryland's IAD article IV(e) was not violated. Bush filed both § 1983 and habeas corpus claims in the district court. The district court dismissed all claims and Bush appealed.

The Fourth Circuit agreed to hear the case and fashioned the questions as follows:

The threshold question presented by the appeal is whether the IAD is federal law, the violation of which might be remediable under either 28 U.S.C. § 2254 or 42 U.S.C. § 1983. Assuming the question is answered in the affirmative, the issue then arises whether there was alleged a violation of the IAD in this case that might, in fact, entitle Bush to relief under either or both of those sections.

---

17 18 U.S.C. App. 2, art. IV(b).
18 Id. art. IV(e).
19 659 F.2d at 412 n.10.
20 Id. at 405-06.
21 Id. at 406.
The Fourth Circuit quickly answered the first part of the question. Citing Maine v. Thiboutot and Cuyler v. Adams the court recognized the Supreme Court's view that the IAD is federal law since it is a compact among the states sanctioned by Congress. Because it is federal law, § 1983 can provide relief for IAD violations. Relief was limited to physical, mental or emotional injury and is limited to monetary damages and injunctive relief.

The Fourth Circuit left to the district court the question of whether the Maryland supplementary provision substantially altered the operation of the IAD or merely clarified or expressed its intended meaning. The court expressed the view that the former could not stand as federal law while the latter would be permissible.

The court also addressed the issue of whether habeas corpus relief sounded under 28 U.S.C. § 2254 for a violation of the trial before return provisions of the IAD. The court held that "because it does not involve any fundamental right historically considered critical to the protection of the criminal accused against unfair prosecution and trial by the state, we hold that, under David [v. United States], it is not a violation subject to collateral review under 28 U.S.C. § 2254." The lower court's dismissal of the habeas corpus action was therefore proper and affirmed. The Fourth Circuit, however, instructed the lower court to allow the § 1983 action upon remand.

III. PRISONERS' RIGHTS

On September 14, 1981, the Fourth Circuit in Nelson v. Collins decided a consolidated appeal of three cases addressing the issue of overcrowded prison conditions and its relationship to the constitutional protection against cruel and unusual punish-

---

22 448 U.S. 1 (1980).
24 659 F.2d at 406.
25 Id. at 414 n.13.
26 Id. at 412.
28 659 F.2d at 409.
29 659 F.2d 420 (4th Cir. 1981).
The cases under review included *Johnson v. Levine*,30 *Nelson v. Collins*,31 and *Washington v. Keller*.32 Writing for the court Judge Russell held that double celling is not a per se violation of an inmate's constitutional protection against cruel and unusual punishment but is only one factor to be considered in examining the totality of circumstances surrounding the inmate's claim.

The cases arose out of Maryland's unexpected delays in the construction of new prison facilities which were necessary to accommodate the rise in the prison population and a district court's order33 to take action and relieve the overcrowded prison conditions. Maryland began construction of the Jessup Annex to relieve overcrowded prison conditions. However, even prior to its completion the new annex was already expected to be overcrowded. The Maryland authorities planned and instituted a system of double bunking in dormitory style prison housing and double celling in their other prisons. To prevent this double celling and double bunking the district court found the Maryland authorities in contempt of its previous order to relieve the overcrowding despite the good faith attempts by the State of Maryland to comply. The district court levied civil sanctions as well as ordered the redistribution of some of Maryland's prison population to federal facilities.34 Maryland appealed the lower court's order arguing that the rise in the prison population and the construction delays were beyond their control and that they had made good faith attempts to comply with the district court order. They also argued that the actions taken by the State of Maryland did not constitute cruel and unusual punishment as proscribed by the constitution.

The Fourth Circuit agreed to review the cases. The court framed the issues as follows:

(1) Did the District Court err in ruling that double celling at the Jessup Annex was unconstitutional and represented an invalid method of relieving overcrowding conditions at the three prisons involved?

34 659 F.2d at 422-23.
(2) Was the District Court in error in refusing to permit double bunking in certain of the dormitories in MHC [Maryland House of Correction]?  
(3) Did the District Court err in ordering the transfer of fifty inmates at MHC and MRDCC [Maryland Reception, Diagnostic & Classification Center] to federal prisons in its order of April 27, 1981?25

The Fourth Circuit in finding the district court’s analysis insufficient and its decisions premature affirmed in part and remanded. Relying upon Bell v. Wolfish36 and the recently decided Rhodes v. Chapman,37 the court held that the district court erred in holding that double ceiling was per se unconstitutional.38 Double ceiling, while not desirable, was held as not necessarily unconstitutional.39 The totality of circumstances assessed upon a reasonableness standard as measured by contemporary standards of decency is the analytical focal point in deciding whether a state prison official has violated a prisoner’s right to be free from cruel and unusual punishment.

Thus the cases were remanded to the district court to expand their scope of inquiry into these issues. The civil contempt order was specifically vacated as also being governed by a reasonableness standard.40 Additionally the court affirmed that part of the district court order upholding the authority to transfer prisoners to other facilities if a factual basis as discussed above is present.41

Chief Judge Winter, joined by Judges Butzner and Phillips, concurred with the court’s opinion except with respect to the court’s view on the transferring of the fifty prisoners. They preferred a remand of this issue for a broader, factual determination, rather than an affirmation of that portion of the district court’s order, and thus were more consistent in their approach to the issues at bar.42

James B. Zimarowski

---

25 Id. at 423.  
28 659 F.2d at 429.  
29 Id. at 427-28.  
30 Id. at 429.  
31 Id.  
32 Id. at 429-31.