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Judge Robert R. Merhige, Jr. - Strict Constructionist Weathers the Storm

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NOTE

JUDGE ROBERT MERHIGE, JR.—STRICT CONSTRUCTIONIST WEATHERS THE STORM

I. INTRODUCTION*

On August 27, 1967, Robert R. Merhige, Jr.,[1] was commissioned as a United States District Court Judge for the Eastern District of Virginia, the embarkment upon what many members of the legal community have labeled a controversial judicial career.[2] However, examination of Judge Merhige's numerous decisions reveals that his image as a disputatius public figure has been more than a function of his flare for vehemently enforcing pronouncements and policies of the Supreme Court. The man, who created fervor throughout this state and the South with his publicly chastised busing decisions of the early 1970s, has been a victim of timing rather than an implementor of unprecedented legal reasoning. He was appointed to the bench amidst the turmoil of an emotionally charged social climate and at a time when the federal forum was beginning to expand and blossom for a host of grievances such as school busing, sexual discrimination and prisoners rights. Oddly, throughout his judicial career, Judge Merhige has perceived himself as a "strict constructionist"[3] striving avidly to adhere to

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1. Judge Merhige has a close affiliation with the University of Richmond Law School, from which he received his LL.B. and honorary J.D. degrees and for which he has continuously served as an Adjunct Professor of Law since the 1973 academic year teaching a course in Trial Tactics. His association with the Richmond community is also deeply rooted in that for over twenty years prior to his judicial appointment, Judge Merhige was a prominent civil and criminal litigator for the firm of Bremner, Merhige, Byrne, Montgomery and Baber. Interview with The Honorable Robert R. Merhige, United States District Court Judge, in Richmond, Virginia (June 27, 1978).

2. Richmond Times-Dispatch, August 28, 1977 at G-1. Although community criticism surrounded Judge Merhige during the height of the school desegregation lawsuits, he has subsequently been awarded numerous civic honors and awards in appreciation of his community service, some of which include: Distinguished Service Award 1977, Virginia Trial Lawyers Association; Citizen of the Year 1976, Richmond Urban League; Special Award 1972, National Bar Association.

3. Interview with The Honorable Robert R. Merhige, United States District Court Judge, in Richmond, Virginia (June 27, 1978).

judicial precedents in decisions transcending the spectrum of constitutional issues. It is the intent of this note to examine Judge Merhige's judicial philosophy in the areas of equal protection, the first amendment, due process and administrative law as compared to federal precedents and trends existing at the time of his opinions.

II. ADMINISTRATIVE LAW

The rapid growth of administrative agencies and their impact on private citizens[1] justifies an analysis of Judge Merhige's opinions in the field. This section of the note will focus on his more significant decisions relating to jurisdiction, standing, scope of review and exhaustion of remedies in administrative litigation.

A. JURISDICTION

In *Etheridge v. Schlesinger*[2] Judge Merhige asserted that the Administrative Procedure Act[3] (APA) was a self-executing grant of jurisdiction to the federal courts.[4] The significance of this conclusion lies in making the federal court an available forum to plaintiffs who cannot otherwise satisfy jurisdictional requirements.[5] Judge Merhige noted that there was a split of authority with regard to this proposition, and therefore, either position could have been credibly argued given the nature of the Supreme Court decisions[6] and the ambiguities of the APA itself.[7] The situation was further

1. In 1952 Mr. Justice Jackson asserted, "The rise of administrative bodies probably has been the most significant legal trend of the last century and perhaps more values today are affected by their decisions than by those of all the courts, review of administrative decisions apart." FTC v. Ruberoid Co., 343 U.S. 470, 487 (1952) (dissenting opinion).

2. 362 F. Supp. 198 (E.D. Va. 1973). The plaintiffs, five active members of the Naval Reserve, sought an injunction against enforcement of a Navy grooming regulation. The regulation in question permitted Navy personnel to wear wigs only for cosmetic purposes and to cover baldness. The plaintiffs wished to wear "short hair wigs" to conceal their longer hair during weekend reserve drills.

3. 5 U.S.C. §§ 501 *et seq* (1977).

4. 362 F. Supp. at 200-01. Jurisdiction was also maintained under 28 U.S.C.A. §§ 1331, 1361 (1966). In Brown v. Schlesinger, 365 F. Supp. 1204 (E.D. Va. 1973), a case very similar to *Ethridge* on its facts, Judge Merhige ruled that jurisdiction could not be maintained under the APA where the plaintiff has not exhausted administrative remedies. 365 F. Supp. at 1207, n. 1.

5. The most notable incapacity would be failure to satisfy the amount in controversy requirement.

6. In Rusk v. Cort, 369 U.S. 367, 380-81 (1962), Mr. Justice Brennan referred to § 10 of the APA and the Declaratory Judgement Act as "general grants of jurisdiction." However, at least one commentator believes that this was inadvertent dictum, asserted without purposeful focus. *See* K. DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES, §23.02 (1976). *See also*

complicated by the split among the circuits.[8]

Today, the question is largely academic. While there was good reason for the Supreme Court to accept the APA as an independent grant of jurisdiction,[9] subsequent amendments to Sections 702 and 704 weakened proponents' arguments.[10] The Supreme Court interpreted the 1976 amendments and legislative history in *Califano v. Sanders*,[11] concluding that both

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Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 410 (1971); Abbott Laboratories v. Gardner, 387 U.S. 136, 141 (1967).

7. The jurisdictional ambiguity of the APA is found primarily in §§702 and 703. These sections (as in force at the time of *Etheridge)* provide in part:

> §702. Right of Review. A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, *is entitled to judicial review thereof.* (emphasis added).
>
> §703. Form and Venue of Proceeding. The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute, or in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory see *of competent jurisdiction.* (emphasis added).

8. In the following cases, these circuits held the APA to be an independent grant of jurisdiction: Bradley v. Weinberger, 483 F.2d 410 (1st Cir. 1973); In re School Board of Broward Co., 475 F.2d 1117 (5th Cir. 1973); Brandt v. Hickel, 427 F.2d 53 (9th Cir. 1970); Brennan v. Udall, 379 F.2d 803 (10th Cir. 1967); Deering Milliken, Inc. v. Johnston, 295 F.2d 856 (4th Cir. 1961). But the following circuits had rejected the doctrine: Twin Cities Chippewa Tribal Council v. Minnesota Chippewa Tribe, 370 F.2d 529 (8th Cir. 1967); Zimmerman v. United States Government, 422 F.2d 326 (3rd Cir. 1970). The Second Circuit was in conflict: *cf.* Toilet Goods Assoc. v. Gardner, 360 F.2d 677 (2d Cir. 1966), *aff'd* 387 U.S. 158 (1967) (holding the APA as a source of jurisdiction) *and* Aguayo v. Richardson, 473 F.2d 1090 (2d Cir. 1973) (where Judge Friendly writes perhaps the best argument why the APA is not a source of jurisdiction).

Judge Merhige did not cite *Deering Milliken* in his consideration of the APA—jurisdiction issue.

9. *See* C. Byse and J. Fiocca, *Section 1361 of the Mandamus and Venue Act of 1962 and "nonstatutory" Judicial Review of Federal Administrative Action,* 81 HARV. L. REV. 308, 326-31 (1967).

10. Pub. L. 94-574, §2, 90 Stat. 2721 (1976) removed the sovereign immunity defense of §702 in certain cases, resolved the uncertainty in §703 as to who should be named as defendant when the United States is sued and, most importantly for our purposes, eliminated the $10,000 amount in controversy requirement of 28 U.S.C. §1331 and 5 U.S.C. §703 in actions against the United States, its agencies, or an officer-employee of an agency acting in his official capacity. This was accomplished by the addition to §1331(a) of "except that no such sum or value shall be required in any such action brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity."

It is clear that Congress agreed with the main argument of the self-executing proponents, *i.e.,* that judicial review was often precluded for failure to satisfy the amount in controversy requirement. Consequently, the exception to §1331 was created. But Congress was also clear that it intended review to be limited to §1331 or other specific jurisdictional statutes, and not the APA, generally. *See,* H.R. REP. No. 94-1656, 94th Cong., 2d Sess. 5, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 6121; Davis, *supra* note 6 (1977 Supp.)

11. 430 U.S. 99 (1977).

the reading and history evidence a Congressional intent to deny self-executing jurisdiction under the APA.

But even in light of the *Califano* decision, Judge Merhige's statement in *Etheridge* was a valid judicial interpretation. It should be remembered that the circuits were in disagreement,[12] the statute was ambiguous[13] and the Supreme Court had intimated a similar principle.[14] Nor should the opinion be criticized for expanding the jurisdiction of the court. The exception was narrow and should not be read as granting review of agency actions not already reviewable. Ruling the APA as an independent grant of jurisdiction did no more than open a forum to a plaintiff whose injury from agency actions did not exceed $10,000. In cases where the plaintiff's injury could not be given a dollar value, APA jurisdiction could be crucial. These were the considerations discussed by Congress prior to the 1976 amendments; and presumably, the same factors weighed heavily in Judge Merhige's decision.

B. STANDING

Even if the court has subject matter jurisdiction, the agency action will go unchallenged if no plaintiff has standing. Standing is a two-edged concept, encompassing both the case and controversy requirement of Article III of the United States Constitution[15] and varying degrees of judicial discretion.[16] In essence, the standing inquiry focuses on whether the plaintiff has "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends. . . ."[17]

The Article III requirements of standing involve a three part inquiry.[18] A plaintiff may satisfy these requisites and still be denied standing based upon self-imposed prudential limitations.[19] Plaintiffs suing under the APA

12. *See* note 8, *supra.*

13. *See* note 7, *supra.*

14. *See* note 6, *supra.* Additionally, in *Califano* the Court stated, "[t]hree decisions of this Court arguably have assumed, with little discussion, that the APA is an independent grant of subject matter jurisdiction." *Califano,* 430 U.S. 105, *(citing Overton Park, Abbott Laboratories,* and *Rusk.)*

15. U.S. CONST., art. III, §2.

16. *See* United States v. Richardson, 418 U.S. 166, 188-97 (1974) (Powell, J., concurring).

17. Baker v. Carr, 369 U.S. 186, 204 (1962).

18. As part of the Article III case and controversy requirement, standing requires the plaintiff to show he has suffered an injury in fact, which was caused by the actions of the defendant which are being challenged and the availability of a judicially manageable remedy which will redress the injury. *See* Warth v. Seldin, 422 U.S. 490, 498-99 (1975); and Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 43-5 (1976).

19. The prudential limitations are those designed to insure that the Court will not render

appear to have a fourth requirement to fulfill[20] and it is the nature of this inquiry that is considered next.

The period 1970-75 might be dubbed the era of the "environment"[21] since the injury-in-fact requirement was held to include non-economic injuries.[22] *Campaign Clean Water, Inc. v. Ruckelshaus,*[23] decided by Judge Merhige in 1973, examined the standing of an environmental group. The opinion clearly explains the plaintiff's injury in fact[24] and the requisite causation.[25] There is no discussion of the third element of standing, namely, the efficacy of an available judicial remedy; but the remedy was obvious and the omission may be excused on this ground.[26] The most curious portion of the *Campaign Clean Water* opinion is its discussion of the zone of interest test.[27] First articulated in *Data Processing,* it is rarely seen in decisions of suits not brought under the APA. But in concluding his discussion of standing under the APA, Judge Merhige remarked that in non-APA cases, "generally the same standards apply . . . ."[28] This is a most interesting statement and a cursory reading might conclude the statement was either inadvertent or simply a generalization.

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advisory opinions or decisions on generalized grievances. *See* Warth v. Seldin, 422 U.S. 490 (1975); and United States v. Richardson, 418 U.S. 166 (1974) (Powell, J., concurring).

20. *See* Association of Data Processing Serv. Org's, Inc. v. Camp, 397 U.S. 150 (1970).

21. DAVIS, *supra* note 6, at §22.00.

22. Sierra Club v. Morton, 405 U.S. 727, 734 (1972). This does not mean, however, that the injury in fact analysis may be disregarded. During the period 1970-75 the Court decided seventeen cases with opinions on standing, and in all of them the main issue was whether the plaintiff had suffered an injury in fact. DAVIS, *supra* note 6, at §22.00.

23. 361 F. Supp. 689 (E.D. Va. 1973). The plaintiff, Campaign Clean Water, was an environmental group seeking to compel the administrator of the Environmental Protection Agency to allot among the states funds authorized by Congress. Congress had appropriated $11,000,000,000 for waste treatment plant construction. The President vetoed the bill and Congress overrode the veto. Pursuant to the President's orders, the administrator released only $5,000,000,000 of the funds.

24. The injury in fact was the impact of continued pollution to the plaintiff's commercial and sport fishing and recreational uses of Virginia waters.

25. Because impoundment of the funds delayed or prevented the planning and construction of waste treatment facilities, the necessary causation between the injury and the defendant's actions was present.

26. Either mandamus, injunction, or declaratory judgment would, if issued, provide relief because either one would necessitate the release of the impounded funds. While not addressed in the standing inquiry, the appropriateness of the requested remedy was considered in a later discussion. Campaign Clean Water, Inc. v. Ruckelshaus, 361 F. Supp. 689, 700 (E.D. Va. 1973).

27. 361 F. Supp. at 693. The "zone of interest" test is a prudential, rather than constitutional, limitation. To satisfy this limitation, the plaintiff must be "*arguably* within the zone of interests to be protected or regulated by the statute" in question. Data Processing Serv., Inc. v. Camp, 397 U.S. 150, 153 (1970) (emphasis added).

28. Campaign Clean Water, Inc. v. Ruckelshaus, 361 F. Supp. 689 (E.D. Va. 1973).

The standing doctrine in APA and non-APA cases differs chiefly by the "zone of interest test" of the former. But analysis of substance rather than form indicates that the distinction between APA and non-APA cases is at least minimal, if not immeasurable. The search for substance leads to this initial inquiry: What purpose does the "zone of interest test" serve? The better view is it permits the courts to apply prudential limitations where Congress has created a right to sue.[29] Under this reasoning, a denial of standing for prudential reasons can be rationalized by concluding Congress did not intend to protect the particular plaintiff's interest.[30]

Thus, equating "zone of interest" with prudential limitations leads to the conclusion that standing in APA and non-APA cases *is "generally the same."* There is merit in reaching the fundamental purpose of the test. First, it discards wooden and artificial distinctions. It gives the "zone of interest test" meaning by impliedly defining what is meant by "arguably".[31] Moreover it provides the means to retreat from the almost "open door" policy of standing which began to evolve in the early seventies.[32] In short, it preserves standing as a constitutional and prudential limitation on the courts, available as a safeguard from public actions and generalized grievances. Yet, it is sufficiently flexible to permit judicial discretion and involvement. Thus, what seemed to be an inadvertent statement rests on sound legal theory and policy bases.

C. Scope of Review

Once it has been determined that a court has jurisdiction and that the plaintiff has standing to challenge an agency, the next important inquiry is how closely will the agency's evidence be scrutinized. Nearly all judicial review of agency evidence in the federal courts is governed by the substan-

29. This was the view espoused by Mr. Justice Powell in his concurring opinion in *Richardson.* Davis, on the other hand, asserts that the zone of interest test is meaningless. However, Davis agrees with Mr. Justice Powell that the standing requirements need to be tightened, but chooses to raise the injury in fact barrier, instead.

30. Even while arguing for stricter standing requirements, Mr. Justice Powell admits his reluctance to deny standing for prudential reasons when Congress has specifically given the plaintiff the right to sue. The zone of interest test allows the Court to deny standing without directly confronting Congress and, at the same time, preserving the understanding of the prudential limitations. *See* United States v. Richardson, 418 U.S. 166 (1974).

31. The zone of interest test is prefaced by "arguably" and could greatly expand standing and thereby make the inquiry without impact. But by requiring "arguably" to meet the prudential requirements of the court, the term takes on a meaning traditionally associated with standing.

32. The broad concept of standing criticized by Mr. Justice Powell in *Richardson, supra* note 16, has been narrowed. *See* Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26 (1976); Warth v. Seldin, 422 U.S. 490 (1975).

tial evidence rule.[33] Not all review, however, is subjected to this low level inquiry. Subject to Section 701 of the APA,[34] Section 706 of the Act states "the reviewing court shall decide all relevant questions of law. . . ."[35] This implies that the court will use its independent judgment when reviewing agency decisions of questions of law.[36] Unfortunately, this only hides the greater problems.[37] Of particular difficulty are those questions which involve a mixture of fact (entitled to low-level scrutiny) and law (subject to the court's independent judgment). The courts have not fully accepted the advice of one noted commentator,[38] and have instead adopted what seems to be an ad hoc approach.[39]

Rodgers v. Cohen[40] is a clear example of the application of the substantial evidence rule. Judge Merhige was bound by the agency decision if there was substantial support in the evidence.[41] The evidence gathered by the agency and offered by the plaintiff included a wide spectrum,[42] however, relying on census information, the agency concluded that the plain-

33. DAVIS, *supra* note 6, at §29.00. First articulated in Consolidated Edison Co. v. NLRB, 305 U.S. 197 (1938), the substantial evidence rule is valid even today.

34. The qualification of 5 U.S.C. §701 is "(a) This chapter applies, according to the provisions thereof, except to the extent that—(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law." Because this section reads "except to the extent that," some, but not necessarily all, agency action may be statutorily beyond review or committed to agency discretion.

35. 5 U.S.C. §706 (1977).

36. DAVIS, *supra* note 6, at §30.00.

37. Davis points out:

> Much the most troublesome problem about scope of review is to discover what it is that guides the courts in choosing between the reasonableness test and the rightness test, that is, between the 'rational basis' test and substitution of judgment, in reviewing the application of legal concepts to the facts of a case.

K. DAVIS, ADMINISTRATIVE LAW §30.01 (3rd ed. 1972).

38. Davis suggests that when a court is confronted with a mixed question of fact and law it should make a dual inquiry. The court should apply the substantial evidence rule to the fact element and substitute its judgment on the issue of law. DAVIS, *supra* note 37, at §30.01.

39. DAVIS, *supra* note 6, at §30.00.

40. 304 F. Supp. 91 (E.D. Va. 1968). In May, 1966, the plaintiff filed an application with the Social Security Administration for widow's insurance benefits pursuant to 42 U.S.C. §202(e)(1). That section provides old age insurance benefits to a widow who has attained the age of sixty and was married to a fully insured individual at least nine months prior to his death. The Social Security Administration denied the request, solely on its conclusion that the plaintiff was not sixty years old.

41. 42 U.S.C. §405(g), in pertinent part provides: "The findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive."

42. Plaintiff alleged she was told by her mother that she was born in 1901. But when applying for Social Security cards in 1939 and 1940 she gave 1911 and 1913 as her year of birth. On a marriage license application plaintiff listed 1913 as her birth year. And, in 1962, in applying for death benefits at her husband's death, she listed 1909 as the year of her birth.

tiff's date of birth was December 9, 1909. Judge Merhige ruled that this determination had support in the evidence.[43]

Clearly, the substantial evidence rule was the proper scope of review, for this was obviously a factual determination. Interestingly, Judge Merhige was willing to substitute judgment on an implied question of law—in reaching its conclusion, did the agency apply standards consistent with its mandate from Congress? In this case the question of law is whether the census enumeration deserves the greatest weight. Based upon prior case law[44] and long standing agency regulations,[45] the answer was, "Yes."

Recognizing the implied questions of law is extremely important if the plaintiff is to have meaningful judicial review of agency decisions. This is especially true since the agency's factual conclusions will be reviewed according to the low-level substantial evidence rule. Because the conclusions are reviewed narrowly, the validity of the process by which these determinations are made (an inquiry peculiarly within the court's competence) is essential to meaningful review.

The substantial evidence rule was also applicable in *Harris v. Richardson.*[46] In reversing the agency's decision, Judge Merhige demonstrated the often quoted principle that the "substantial evidence rule is made of rubber, not wood."[47] An alternative ground for reversal was the agency's reliance on an inappropriate test in reaching its decision.

Judge Merhige concluded that the agency had not shown, by substantial evidence, that the services rendered to the plaintiff were custodial in nature.[48] Standing alone this decision is unique.[49] It gains further significance

43. The hearing examiner gave greatest weight to the 1920 Census which enumerated the plaintiff as a child of ten years. Plaintiff was not enumerated in the 1910 Census, however.

44. 304 F. Supp. at 93, (citing Tindle v. Celebrezze, 210 F. Supp. 912 (S.D. Cal. 1962)).

45. 20 C.F.R. §404.703(c).

46. 357 F. Supp. 242 (E.D. Va. 1973). Plaintiff appealed a denial of medicare treatment for services rendered to her at an Extended Care Facility (ECF). These payments were authorized by 42 U.S.C. §1395(d). The hearing examiner ruled the plaintiff was eligible, but the Appeals Council, on its own motion, reviewed and reversed on the grounds that the treatments received at the ECF were custodial rather than skilled nursing in nature, and thus excluded by 42 U.S.C. §1395y(a)(9). "Custodial care" is not defined in the Act, but "skilled nursing service" is expounded in 20 C.F.R. §§405.127 and 405.128.

47. DAVIS, *supra* note 37, at §29.02.

48. Significantly, it was shown that the plaintiff's physical condition while at the ECF required close supervision. Her doctors also testified of her need for skilled nursing care. And, the treatments received at the ECF were identical to those rendered in the hospital. 357 F. Supp. 242, 245-46 (E.D. Va. 1973).

49. Because the substantial evidence rule affords only a narrow scope of review, the agency is in an excellent position to have its factual determinations upheld by the court. The *Harris* decision is additionally noteworthy because Judge Merhige did not defer to the agency where:

when it is realized that again Judge Merhige substituted his own judgment on a threshold question without hesitation.

The agency advanced a broad definition of "custodial care,"[50] but Judge Merhige rejected it, relying on Fourth Circuit authority.[51] Thus, the denial of benefits could not stand, for in reaching its decision, the agency relied on the wrong definition. Under the facts of *Harris,* this seems the better rationale for reversal.[52]

D. Exhaustion of Remedies

Judicial review of agency action may be precluded (or at least delayed) when the court invokes the exhaustion of remedies doctrine. The exhaustion doctrine, like the ripeness issue,[53] focuses on when judicial review may be sought. Despite broad language to the contrary,[54] exhaustion is not always a prerequisite of review.[55] Thus, the important question is not whether a plaintiff has exhausted the administrative remedies, but whether he must do so. One noted commentator believes that the Supreme

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1) the agency was arguably better suited to determine whether particular services were custodial; 2) the agency is respected for its expertise; and 3) Congress delegated wide discretion to the agency.

50. The agency's Appeals Council argued that "custodial care" was any service which need not be administered by trained personnel.

51. Ridgely v. Secretary of H.E.W., 345 F. Supp. 983 (D. Md. 1972), *aff'd* 475 F.2d 1222 (4th Cir. 1973). In *Ridgely,* it was held that H.E.W. should consider not only the treatment provided, but every aspect of the plaintiff's condition in deciding whether care is custodial.

52. One legitimate criticism of the *Harris* decision is that the agency decision may have been supported by substantial evidence. But even if this were true, the ultimate result should still have been the same, on the basis of the question of law interpreted by the court.

The issue in *Harris* might have been framed in terms of a mixed question of fact and law, with the determination of what treatments were provided as the fact portion and whether these services were custodial as the question of law. This rationale would have given the same result since the court would substitute its judgment on the question of law.

53: The ripeness doctrine and the exhaustion doctrine both concentrate on the timing of judicial review. Ripeness prevents the courts from deciding issues not yet justiciable, while the exhaustion doctrine allows the agency full opportunity to correct errors internally.

54. In Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 50-51 (1938), the Supreme Court said, "the long settled rule of judicial administration [is] that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted. . . ."

55. Exhaustion is not required when the effort would be futile, United States *ex rel.* Marrero v. Warden, Lewisburg Penitentiary, 483 F.2d 656 (3rd Cir. 1973), *rev'd on other grounds,* 417 U.S. 653 (1974); or if the administrative remedy is inadequate, Plano v. Baker, 504 F.2d 595 (2d Cir. 1974); or if the suit is challenging a state agency's action under 42 U.S.C. §1983, Steffel v. Thompson, 415 U.S. 452 (1974); or if the sole issue is one of constitutional law, Weinberger v. Salfi, 422 U.S. 749 (1975); or where there is a clear lack of agency jurisdiction and exhaustion will cause the plaintiff to suffer irreparable injury, K. Davis, Administrative Law 135 (6th ed. 1977).

Court has not been clear in answering this question.[56] This necessarily makes the lower court decisions of exhaustion issues more significant[57] and justifies our examination of Judge Merhige's attitudes on the subject.

The exhaustion doctrine may be defended on grounds of maintaining agency autonomy and respecting its expertise.[58] Exhaustion also allows the agency opportunities to correct its own mistakes and assures that the court will have the benefit of a complete factual record.

In some instances it is fairly clear whether the court will or will not require exhaustion of administrative procedures.[59] But in the gray areas, the courts seem to balance the threatened harm to the plaintiff if he is forced to exhaust against the disadvantage to the agency from circumventing its internal procedures.[60]

This balancing process was evident in *Serghini v. City of Richmond.*[61] The Department of Labor's motion to dismiss was granted because the plaintiff had failed to exhaust available administrative remedies. In respecting the Department's autonomy, Judge Merhige commented, "it appears manifestly unfair"[62] to permit the plaintiff to attack the agency without first subscribing to its rules for resolving disputes. Review at this point would not only deprive the agency of autonomy and preclude it from correcting its own errors, it would also allow the plaintiff early review without a showing of threatened injury.[63] Additionally, administrative procedures were both available and adequate,[64] so that on balance, requiring exhaustion was the better course.[65]

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56. DAVIS, *supra* note 6, at §20.01.

57. *Id.*

58. McKart v. United States, 395 U.S. 185 (1969).

59. *See* note 55, *supra* for instances where exhaustion will not be required. Exhaustion usually *is* required when a statute commands it, where the issues are within the agency's specialization and when intra-agency procedures are as likely to provide relief as the court. DAVIS, *supra* note 6, at §20.01.

60. United States v. Newman, 478 F.2d 829 (8th Cir. 1973).

61. 426 F. Supp. 326 (E.D. Va. 1977). The plaintiff alleged that he had been illegally denied employment opportunities under the Comprehensive Employment and Training Act programs, 29 U.S.C. §§801-992 (Supp. V 1975). The plaintiff sued the Department of Labor contending that it did not supervise administration of the program so as to insure that funds would not be used in a discriminatory manner. The State administrative remedies were exhausted, but the plaintiff did not file a letter of complaint with the Department pursuant to 29 C.F.R. §98.42 (1976) which initiated the agency's review.

62. 426 F. Supp. at 328.

63. *Id.*

64. A letter of complaint triggers an investigation, (29 C.F.R. §98.45) which may be followed by a formal hearing (29 C.F.R. §§98.46-98.47) and eventually, by judicial review (29 C.F.R. §98.49).

65. Judge Merhige cited League of United Am. Citizens v. Hampton, 501 F.2d 843 (D.C.

Exhaustion was also required in *Russi v. Weinberger.*[66] Judge Merhige held that the plaintiff need not exhaust administrative remedies in order to challenge the constitutionality of the agency action suspending payments prior to a hearing. This question, however, had already been settled[67] and consideration was thus unnecessary. Likewise, the failure of the agency to abide by its own notice provisions could be considered prior to exhaustion,[68] but the court did not have the requisite facts before it.[69] Thus, the purely legal claims which did not require exhaustion, for other reasons, could not be reviewed. And exhaustion was necessary for review of factual issues for if the agency provided adequate remedies, the agency's expertise exceeded that of the court and the plaintiff was not threatened with irreparable injury.[70]

E. Conclusion

The opinions which have been discussed in this section are representative of Judge Merhige's decisions in administrative law. Relying in part upon an equivocal Fourth Circuit decision, but possibly more upon his own

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Cir. 1974) as authority for this conclusion. In *League*, the court held a plaintiff should be required to exhaust administrative remedies:

(1) When the agency has authority to grant the relief the plaintiff seeks;
(2) To discourage forum shopping and promote judicial economy;
(3) When a judicial decision would amount to an advisory opinion;
(4) When the agency action may grant relief or alter the issues;
(5) When the issues require the agency's expertise;
(6) To allow uniformity in the application of agency regulations; and
(7) When agency action may help to clarify the issues.

Id. at 847.

66. 373 F. Supp. 1349 (E.D. Va. 1974). The plaintiffs challenged an H.E.W. decision to suspend compensation for services rendered by the plaintiffs until after a review by Blue Shield of the plaintiffs' charges for those services. H.E.W. suspected that payments to the plaintiffs had been excessive, and if supported by an investigation, the money withheld would be used to offset the excess balance.

67. The Fourth Circuit, in Wilson Clinic and Hosp., Inc. v. Blue Cross of South Carolina, 494 F.2d 50 (4th Cir. 1974), upheld the power of the H.E.W. Secretary to hold current obligations as an offset against past overpayments.

68. 373 F. Supp. at 1355, (citing Leedom v. Kyne, 358 U.S. 184 (1958)). In *Leedom*, Mr. Justice Whittaker ruled that overturning an agency decision that exceeded its authority was not review of an agency decision and so exhaustion would not be necessary.

69. Although the issue was properly before the court, there were no facts upon which to address the question. The plaintiff's allegation was not in affidavit form and the defendant's brief did not mention any failure of notice. 373 F. Supp. at 1355.

70. The plaintiffs were not threatened with irreparable injury because if H.E.W.'s suspicions were found true, the plaintiffs would have been required to reimburse the agency. And, if the agency was wrong, the funds could then be paid to the plaintiffs. Judge Merhige noted that the doctor-plaintiffs in this case were not experiencing the "brutal need" which has been present in Goldberg v. Kelley, 397 U.S. 254 (1970). 373 F. Supp. at 1352-53.

belief that the federal courts should be an available forum, Judge Merhige ruled that the APA was a self-executing jurisdictional grant. As previously noted, this belief was shared by several commentators. The question also was addressed by most of the circuits and Congress in 1976. His cogent interpretation of standing in the *Campaign Clean Water* decision demonstrates a perception not only of the legal theories behind standing, but the policy implications as well. While maintaining his respect for agency expertise and autonomy, Judge Merhige was quick to seize upon the implied questions of law and mixed questions of fact and law which courts often overlook in their deference to the agency. This close scrutiny of agency conclusions of law was tempered, however, by his understanding of the exhaustion doctrine. In short, it is submitted that these opinions evidence Judge Merhige's willingness to review agency decisions if and only if, the issues are properly before the court. Neither private citizen, nor administrative agency could demand more, or hope for less.

III. THE SIXTH AMENDMENT AND POST-CONVICTION RELIEF

The sixth amendment to the Constitution guarantees certain rights to the citizens of the United States involved in criminal proceedings, including the right to the assistance of counsel, the right to a public and speedy trial, and the right to be tried by an impartial jury.[1] Judge Merhige has made substantial contributions to this area of the law, as evidenced by an examination of his decisions.[2]

A. THE RIGHT TO THE ASSISTANCE OF COUNSEL

1. *Indigent's Right to Counsel—Misdemeanors*

Since 1963, the sixth amendment has been interpreted to require the assistance of counsel for a defendant charged with a felony.[3] This standard

1. U.S. CONST. amend. VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

2. Because Judge Merhige has not had the opportunity to hear post-conviction relief petitions alleging a denial of the right to a public trial, the right to compulsory process for obtaining witnesses, nor the right to confrontation of witnesses, such topics will not be discussed herein.

3. Gideon v. Wainwright, 372 U.S. 335 (1963).

has been made obligatory on the states by the due process clause of the fourteenth amendment.[4] Prior to the United States Supreme Court's decision in *Argersinger v. Hamlin*,[5] the court avoided addressing the issue of whether an indigent defendant charged with a misdemeanor was entitled to counsel at the state's expense.[6]

In 1971, Judge Merhige was given the opportunity to address this issue in *Marston v. Oliver*.[7] Marston, an indigent defendant, had been convicted in state court of driving on a suspended operator's license. On appeal to the state circuit court, Marston's request for a court appointed attorney was denied. He was fined and sentenced to twelve months in jail. While imprisoned, Marston filed a petition for habeas corpus, challenging the denial of counsel. Although released prior to the habeas corpus proceeding, Marston was subsequently barred from operating a motor vehicle in Virginia, having come within the habitual offender statute.[8] On a hearing of the defendant's petition for post-conviction relief, Judge Merhige held that the case was not moot in light of the very real civil disability of a ten year license revocation. After noting that the language of *Gideon v. Wainwright*[9] was not limited to felonies,[10] Judge Merhige declared Marston's conviction void. In doing so, he indicated his views concerning the importance of the assistance of counsel:

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4. *Id.*

5. 407 U.S. 25 (1972).

6. State v. DeJoseph, 3 Conn. Cir. 624, 222 A.2d 752, *cert. denied*, 385 U.S. 982 (1966); Winters v. Beck, 239 Ark. 1093, 397 S.W.2d 364 (1966), *cert. denied*, 385 U.S. 907 (1966).

7. 324 F. Supp. 691 (E.D. Va. 1971), *rev'd*, 485 F.2d 705 (4th Cir. 1973).

8. VA. CODE ANN. §46.1-387.1-.12 (Cum. Supp. 1978).

9. Gideon, *supra* note 3.

10. Marston v. Oliver, 324 F. Supp. 691 (E.D. Va. 1971).

> Not only these precedents but also reason and reflection require us to recognize that in our adversary system of criminal justice, *any person haled into court*, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth. Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try *defendants accused of crime*. Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an ordered society. Similarly, there are few defendants *charged with crime*, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses. That government hires lawyers to prosecute and defendants who have money hire lawyers to defend are the strongest indications of the widespread belief that lawyers *in criminal courts* are necessities, not luxuries. The right of one *charged with crime* to counsel may not be fundamental and essential in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This nobel ideal cannot be realized if the *poor man charged with crime* has to face his accusers without a lawyer to assist him. (emphasis added).

Id. at 694.

> This Court has concluded that at least when a layman faces possible imprisonment for twelve months, whatever the label of his offense, due process requires that he have the opportunity to defend himself by counsel. The distinction between felonies and misdemeanors is only a matter of designations applied by state law; federal constitutional rights do not hinge on such superficialities. The consequences of a misdemeanor conviction may well be more serious than those flowing from many felony convictions. . . .No logical justification exists for drawing any distinction between Marston's misdemeanor case and that of an indigent felony defendant.[11]

2. *Misdemeanant's Post-Conviction Relief from Civil Disability*

Judge Merhige's holding that a denial of a misdemeanant's request for counsel can in some instances be proper grounds for post-conviction relief was not unprecedented in its day.[12] It was distinctive, however, in that it applied to a defendant who was free from custody but suffering from a resulting civil disability. The significance of this decision can be determined by examining subsequent United States Supreme Court decisions.

In June, 1972, the United States Supreme Court in the case of *Argersinger v. Hamlin,*[13] citing the same language of *Gideon v. Wainwright*[14] that Judge Merhige had cited in *Marston,*[15] held that absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony unless he was represented by counsel at his trial.[16] The Supreme Court, however, did not deem it necessary at that time to address the issue of its retroactive application nor the issue concerning resulting civil disabilities. These omissions set the stage for conflict between Judge Merhige and the Fourth Circuit Court of Appeals.

In October, 1973, the Fourth Circuit Court of Appeals reversed Judge Merhige's decision of *Marston v. Oliver.*[17] Although the Fourth Circuit *did* indicate in dictum that *Argersinger* was to have retroactive application

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11. *Id.* at 696. Judge Merhige indicated that misdemeanants can be subjected to imprisonment just as felons are. He further noted that any incarceration over thirty days, more or less, will usually result in the loss of employment with substantial detriment to the defendant and his family.

12. Harvey v. State, 340 F. 2d 263 (5th Cir. 1965); Beck v. Winters, 407 F.2d 125 (8th Cir.), *cert. denied,* 395 U.S. 963 (1969).

13. 407 U.S. 25 (1972). This case involved an indigent defendant seeking habeas corpus relief from an uncounselled conviction resulting in a six month jail sentence. The Supreme Court of Florida denied petitioner relief. On certiorari, however, the United States Supreme Court refersed, thereby granting relief.

14. *Id.* at 31-32.

15. Marston, *supra* note 10.

16. 407 U.S. at 37.

17. 485 F.2d 705 (4th Cir. 1973).

concerning actual incarceration,[18] the court refused to allow its retroactive application to relieve the defendant of the collateral civil consequences of his conviction.[19] In so deciding, the Fourth Circuit concentrated on that part of the *Argersinger* opinion concerning the loss of liberty[20] and concluded that *Argersinger* invalidated only the imprisonment, leaving the conviction itself intact.[21] The Fourth Circuit went on to say:

> In sum, *Argersinger* purported to excise from the misdemeanor conviction only those consequences that related to loss of liberty and imprisonment. So far as its direct or collateral consequences are the loss of liberty on the part of the defendant, *Argersinger* applies. . . . But, where it does not carry with it these collateral consequences of imprisonment but merely lays the defendant open to a civil proceeding wherein a civil right may be involved, we are of the opinion that neither the purpose nor limited scope of the decision in *Argersinger* suggests that its principle should be applied retroactively.[22]

Although the Fourth Circuit has steadfastly denied that Judge Merhige's interpretation of *Argersinger* concerning retroactive application to civilly disabled defendants is correct, this denial is questionable in light of the Supreme Court's decision in *Berry v. City of Cincinnati.*[23] In *Berry,* the Supreme Court held that *Argersinger* is to be retroactively applied where the defendant is faced with actual incarceration should his conviction be upheld. However, the court did not limit its holding to that situation, but went on to say that those convicted prior to the decision in *Argersinger* are entitled to the constitutional rule enunciated in that case so long as that person can allege and prove a "bona fide, existing case or controversy sufficient to invoke the jurisdiction of a federal court."[24]

In explaining the "case or controversy" requirement, the United States Supreme Court cited *Carafas v. LaVallee,*[25] *Sibron v. New York,*[26] and

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18. *Id.* at 707-708.

19. *Id.* at 708, 710.

20. 407 U.S. at 40. There Mr. Justice Douglas stated: "The run of misdemeanors will not be affected by today's ruling. But in those that end up in the actual deprivation of a person's liberty, the accused will receive the benefit of 'the guiding hand of counsel' so necessary when one's liberty is in jeopardy." *Id.*

21. Marston, *supra* note 17 at 707.

22. *Id.* at 708.

23. 414 U.S. 29 (1973). The Supreme Court of the United States held that *Argersinger* should have retroactive application. Petitioner was released on bail pending action on his claim and would have been reincarcerated had the United States Supreme Court left the Ohio court's decision undisturbed. The Ohio court had decided that *Argersinger* should not be applied retroactively.

24. *Id.* at 30.

25. 391 U.S. 234 (1968).

26. 392 U.S. 40 (1968).

Ginsberg v. New York.[27] In each case, it was held that a case is not moot merely because the sentence has been fully served when there exist collateral legal consequences that might flow from the improper conviction.[28]

Berry suggests that the retroactive application of *Argersinger* should not be limited to cases where the present effect of the prior unconstitutional conviction is imprisonment, but should extend to cases where its application would relieve the defendant of present collateral consequences not involving a loss of liberty. The cases cited by the Supreme Court make no distinction between imprisonment and other legal consequences. Yet, in spite of *Berry*, the Fourth Circuit Court of Appeals has subsequently affirmed its decision in *Marston.*[29] As a result, it appears that Judge Merhige has been forced to make some personally uncomfortable "tongue in cheek" decisions.[30]

Thus, it seems that we must await future United States Supreme Court decisions to determine whether Judge Merhige's prophesy of *Argersinger* will be extended to the realm of collateral consequences. In light of *Berry*, it appears that it will be. Apparently, nothing less than that will relieve Judge Merhige from the judicial restraints imposed by the Fourth Circuit Court of Appeals. In any event, Judge Merhige's legal principles and personal feelings are clear. The assistance of counsel is fundamental to our system of criminal process. The right extends to all persons facing possible imprisonment. Uncounselled convictions should be void *ab initio* and grounds for post-conviction relief. Finally, *Argersinger* should relieve the defendant not only of any incarceration, but of any civil disabilities arising out of an uncounselled conviction.

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27. 390 U.S. 629 (1968).

28. In *Carafas, supra* note 25, the collateral consequences flowing from petitioner's burglary and grand larceny convictions were that he could not engage in certain businesses, could not serve as an official in a labor union for a specified time, could not vote in any state election and could not serve as a juror.

In *Sibron, supra* note 26, the collateral consequences flowing from the defendant's heroin possession conviction were that the conviction might later be used to impeach his character should it be placed in issue in any future criminal trial. Here, the court said: "[A] criminal case is moot only if it is shown that there is no possibility that any collateral legal consequences will be imposed on the basis of the challenged conviction." 392 U.S. at 57.

In *Ginsburg, supra* note 27, the resulting collateral consequences of defendant's conviction for selling improper literature to minors was that it might prevent the petitioner from obtaining licensing under state and municipal laws regulating various lawful occupations.

29. Morgan v. Juvenile and Domestic Relations Court, 491 F.2d 456 (4th Cir. 1974). *Morgan*, like *Marston*, involved a misdemeanant who had been imprisoned as a result of an uncounselled conviction, but who had been released from jail prior to a decision on his *Argersinger* claim.

30. *See, e.g.*, Hensley v. Ranson, 373 F. Supp. 88 (E.D. Va. 1974); Whorley v. Brillhart, 373 F. Supp. 83 (E.D. Va. 1974).

3. *Effectiveness of Counsel*

Although the discussion thus far has centered around the constitutional right to counsel in criminal proceedings, it is well established that presence of counsel alone is not sufficient—the assistance must be effective.[31] The Supreme Court of the United States has determined that the right to counsel is the right to the effective assistance of counsel,[32] yet the Court has consistently denied certiorari in cases that would necessitate establishing guidelines for determining what constitutes counsel effectiveness.[33] As a result, a considerable amount of pressure has been exerted upon the federal and state courts to critically examine the problem of ineffective assistance of counsel and to articulate a meaningful test or standard of effective representation.[34]

Historically, the federal courts held that for assistance of counsel to be constitutionally defective, counsel's efforts must have been so perfunctory as to have rendered the trial a farce or a mockery of justice. Although the "farce or mockery test" continues to reign in four of the Federal Circuit Courts of Appeal,[35] it has recently been specifically rejected in the others.[36]

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31. *See* Bazelon, *The Defective Assistance of Counsel*, 42 U. CIN. L. REV. 1 (1973); Bines, *Remedying Ineffective Representation in Criminal Cases: Departures from Habeas Corpus*, 59 VA. L. REV. 927 (1973); Craig, *The Right to Adequate Representation in the Criminal Process: Some Observations*, 22 SW. L.J. 260 (1968); Finer, *Ineffective Assistance of Counsel*, 58 CORNELL L. REV. 1077 (1973); Grano, *The Right to Counsel: Collateral Issues Affecting Due Process*, 54 MINN. L. REV. 1175 (1970); Lee, *Right to Effective Counsel: A Judicial Heuristic*, 2 AM. J. CRIM. L. 277 (1974); Waltz, *Inadequacy of Trial Defense Representation as a Ground for Post-Conviction Relief in Criminal Cases*, 59 NW. U. L. REV. 289 (1964); Comment, *Incompetency of Counsel*, 25 BAYLOR L. REV. 299 (1973); Comment, *Effective Assistance of Counsel for the Indigent Defendant*, 78 HARV. L. REV. 1434 (1965); Comment, *Federal Habeas Corpus—A Hindsight View of Trial Attorney Effectiveness*, 27 LA. L. REV. 784 (1967); Comment, *The Effective Assistance of Counsel: An Incomplete Constitutional Right*, 18 ME. L. REV. 248 (1966); Comment, *The Right to Effective Assistance of Counsel*, 42 MISS. L. J. 213 (1971); Comment, *Effective Assistance of Counsel*, 49 VA. L. REV. 1531 (1963); Comment, *Effective Representation—An Evasive Substantive Notion Masquerading as Procedure*, 39 WASH. L. REV. 819 (1964).

32. McMann v. Richardson, 397 U.S. 759, 771 (1970). *See also* Reece v. Georgia, 350 U.S. 85, 90 (1955); Glasser v. United States, 315 U.S. 60, 69-70 (1942); Avery v. Alabama, 308 U.S. 444, 446 (1940); Powell v. Alabama, 287 U.S. 45, 57 (1932).

33. *See, e.g.*, Wallace v. Kern, 481 F.2d 621 (2nd Cir. 1973), *cert. denied*, 414 U.S. 1135 (1974).

34. 26 A.L.R. Fed. 218 (1976).

35. First Circuit cases employing the "farce or mockery" test include: United States v. Benthiem, 456 F.2d 165 (1st Cir. 1972); Bottiglio v. United States, 431 F.2d 930 (1st Cir. 1970); Michaud v. Robbins, 263 F. Supp. 535 (D. Me.), *aff'd*, 424 F.2d 971 (1st Cir. 1970); United States v. Madrid Ramirez, 535 F.2d 125 (1st Cir. 1976). *But see* Dunker v. Vinzant, 505 F.2d 503 (1st Cir. 1974), *cert. denied*, 421 U.S. 1003 (1975).

Second Circuit cases implementing the "farce or mockery" test for effective representation

Prior to the Fourth Circuit's decision of *Marzullo v. Maryland*[37] in 1977, it had employed a dual standard. Although the court had ostensibly adopted the "farce or mockery" test for effective representation of counsel,[38] it had articulated specific guidelines for appointed counsel to follow in order to render effective assistance. In *Coles v. Peyton*,[39] the Court maintained:

> The principles may be simply stated: Counsel for an indigent defendant should be appointed promptly. Counsel should be afforded a reasonable opportunity to prepare to defend an accused. Counsel must confer with his client without undue delay and as often as necessary, to advise him of his rights and to elicit matters of defense or to ascertain that potential defenses are unavailable. Counsel must conduct appropriate investigations, both factual and legal, to determine if matters of defense can be developed and to allow himself enough time for reflection and preparation for trial. An ommission or failure to abide by these requirements constitutes a denial of effective representation of counsel unless the state, on which is cast the burden of proof once a violation of these precepts is shown, can establish lack of prejudice thereby.[40]

In cases subsequent to *Coles*, the Fourth Circuit applied the "farce or

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include: United States v. Badalamente, 507 F.2d 12 (2nd Cir. 1974), *cert. denied*, 421 U.S. 911 (1975); United States v. Ortega-Alrarez, 506 F.2d 455 (2nd Cir. 1974), *cert. denied*, 421 U.S. 910 (1975); Mosher v. LaVallee, 351 F. Supp. 1101 (S.D.N.Y. 1972), *aff'd*, 491 F.2d 1346 (2nd Cir.), *cert. denied*, 416 U.S. 906 (1974); United States v. Sangemino, 401 F. Supp. 903 (S.D.N.Y. 1975), *aff'd*, 538 F.2d 316 (2nd Cir. 1976).

Ninth Circuit cases employing the "farce or mockery" test include: United States v. Martin, 489 F.2d 674 (9th Cir. 1973), *cert. denied*, 417 U.S. 948 (1974); Borchert v. United States, 405 F.2d 735 (9th Cir. 1968), *cert. denied*, 394 U.S. 972 (1969). *But see* United States v. Jones, 512 F.2d 347 (9th Cir. 1975); United States v. Stern, 519 F.2d 521 (9th Cir.), *cert. denied*, 423 U.S. 1033 (1975).

The Tenth Circuit has also adopted the "farce or mockery" test for determining counsel effectiveness. *See* United States v. Baca, 451 F.2d 1112 (10th Cir. 1971), *cert. denied*, 405 U.S. 1072 (1972); United States v. Larsen, 525 F.2d 444 (10th Cir. 1975), *cert. denied*, 423 U.S. 1075 (1976).

36. Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977), *cert. denied*, 46 U.S.L.W. 3678 (May 1, 1978) (no. 77-784); United States v. Easter, 539 F.2d 663 (8th Cir. 1976); Williams v. Twomey, 510 F.2d 634 (7th Cir.), *cert. denied*, 423 U.S. 876 (1975); Beasley v. United States v. DeCoster, 487 F.2d 1197 (D.C. 1973); Moore v. United States, 432 F.2d 730 (3rd Cir. 1970). The courts in each of these cases specifically rejected the "farce or mockery" test and adopted a version of the "normal competency" test for constitutionally adequate representation of counsel. The defense counsel's representation should be within the range of normal competence demanded of attorneys in criminal cases.

37. 561 F.2d 540 (4th Cir. 1977), *cert. denied*, 46 U.S.L.W. 3678 (May 1, 1978) (no. 77-784).

38. Root v. Cunningham, 344 F.2d 1 (4th Cir.), *cert. denied*, 382 U.S. 886 (1965); Miller v. Cox, 457 F.2d 700 (4th Cir.) *cert. denied*, 409 U.S. 1007 (1972).

39. 389 F.2d 224 (4th Cir.) *cert. denied*, 393 U.S. 849 (1968).

40. *Id.* at 226 (footnote omitted).

mockery" test in some instances,[41] and the *Coles* guidelines in others.[42] In September, 1977, the Fourth Circuit, in the case of *Marzullo v. Maryland,*[43] resolved the issue and rejected the "farce or mockery" test for determining constitutionally sufficient representation. In so doing, it adopted the standard that defense counsel's representation should be within the range of normal competence demanded of attorneys in criminal cases.[44]

During the Fourth Circuit's ambivalence, Judge Merhige, in hearing habeas petitions grounded on ineffective representation, never employed the "farce or mockery" test. In *Ware v. Cox,*[45] without addressing the issue of farce or mockery, Judge Merhige indicated that the representation made by counsel was insufficient to meet constitutional requirements.[46] He stressed that it is an attorney's duty to render the defendants detached, informed advice based on his estimates of the state's case and their own. "[A] client's professed desire to plead guilty does not end a lawyer's job."[47] Judge Merhige cited *Coles v. Peyton* in his opinion,[48] but deemed it unnecessary to address the question of whether counsel's representation amounted to a mockery.

In a later case, *McLaughlin v. Royster,*[49] Judge Merhige deemed counsel's representation constitutionally deficient, again without addressing the issue of farce or mockery. A first degree murder defendant, fearful of the death penalty, requested that his lawyer negotiate a guilty plea for a life sentence. Although counsel successfully fulfilled this request, he made no investigation into the circumstances surrounding the alleged murder, failed to develop an insanity defense despite knowledge of the defendant's history of mental instability, and frankly stated that had the defendant employed him, he would have proceeded differently. After determining that the same constitutional requirements of effectiveness apply to ap-

41. *See, e.g.,* Bennett v. Maryland, 425 F.2d 181 (4th Cir.), *cert. denied,* 400 U.S. 881 (1970); Miller v. Cox, 457 F.2d 700 (4th Cir.), *cert. denied,* 409 U.S. 1007 (1972).

42. *See, e.g.,* United States v. Peterson, 524 F.2d 167 (4th Cir. 1975), *cert. denied,* 423 U.S. 108 (1976); Hall v. United States, 410 F.2d 653 (4th Cir.), *cert. denied,* 396 U.S. 970 (1969).

43. *See* note 37, *supra.*

44. *Id.* at 5.

45. 324 F. Supp. 568 (E.D. Va. 1971). Here, the defense attorney thought it unnecessary due to the defendant's steadfast desire to plead guilty, to speak to the arresting officer prior to the day of trial, failed to make an independent investigation of the facts and did not inform the defendant of the possible ramifications of a plea of guilty.

46. *Id.* "This court does not base its decision, however, on factfindings made in the state habeas proceedings. The conviction of Ware must fail for a much simpler reason than the inadequacy of counsel's investigation." *Id.* at 572.

47. *Id.* at 571.

48. *Id.*

49. 346 F. Supp. 297 (E.D. Va. 1972).

pointed counsel and retained counsel alike,[50] Judge Merhige held as a matter of law that the defendant had not been effectively assisted as required by the sixth amendment. As a result, the conviction could not stand, and post-conviction relief was rendered accordingly. Without ever addressing the standard of farce or mockery, nor ever pointing to a specific duty required of counsel as delineated in *Coles v. Peyton,*[51] Judge Merhige discussed generally counsel's duty to his client. He stressed that the constitutional requirement of assistance of counsel is not satisfied by a token appearance of counsel who does nothing more to aid his client than acquiesce in his wishes.[52] To allow such representation to be sufficient would be to "reduce the role contemplated by the Constitution to that of a messenger, and to cast the responsibility for the fairness of the entire proceedings upon the individual defendant who the law recognizes is most in need of assistance."[53]

Stressing the importance of the guiding hand of counsel, Judge Merhige went on to say:

> . . . [W]e are asked here by the State to conclude that an attorney can properly abandon all possible lines of inquiry simply because his client proves unhelpful. One of the primary functions and responsibilities of a lawyer in a criminal case encompasses the provision of dispassionate advice. It encompasses the advice of an intelligent, informed mind. Experience shows that when facing a criminal charge, even educated, sophisticated persons may well become incapable of calculating the wisest course. It is especially at such times, and it falls upon the lawyer the duty to see to it, that any advice in criminal defense, by whomsoever made, attorney or client, will be the result of a thorough investigation. The performance of this duty is crucial to the fairness of the trial, and the State cannot be heard to justify an unfair procedure by tracing it in part to the derelictions of the petitioner.[54]

Without enunciating a test for effectiveness, Judge Merhige did say that constitutionally sufficient representation requires that counsel's best efforts be implemented,[55] and that he act as an active advocate on behalf of his client.[56] In light of the fact that defense counsel admitted he would

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50. *Id.* at 301.
51. Coles, *supra* note 39 at 226.
52. McLaughlin, *supra* note 50 at 300.
53. *Id.* at 301.
54. *Id.* at 301-02.
55. *Id.* at 302.
56. *Id.* at 303 citing Anders v. California, 386 U.S. 738, 744 (1967) where it was said:
> The constitutional requirement of substantial equality and fair process can only be attained where counsel acts in the role of an active advocate in behalf of his client as opposed to that of *amicus curiae*. . . . His role as advocate requires that he support his client's appeal to the best of his ability.

have proceeded differently had he been employed, his best efforts had obviously not been utilized. Petitioner's quest for habeas corpus relief was granted accordingly.

In 1977, in the case of *Wood v. Zahradnick*,[57] Judge Merhige again declined to implement the "farce or mockery" test in determining counsel effectiveness. Pointing to the duties of defense counsel as delineated in *Coles v. Peyton*,[58] Judge Merhige held that when reasonable grounds exist for questioning the sanity or competency of a defendant and counsel fails to explore the matter, the defendant has been denied effective assistance of counsel. Acknowledging the fact that an attorney's duty does not mandate the exploration of the defendant's sanity in every instance, Judge Merhige held that counsel has an affirmative obligation to make this inquiry where facts known to counsel or accessible with minimal diligence raise doubt as to defendant's mental condition.[59] In light of the facts of this case,[60] such an affirmative duty was mandated and negligence in fulfilling this duty was deemed sufficient to constitute a denial of the defendant's constitutional right to effective representation of counsel.

The preceeding discussion indicates by negative inference that Judge Merhige has never invoked nor favored the "farce or mockery" test in determining counsel effectiveness. It cannot be said conclusively that Judge Merhige's "best effort-active advocate" requirement espoused in *McLaughlin v. Royster*[61] foreshadowed the normal competency test recently adopted by the Fourth Circuit and others.[62] It can, however, be safely said that Judge Merhige realized that representation can be constitutionally deficient without constituting a farce or mockery while other courts were still applying that questionable standard.

B. The Right to Trial by an Impartial Jury

It is well established that the sixth amendment to the Constitution

57. 430 F. Supp. 107 (E.D. Va. 1977).

58. Coles, *supra* note 39 at 226.

59. Kibert v. Peyton, 383 F.2d 566 (4th Cir. 1967); Owsley v. Peyton, 368 F.2d 1002 (4th Cir. 1976); McLaughlin v. Royster, 346 F. Supp. 297 (E.D. Va. 1972).

60. Here the defendant, a twenty-seven year old man, raped, robbed, and brutally beat a sixty-seven year old woman whom he had known all his life. The physical and testimonial evidence at trial left no doubt that the petitioner committed the acts in question. As Judge Merhige put it, "the only thing standing between Cecilwood [the defendant] and the electric chair, other than the mercy of the Court, were potential defenses pertaining to his mental condition." 430 F. Supp. 107, 112 (E.D. Va. 1977). With minimal effort, counsel could have learned of defendant's limited mental capacity and his dependency on heroin.

61. *See* note 49, *supra* note at 302-03.

62. See note 36, *supra*.

guarantees a defendant charged with a serious offense a trial by jury.[63] This right has been deemed so fundamental that it has been incorporated under the due process clause of the fourteenth amendment, thereby making it obligatory upon the states.[64] This right cannot be infringed upon, absent an expressed, intelligent, and voluntary waiver.[65] The sixth amendment further guarantees that the jury, once provided, be able to render a fair and impartial decision.[66]

1. *Accused's Dilemma—Jury Sentencing*

Roman v. Parrish[67] concerned a habeas petition heard by Judge Merhige alleging an infringement on petitioner's right to trial by jury. Petitioner challenged the constitutionality of a Virginia statute,[68] claiming that it placed a penalty upon a defendant wishing to exercise his constitutional right to a jury trial. Since the jury, by statute,[69] had to prescribe a sentence within the limits established by law, and since the sentence could not be suspended or probation granted as a judge might in cases where a jury trial was waived, petitioner claimed that the statutory framework unduly burdened his right to trial by jury. Judge Merhige dismissed petitioner's claim as unfounded in light of the fact that the judge, under the statutory provision, could suspend the sentence or allow probation subsequent to the jury verdict.[70] Since petitioner could not support his claim that as a practical matter the trial judge never deviated from the jury's recomendation, his petition for habeas corpus relief was denied.

2. *Jury Bias—Prejudicial Statements and Pre-Trial Publicity*

Once provided, the jury must be able to render a fair and impartial

63. Patton v. United States, 281 U.S. 276 (1930).
64. Duncan v. Louisiana, 391 U.S. 145 (1968).
65. Adams v. United States, 317 U.S. 269 (1942).
66. Irvin v. Dowd, 366 U.S. 717 (1961).
67. 328 F. Supp. 882 (E.D. Va. 1971).
68. VA. CODE ANN. §53-272 (Repl. Vol. 1967) provided in part:
> After a plea, a verdict, or a judgment of guilty in any court having jurisdiction to hear and determine the offense, with which the prisoner at bar is charged, if there are circumstances in mitigation of the offense, or if it appears compatable with the public interest, the court may suspend the execution of sentence, in whole or in part, or the imposition of sentence or commitment, and may also place the defendant on probation under the supervision of a probation officer, during good behavior for such time and under such conditions of probation that the court shall determine.

69. VA. CODE ANN. § 19.1-291 (Repl. Vol. 1960) provided: "The punishment in all criminal cases tried by jury shall be ascertained by the jury trying the same within the limits prescribed by law."
70. VA. CODE ANN. § 53-272 (Repl. Vol. 1967), *supra* note 68.

decision.[71] The legitimate interest that society has in convicting the guilty does not outweigh its duty to guarantee the accussed a fair trial.[72] In *Thacker v. Cox*,[73] prejudicial statements were made in front of veniremen.[74] Judge Merhige held that in light of the circumstances there was a *probability* that the venireman had become prejudiced against the defendant.[75] Once determining that such a probability existed, the burden shifted to the state to disprove prejudice. Where the state cannot objectively prove a lack of bias, the conflict must be resolved in favor of the defendant. To decide otherwise, stressed Judge Merhige, would "be sanctioning that which cannot be allowed—namely, allowing the jury to not only be triers of fact but curers of legal deficiencies. Such practices are realistically unsound and constitutionally prohibited."[76]

Pretrial publicity is yet another way in which prospective jurors might be affected so as to make it impossible to render a fair and imparitial decision. In *Irvin v. Dodd*,[77] the Supreme Court held that "the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors."[78] Whether this constitutional guarantee has been

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71. Irvin, *supra* note 66.

72. Gilbert v. United States, 366 F.2d 923 (9th Cir. 1966), *cert. denied*, 388 U.S. 922 (1967).

73. 309 F. Supp. 101 (E.D. Va. 1970).

74. Basically, the allegations of prejudice were prompted by the trial court's inquiry as to whether the defendant had had an opportunity to talk to his court appointed counsel. After the defendant's reply that he was not satisfied with his attorney, counsel volunteered information that the defendant had been uncooperative, that he wished to be dismissed from the case, and that the defendant had told a police officer that he would kill his appointed counsel.

75. Thacker, *supra* note 73. There Judge Merhige stated:

> The obvious danger of counsel's statement, therefore, is that it may have prejudiced the jury in their consideration of the tendered defense. It is certainly reasonable to conclude that the jury, in deciphering counsel's statement, found him not to be a one-time insane killer, but a cold, calculating murderer who violently disposed of anyone who refused to cooperate with him in the manner he thought appropriate. This probability is butressed by the fact that the statement was made by an officer of the court and the judge was silent in reference to the statement both in the *voir dire* examination of the prospective jurors and any specific admonition to the jury concerning the statement. If the jury was influenced consciously or subconsciously in this regard, the defendant would have received a trial tantamount to one where an accused stood guilty before being so proven. Such reasoning is substantiated by the fact that there was never any question as to who fired the fatal shots which killed the deceased—the crucial question was whether the defendant was legally insane at the time of the shooting. If, per chance, a voluntary decision to this issue was usurped from the jury's determination, though inadvertantly, the petitioner's secured rights under due process were violated. (Footnote omitted).

Id. at 104-105.

76. *Id.* at 108.

77. *Supra*, note 66.

78. *Id.* at 722.

infringed upon by the existence of pretrial publicity is ordinarily evaluated in terms of the extent, nature, and impact of such on the prospective jurors as ascertained through adequate voir dire examination.[79]

Judge Merhige had the opportunity to apply this three pronged analysis in *Wansley v. Miller.*[80] After noting that the standard set forth by the Supreme Court in *Irvin*[81] established minimum requirements,[82] Judge Merhige determined from the extent,[83] nature,[84] and probable impact on the prospective jurors, that the petitioner has been denied his sixth amendment right to a fair trial by an impartial jury. Judge Merhige, in considering the third trial, did not feel obliged to accept the prospective jurors statements claiming indifference and lack of bias, but maintained that the court had a responsibility and a duty to independently evaluate the voir dire testimony of the jurors.[85] Upon careful examination of the voir dire transcripts, it was held as a matter of law, that it was impossible for prospective jurors to possess the "indifference" required for an impartial hearing, personal good intentions notwithstanding.[86]

In *Altizer v. Paderick,*[87] Judge Merhige held that in light of the extent of publicity[88] and the extensive questioning of prospective jurors during the

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79. Wansley v. Slayton, 487 F.2d 90 (4th Cir. 1973), *cert. denied,* 416 U.S. 994 (1974). *See also* Beck v. Washington, 369 U.S. 541 (1962).

80. 353 F. Supp. 42, *aff'd sub nom.,* Wansley v. Slayton, 487 F.2d 90 (4th Cir. 1973).

81. Irvin v. Dodd, *supra* note 66:

> To hold that the mere existence of any preconceived notion as to the guilt or innocence of the accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.

Id. at 723.

82. Wansley v. Slayton, 353 F. Supp. 42, 50 (E.D. Va. 1975), *aff'd,* 487 F.2d 90 (4th Cir. 1973), *cert. denied,* 416 U.S. 944 (1974).

83. Without portraying the statistics, Judge Merhige concluded that the coverage of the Wansley case in the two Lynchburg papers was "enormous." Of the 43 veniremen who were questioned about their familiarity with the press coverage in the Lynchburg papers, 40 had positive recollection of said coverage. At least 16 veniremen believed him guilty because of the newspaper articles, or were not sure they could put aside what they had read in the newspapers.

84. Upon review, Judge Merhige concluded the publicity to be "both inflamatory and highly prejudicial." The petitioner, Wansley, was referred to in the articles as "a 17 year old Negro youth who was arrested Saturday as the rapist who attacked two women and tried to attack two others."

85. *Wansley, supra* note 82 at 51.

86. *Id.* at 52.

87. 399 F. Supp. 918 (E.D. Va. 1975).

88. At no time, including the day following the attack or petitioner's arrest, were the circumstances surrounding thee petitioner's trial deemed important enough to be carried on

voir dire examination, the court employed procedures had adquately protected petitioner's right to a fair trial. Although three members of the venire panel had indicated some degree of familiarity with a relative of the prosecutrix, such was held not error of contitutional dimension in Judge Merhige's court, especially in light of the fact that petitioner's trial counsel did not employ any of his four preemptory challenges in the state court proceedings.[89] Prejudice will not be inferred on so meager a record.[90]

Thus, it appears that Judge Merhige's philosophy concerning the right to trial by an impartial jury can be stated in a nutshell. Although the accused is not guaranteed a trial free from all error, he is entitled to proceedings that are fundamentally fair.[91] While courts must accept the fact that it is not possible to empanel a jury with completely sterile minds concerning the current proceedings, this goal must be sought with utmost vigilence.[92] Where there exists a legitimate probability that the jurors have become prejudiced so as to make the rendering of an impartial decision impossible, the heavy burden shifts to the state to prove a lack of bias. If the state cannot carry this burden, the conviction cannot stand and post-conviction relief must be granted. But where procedural safeguards have been taken to protect the accused's right to a fair trial, an idle claim of prejudice will not shift the burden. The legitimacy of petitioner's claim must be examined in light of all the circumstances. The court will scrutinize such claims closely and fairly so as to protect society's legitimate interest in convicting the guilty while maintaining his duty to insure that the accused is tried fairly.[93] The courts cannot arbitrarily unbalance the scales of justice, but *must* be guided by principles of fundamental fairness.[94]

C. The Right to a Speedy Trial

The sixth amendment to the United States Constitution guarantees the defendant involved in criminal proceedings the right to a speedy trial.[95] This right has been deemed fundamental and is thereby applicable to the

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the front page of the Fredricksburg Free Lance Star. The contents of the seven related articles included nothing more than factual statements regarding the status of the proceedings. Moreover, the last of these articles appeared in the newspaper approximately two and one-half months prior to the petitioner's trial. Finally, there was one isolated radio comment questioning the use of public funds to provide the petitioner with a psychiatric examination.

89. Altizer, *supra* note 87 at 925.
90. *Id.*
91. Thacker, *supra* note 73 at 103.
92. *Id.*
93. *Id.*
94. *Id.*
95. U.S. Const. amend. VI.

states through the due process clause of the fourteenth amendment.[96] It is well settled that any appreciable delay between arrest and trial in and of itself raises the issue and places on the prosecution a heavy burden of demonstrating that the defendant's sixth amendment right has not be been abridged.[97]

In *Barker v. Wingo*,[98] the United States Supreme Court set forth four related factors to be considered in determining whether one's constitutional right has been violated. The four factors are: (1) the length of the delay; (2) the reason for the delay; (3) defendant's assertion of the right; and (4) the prejudice to the defendant.[99] As in any balancing test, the court is given wide discretion and can weigh the relevant factors in differing proportions.[100]

Judge Merhige has had but one opportunity to date to employ the balancing test in post-conviction proceedings where an infringement of one's constitutional right to a speedy trial has been alleged. In *Clark v. Oliver*,[101] Judge Merhige held that a defendant whose trial was not conducted until some two and one-half years following the alleged offense had been constitutionally deprived. In *Clark*, the respondent asserted no reason for the delay. Respondent alleged that the defendant had failed to insist upon a trial and thereby had waived his constitutional right. Noting that for an effective waiver there must be an intentional relinquishment of a known right or privilege,[102] Judge Merhige held that in light of petitioner's ignorance[103] and lack of legal assistance,[104] petitioner had not waived his right

96. *See* Dickey v. Florida, 398 U.S. 30 (1970); Smith v. Hooey, 393 U.S. 374 (1969); Klopher v. North Carolina, 386 U.S. 213 (1967).

97. Coleman v. United States, 422 F.2d 150 (D.C. Cir. 1971).

98. 407 U.S. 514 (1972).

99. *Id.* at 530.

100. *Id.* at 533.

101. 346 F. Supp. 1345 (E.D. Va. 1972). The offenses for which the petitioner was tried and convicted were committed in Greenville County, Virginia on July 27, 1952 while the petitioner was an escapee from detention in North Carolina. Following petitioner's recapture, indictments were returned against the petitioner and detainers were lodged with the North Carolina authorities at about the same time. The petitioner was discharged from North Carolina on June 8, 1954, and thereafter was incarcerated in Petersburg, Virginia until March of 1955. He was then released to Greenville County authorities for trial in Greenville Circuit Court in April, 1955.

102. *Id.* at 1350, citing Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

103. "[P]etitioner possessed only a third grade education which he had received as a child in a one room country school in North Carolina. With this educational limitation, the petitioner neither knew whom to write to secure an earlier release date nor how to compose a demand upon Virginia authorities." *Id.* at 1347.

104. "Counsel was not appointed to represent the petitioner on the charges against him until April 19, 1955." *Id.*

to a speedy trial. Concerning the fourth factor of the balancing procedure, it was held that there existed a strong *possibility* of prejudice to the petitioner.[105] Petitioner had been convicted largely on the basis of a personal identification, evidence which Judge Merhige pointed out, grows less reliable over an extended period of time.[106] Relying on the principle that the primary function of every trial is the search for the truth,[107] it was held that there was a reasonable *possibility* that the search had been hampered by the delay. Post-conviction relief was rendered accordingly.

In summary, the constitutional guarantee to a speedy trial has universally been thought essential to protect the demands of criminal justice in the Anglo-American legal system.[108] It prevents undue and oppressive incarceration prior to trial, minimizes anxiety and concern accompanying public accusation and limits the possibilities that a long delay will impair the ability of an accused to defend himself.[109] These demands are essential to our system of criminal justice and Judge Merhige seems determined to preserve them.

IV. THE RIGHTS OF PRISONERS

Judge Merhige's decisions have had a significant impact in at least two areas of the prisoner's rights field. This section examines the effect of the Merhige decisions on the "hands off" doctrine and on due process procedures in intraprison disciplinary hearings.

Federal judicial interference with the operation and maintenance of penal institutions, particularly in the area of custodial treatment of prisoners, has been sparce until recent years.[1] The "hands off" doctrine[2]—that

105. Prior to 1973, there was some question as to whether actual prejudice needed to be shown to establish an abridgement of one's constitutional right to a speedy trial. However, the United States Supreme Court in Moore v. Arizona, 414 U.S. 25 (1973), held that such an affirmative demonstration of prejudice is not required.

106. Clark, *supra* note 101 at 1350.

107. *Id.*

108. Klopher v. North Carolina, *supra* note 96 at 223: "The right to a speedy trial is as fundamental as any of the right guaranteed by the Sixth Amendment."

109. Smith, *supra* note 96 at 378.

1. 6 SUFFOLK L. REV. 1169, 1170 (1972); *see also* Lee v. Tahash, 352 F.2d 970 (8th Cir. 1965), Childs v. Pegelow, 321 F.2d 487 (4th Cir. 1963). *But see* Cooper v. Pate, 382 F.2d 518 (7th Cir. 1967).

2. For an explanation of the various rationale used by courts to justify the employment of this doctrine, *see* Price v. Johnston, 334 U.S. 266, 285 (1948); Cole v. Smith, 344 F.2d 721,

courts will not interfere with prison administration—was repudiated by the United States Supreme Court in *Procunier v. Martinez.*[3]

The rejection of the "hands off" doctrine and its underlying rationale was aided, to some extent, by the resurgence of 42 U.S.C. § 1983.[4] Section 1983 was originally enacted as part of the Civil Rights Act of 1871 to enforce the provisions of the fourteenth amendment. However, it was not until the Supreme Court's decision in *Monroe v. Pape,*[5] that section 1983 began to be utilized by plaintiffs to protect fourteenth amendment rights and privileges.[6] *Monroe*[7] held that section 1983 encompassed any deprivation under color of state authority[8] of a right guaranteed by the fourteenth amendment.[9] The effect of *Monroe* was to make available to state prisoners, *inter alia,* a section 1983 cause of action in federal court under the

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724 (8th Cir. 1965); Cooper v. Pate, 324 F.2d 165, 167 (7th Cir. 1963); Landman v. Royster, 333 F. Supp. 621, 645 (E.D. Va. 1971).

3. 416 U.S. 396 (1974). The lower federal courts, however, had rejected the "hands off" doctrine to a limited extent prior to the U.S. Supreme Court's repudiation. *See* Landman v. Peyton, 370 F.2d 135 (4th Cir.), *aff'd,* 385 U.S. 881 (1966), *cert. denied* 392 U.S. 939 (1968); Washington v. Lee, 263 F. Supp. 327 (M.D. Ala. 1966), *aff'd* 390 U.S. 333 (1968); Talley v. Stephens, 247 F. Supp. 683 (E.D. Ark. 1965).

4. 42 U.S.C. §1983 (1974) states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Today, Section 1983 provides prisoners with an appropriate federal cause of action. Wilwording v. Swenson, 404 U.S. 249, 251 (1971).

5. 365 U.S. 167 (1961).

6. *Developments in the Law-Section 1983 and Federalism,* 90 HARV. L. REV. 1133, 1135 (1975) [hereinafter cited as Developments in the Law]. The author credits *Monroe* with giving new life to the dormant Civil Rights Act.

7. *Monroe* involved a suit in federal court under § 1983 for acts by the Chicago police directed at a black complainant. Thirteen Chicago police made a warrantless search of the plaintiff's residence, humiliated the plaintiff, ransacked his home, held the plaintiff at the police station for ten hours without pressing charges and interrogated the plaintiff without formally charging him. He sued, claiming that he was deprived of his rights and privileges as secured by the Constitution within the meaning of Section 1983.

8. Color of state law was defined as "[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law . . ." 365 U.S. at 184 (quoting United States v. Classic, 313 U.S. 299, 326 (1941).

9. 365 U.S. at 170-71. The court, through Mr. Justice Douglas, based its interpretation and its reach on the Civil Rights Act of 1871 and its legislative history respectively. The court reasoned that section 1983 afforded a federal cause of action, even though one was available in state court, because the privileges and immunities guaranteed under the fourteenth amendment might be denied by a state agency. 365 U.S. at 183. *See also The Supreme Court, 1960 Term,* 75 HARV. L. REV. 40, 214 (1961).

rubric of either the due process or cruel and unusual punishment clauses.[10] The impact of this on the prison system is obvious—it permits federal courts to intervene in the operation, maintenance, and policy making of state penal institutions.[11]

A. The "Hands Off" Doctrine

Judge Merhige's first published decision involving prisoner's rights was *Dabney v. Cunningham.*[12] At that point in time, the Fourth Circuit Court of Appeals,[13] among others,[14] had already begun the trend of rejecting the "hands off" doctrine in order to intervene in the internal affairs of a state's penal system when punitive sanctions were imposed arbitrarily and without reasonable justification.[15] Judge Merhige followed this progressive stance in *Dabney* and ordered the petitioners release from punitive segregation because the prison administrators had acted in an arbitrary manner.[16]

Although the "hands off" policy had been rejected by other lower federal courts, the United States Supreme Court continued to adhere to it.[17] Thus, some justification from Judge Merhige for this deviation from the tradition in *Dabney* was appropriate, but not forthcoming.[18] The decision, while

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10. *Developments in the Law, supra* note 6, at 1173. The author notes that almost any common law tort can be converted into a constitutional violation and made the basis for a section 1983 action. This means that acts of prison officials which prior to *Monroe* gave rise to a cause of action only in state court, now could be brought in either state or federal court.

11. *Id. See also* Note, *Constitutional Law: "Under Color of" Law and The Civil Rights Act,* 1961 Duke L. Rev. 452, 457. Another commentator has suggested that this ruling could effectively overrule many prior decisions which dismissed damage suits against state law enforcement officers for want of jurisdiction. 37 N. Dakota L. Rev. 433, 434 (1961).

12. 317 F. Supp. 57 (E.D. Va. 1970). It is not clear from the report whether this is a section 1983 action.

13. Landman v. Peyton, 370 F.2d 135 (4th Cir. 1966).

14. *See* note 2 *supra.*

15. 317 F. Supp. at 60. Judge Merhige states that the courts have used the *Dabney* standard several times since 1966 and supports this statement with several unpublished decisions from the Fourth Circuit.

16. *Id.* at 61. The case involved a prisoner who was kept in padlock for approximately 20 months based merely on the opinion of one state official that Dabney was "unsuitable" for non-padlock status.

17. *Supra* note 14 and accompanying text.

18. 317 F. Supp. at 60. Judge Merhige merely stated:

> It has been clear at least since Howard v. Smyth, *supra,* in 1966, that courts in this Circuit will intervene when punitive sanctions are imposed arbitrarily and without reasonable justification. This standard has been employed several times in intervening years.

He noted that the action in the instant case was arbitrary and unjustified, and he therefore granted relief to the petitioner.

certainly justified on the merits, nevertheless, warranted a more complete explanation and justification than Judge Merhige deemed necessary.

Landman v. Royster,[19] decided by Judge Merhige the following year, provided some explanation and justification for Judge Merhige's rejection of the "hands off" doctrine. *Landman* was a class action suit under section 1983 by inmates of the Virginia Penal System naming as defendants those individuals charged with the maintenance and supervision of the Virginia correctional system.[20] The plaintiffs' complaint alleged four areas in which their constitutional rights were being abridged: the administration of discipline within the prisons; the reasons for invoking sanctions; the process of adjudication; and the imposition of various penalties.[21] Judge Merhige held, generally, that the prison administrators had abridged the inmates constitutional rights and privileges by imposing discipline for the wrong reason,[22] by imposing valid discipline without affording due process,[23] and by imposing constitutionally prohibited punishment.[24]

The remedies fashioned by Judge Merhige were significant not only because he, again, rejected the traditional "hands off" policy, but also because the resultant effect of the remedies he fashioned was so extensive

19. 333 F. Supp. 621 (E.D. Va. 1971).

20. *Id.* at 625.

21. 333 F. Supp. at 626.

22. *Id.* at 656. The court prohibited further punishment for misbehavior, misconduct, agitation or for exercising constitutionally protected activities. The problem with imposing punishment for these activities was that the prisoner had no guidance by which to govern his behavior and that the imposition of penalties for such behavior would be arbitrary. However, the court permitted punishment for insolence, harassment, and insubordination. These acts are not vague, but are definable so as to reduce the chance for arbitrary punishment for their violation.

23. *Id.* at 651. This was probably the most significant portion of the decision, for here Judge Merhige introduced basic procedural due process safeguards into the intradisciplinary process. He established a comprehensive scheme of due process guarantees which must be employed by the prison administration in a disciplinary hearing whenever there is a possibility that the inmate might be subjected to loss of a property or liberty interest.

24. *Id.* at 647. Judge Merhige rejected the punishment-control dichotomy and stated that any act may be a violation of the eighth amendment's cruel and unusual punishment clause. As such, he prohibited further imposition of bread and water diets, handcuffing or chaining prisoners to their cell, taking their clothes while in solitary and keeping them in unheated cells with open windows in the winter, crowding several men into a "single" solitary cell, or using tear gas to silence noisy or misbehaving inmates in their cells. Judge Merhige held that removing an inmate's mattress and blanket did not violate the inmate's constitutional rights under the eighth amendment because there was no substantial effect on the inmate's health. The punishments that were invalidated under the eighth amendment were so invalidated because Judge Merhige felt that the purported purpose could be achieved by a less drastic means.

and far-reaching as to permeate nearly the entire spectrum of prison life.[25] Judge Merhige recognized and rejected the traditional arguments favoring the "hands off" policy,[26] stating that "rehabilitative treatment, to repeat, constitutes no talismanic state interest which will justify any exactions from individual prisoners."[27] The rationale was that penal officials may temporarily suspend an inmate's constitutional rights, but only to serve a legitimate rehabilitative end.[28] In the absence of a legitimate rehabilitative end, federal court intervention was deemed appropriate to insure that the prisoner's constitutional rights were reinstated and not abridged by future arbitrary action. He noted, however, that *Landman* was a very transitory situation, and that future needs may arise necessitating the suspension of certain constitutional rights, now available to the inmates, in order to effectuate a specific rehabilitative result.[29]

The early tone of *Landman* was indicative of a total rejection of the "hands off" doctrine.[30] However, in concluding the *Landman* opinion Judge Merhige stated that the best justification for the "hands off" doctrine will appear when prison authorities establish a legitimate interest in the rehabilitation of prisoners. Moreover, he recognized that courts are of questionable competence in this area and that judicial intervention "might be positively harmful to some rehabilitative efforts."[31] The language is confusing because he also indicates that labelling an act rehabilitative would not automatically preclude judicial scrutiny.[32] Reading this in conjunction with subsequent decisions, it appears that Judge Merhige has only conditionally rejected the "hands off" doctrine,[33] his attitude being that the court should not act as a prison review board, nor overturn a decision by prison officials unless due process has not been complied with

25. *See* notes 22, 23, and 24 *supra* and accompanying text for a brief explanation of the remedies that Judge Merhige enumerated.

26. 333 F. Supp. at 643-45. Judge Merhige cites arguments such as loss of certain rights upon lawful incarceration and court's lack of expertise or authority in this area.

27. *Id.* at 657. *See also* S. Rubin, UNITED STATES PRISON LAW (1975) [hereinafter referred to as Rubin]. Rubin credits Judge Merhige with rejecting the "hands off" doctrine.

28. 333 F. Supp. at 657.

29. *Id.* While recognizing that needs may change and further rights may have to be abridged in order to meet these changes, Judge Merhige pointed out that these rights may only be abridged if the prison authorities can demonstrate a legitimate interest in rehabilitation.

30. 333 F. Supp. at 643. *See also* Rubin at 11, where it is stated that Judge Merhige completely rejects the "hands off" doctrine.

31. 333 F. Supp. at 657.

32. *Id.*

33. Judge Merhige seems to feel that the "hands off" doctrine should be applied unless initial scrutiny reveals that the abridgement of the particular constitutional right has no rational relationship to a legitimate rehabilitative end.

or the act was clearly arbitrary and capricious.[34] Courts should act to protect a prisoner's constitutional rights, but should refrain from interfering with internal prison affairs in all other instances.[35]

When *Landman* was decided in 1971, Judge Merhige, was among the frontrunners in rejecting the "hands off" doctrine. He has continued to adhere to a conditional "hands off" doctrine and has consistently applied this doctrine in subsequent years.

It is apparent Judge Merhige has refused to redress section 1983 claims where the action complained of does not rise to the level of a deprivation of constitutional rights. Accordingly, he has invoked the "hands off" doctrine to deny relief to inmates who complained of constitutional violations by prison officials for making lateral job transfers without first providing a hearing,[36] of the discretionary application of experimental rehabilitation programs,[37] and of delays in the delivery of inmate mail,[38] on the basis that the constitution does not reach these acts. In addition, where constitu-

34. Holland v. Oliver, 350 F. Supp. 485 (E.D. Va. 1972). The plaintiff was challenging the punishment which he received after an attempted escape. He attacked the conviction on grounds that the evidence was insufficient and that due process was lacking. The court refused to review the former and granted relief on the latter because the defendant failed to afford the plaintiff certain due process procedures. *See also* Wesson v. Moore, 365 F. Supp. 1262, 1266 (E.D. Va. 1973). *But see* Penn v. Oliver, 351 F. Supp. 1292, 1294-95 (E.D. Va. 1972), where Judge Merhige did examine the sufficiency of the evidence. The case involved the plaintiff's claim that an I.C.C. action was based on inadequate facts. Judge Merhige held that there were adequate facts to support an action and that the action was not arbitrary and capricious.

35. Moore v. Howard, 410 F. Supp. 1079, 1080 (E.D. Va. 1976). Moore sued alleging that he was denied work release and parole because of the numerous court petitions which he filed. The defendant failed to refute the plaintiff's contentions that the plaintiff's proclivity for filing petitions was a determining factor in the parole and work release decision. The court denied the defendant's motion for a summary judgment.

36. Lloyd v. Oliver, 363 F. Supp. 821 (E.D. Va. 1973). In this case Judge Merhige held that the plaintiff's complaint alleging that a lateral job change triggered due process safeguards was without merit. Such action involved no potential loss of rights privileges or parole eligibility and there was therefore no constitutional issue upon which the court could act. 363 F. Supp. at 822.

37. Lewis v. Oliver, 397 F. Supp. 1204, 1206 (E.D. Va. 1975). The plaintiff complained that prison administrators were assigning poor security risk inmates to participate in a furlough program. Judge Merhige held that prison officials must be given great latitude in administering experimental programs, and unless they act arbitrarily the court would not intervene. Judge Merhige stated that by fine tuning an experimental program, prison officials do not violate the inmates' constitutional rights.

38. Fore v. Godwin, 407 F. Supp. 1145, 1146 (E.D. Va. 1976). The plaintiff complained that an 18 hour delay in the delivery of mail was violative of his constitutional rights. The mail was delivered at noon, opened and inspected for contraband and delivered the following morning at 6:00 a.m. Judge Merhige held that, while this was a lengthy delay, it did not exceed constitutionally permissible limits.

tional rights have been adversely affected by the acts of prison officials, but the intrusion is de minimus, Judge Merhige has refused to intervene and has invoked the "hands off" doctrine, reasoning that the prisons interest in the maintenance of security and orderly operation of the institution is sufficiently compelling to authorize the prison officials' actions.[39] Thus, while certain grooming regulations,[40] restrictions on inter-institutional correspondence between inmates,[41] and restrictions on inmate activities with commercial banking institutions,[42] were held to abridge certain of the inmate's constitutional rights, the injury was de minimus and not of sufficient magnitude to invoke federal court intervention.

The "hands off" doctrine is not applicable, according to Judge Merhige, when a constitutional right is violated and the violation is of severe enough nature to warrant federal protection of the right in question. Accordingly, Judge Merhige rejects the doctrine in favor of intervention in prison affairs where medical care is not afforded prison inmates,[43] where the eighth

39. Essentially, this is a balancing test—the party with the stronger interest being awarded the requested relief.

40. Howard v. Warden, Petersburg Reformatory, 348 F. Supp. 1204, 1206 (E.D. Va. 1972). The plaintiff challenged the Federal Reformatory Regulation governing the length of inmate's hair and facial growth. Judge Merhige held that the inmate had a constitutionally protected interest in choosing his own grooming standards, but that this intrusion by the prison authorities created only a minor loss, and that the institution's right to promulgate regulations necessary and proper to further orderly prison administration was sufficiently compelling to authorize this infringement.

41. Peterson v. Davis, 415 F. Supp. 198, 200 (E.D. Va. 1976). The prison had a regulation governing inter-institutional correspondence between inmates. The plaintiff alleged that this was a violation of his first amendment rights. Judge Merhige held that while this regulation infringed upon the plaintiff's first amendment rights, the infringement was de minimus and not of sufficient magnitude to warrant judicial relief, when compared with the government's interest in maintaining security.

42. Nix v. Paderick, 407 F. Supp. 844, 846 (E.D. Va. 1976). Plaintiff, a prison inmate, opened a checking account with a banking and trust institution outside of the prison. Upon discovering the account prison authorities advised the bank to terminate it's relationship with the plaintiff. The bank subsequently refused to allow the plaintiff to withdraw his money. The prison then issued Guideline 823 prohibiting inmate checking accounts. Judge Merhige upheld its validity on the ground that the state had a compelling interest in not allowing money, currency, checks or other negotiable or potentially negotiable instruments in prison and that the inmate's loss was de minimus.

43. Mills v. Oliver, 367 F. Supp. 77, 79 (E.D. Va. 1973). The plaintiff alleged that he was denied adequate medical treatment. While Judge Merhige rejected the plaintiff's claim, he noted that a prisoner has a constitutional right to reasonable medical treatment and that courts would intervene if, under the totality of the circumstances, denial of adequate medical treatment is of sufficient magnitude to trigger constitutional protection. Judge Merhige also noted that the treatment itself is not subject to judicial review where a mere difference of opinion between a prisoner and an institutional doctor as to the necessary and proper treatment of the injury exists. The prisoner can not be the ultimate judge of what medical treatment is necessary or proper.

amendment is violated as a result of inadequate protection of inmates from violence,[44] where inmate access to the courts is blocked,[45] or where inmate mail is unreasonably interfered with by prison officials.[46]

B. Due Process

Judge Merhige's concept of due process in an intraprison disciplinary proceeding predated and prophesized the United States Supreme Court's decision in this matter by approximately two years.[47] In *Landham,* Judge Merhige held that certain procedural due process requirements were necessary for an intraprison disciplinary proceeding.[48] He specially determined that the decision to punish must be made by an impartial tribunal, that a hearing was necessary, that the inmate had a right to present evidence, that prior written notice of the charge must be given, that the inmate may confront and cross-examine adverse witnesses, that the ultimate decision must be based on evidence presented at the trial, and that the inmate has a right to select a lay advisor, or legal counsel when the loss of a substantial right is involved.[49] These standards are required when the punishment involves solitary confinement, transfer to maximum security, loss of good time, or padlock confinement for more than ten days.[50] When the punish-

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The court, Judge Merhige states, will rely on the reports of the prison doctor. Fore v. Godwin, 407 F. Supp. 1145, 1146-47 (E.D. Va. 1976); Ray v. Parrish, 399 F. Supp. 775, 777 (E.D. Va. 1975).

44. Penn v. Oliver, 351 F. Supp. 1292, 1294 (E.D. Va. 1972). Judge Merhige held, in response to the plaintiff's suit that the prison failed to adequately protect him from violence, that the eighth amendment guarantees a prisoner freedom from attacks and violence at the hands of his fellow inmates. To constitute a deprivation within the meaning of the eighth amendment, the assaults and violence must be the result of total laxity of security within the prison. A pattern of undisputed and unchecked violence triggers the eighth amendment because the deprivation is of such a serious magnitude. *See also* Fore v. Godwin, 407 F. Supp. 1145, 1147 (E.D. Va. 1976).

45. Welch v. Evans, 402 F. Supp. 468 (E.D. Va. 1975). The plaintiff's petition for a writ of habeas corpus was not transmitted to the courts by a Virginia Beach police officer. Judge Merhige held that the defendant had a clear duty to transmit the plaintiff's material to the courts and that willful or negligent failure to do so which prevents the plaintiff's access to the court would result in court intervention under 42 U.S.C. § 1983.

46. *See* Fore v. Goodwin, 407 F. Supp. 1145 (E.D. Va. 1976); Ray v. Parrish, 399 F. Supp. 775, 776-77 (E.D. Va. 1975). In both cases Judge Merhige recognized that interference with an inmate's mail may constitute a constitutional violation and may trigger court intervention.

47. Wolff v. McDonnell, 418 U.S. 539 (1974).

48. 333 F. Supp. at 651-53. Judge Merhige applied the traditional due process test, weighing the individual's interests against the purpose and function of the government. He found that an adjudicatory proceeding of this nature requires certain due process safeguards and that these safeguards do not unduly impede legitimate prison function.

49. 333 F. Supp. at 653-54.

50. *Id.*

ment involved lesser penalties,[51] due process safeguards are accordingly limited.[52]

Judge Merhige purported to reject the punishment-control dichotomy, which had been used by prison administrators to avoid having to afford due process safeguards, reasoning that due process attaches whenever substantial deprivations of rights are involved.[53] However, in *Landman*, and in later decisions he seems to fluctuate and use the two concept interchangeably or even simultaneously.[54] What evolved was that if the deprivation is of a sufficient magnitude then it triggers due process. The exact extent of the due process safeguards required is then determined on the basis of the type of action involved—either Institutional Classification Committee[55] or Institutional Adjustment Committee.[56] But this determination is essentially a function of the punishment-control dichotomy; that is, the I.C.C. hearings are characterized as involving primarily nonpunitive or control dispositions, while the I.A.C. dispositions are exclusively punishment oriented.[57] The punishment-control dichotomy lives, but in a weaker form.[58] That is, under *Landman* the full panoply of due

51. Lesser penalties include minor fines, loss of commissary rights, restrictions of an individual's recreation privileges, and padlocking for less than ten days. 333 F. Supp. at 654.

52. *Id.* In the less safeguarded proceeding, due process was held to require only verbal notice, an opportunity to be heard and the right to confront and cross-examine adverse witnesses. *Id.*

53. 333 F. Supp. at 645. The plaintiff's argument was that when punishment was involved due process attaches because of the possibility of the loss of certain benefits. However, if the same action were labeled "control," then due process did not attach. This was particularly true when security changes were involved. Placing an inmate in maximum security could be a form of punishment or it could be a be a means of control. Judge Merhige reasoned that in either case the act of confinement involves a loss by the inmate of some freedom and that the loss, not the label, triggers due process.

54. In Cousins v. Oliver, 369 F. Supp. 553, 555-56 (E.D. Va. 1974), Judge Merhige noted that the I.C.C. primarily functions to determine security status and is theoretically nonpunitive, whereas the I.A.C. is penal in nature. Thus, the I.C.C. proceedings permitted more flexible procedures. Similarly, in Wesson v. Moore, 365 F. Supp. 1262, 1266 (E.D. Va. 1973), he said due process was more flexible with an I.C.C. hearing since its powers are less severe (by degree of deprivation) than typical punitive action. Then, in Almanza v. Oliver, 368 F. Supp. 981, 985 n.5 (E.D. Va. 1973), he stated that elaborate due process was not involved with I.C.C. hearings because the loss was not of momentous value. In Nimmo v. Simpson, 370 F. Supp. 103 (E.D. Va. 1974), Judge Merhige stated that the I.C.C. is not a criminal proceeding. "[I]t is necessarily a rough and imperfect enterprise which except for truly minimal safeguards such as the right to appear and defend is left in the hands of the state." *Id.* at 102.

55. Hereinafter referred to as I.C.C.

56. Hereinafter referred to as I.A.C.

57. *See* Cousins v. Oliver, 369 F. Supp. 553, 555-56 (E.D. Va. 1974), and note 56 *supra.*

58. It is weaker because the form of the dichotomy which Judge Merhige rejected could preclude due process safeguards entirely, whereas the present form merely reduces the extent of due process safeguards afforded an individual.

process safeguards attaches when punishment involves solitary confinement, transfer to maximum security or confinement to padlock for more than ten days.[59] However, in later decisions it becomes clear that I.C.C. actions resulting in solitary confinement, transfer to maximum security or confinement to padlock for more than ten days triggers only minimum due process safeguards since these actions are not intended to be punishment, but are merely measures of reclassification to prevent possible escape.[60] Thus, the same action involving an inmate's confinement status can be levied with differing degrees of due process safeguards merely because one action is intended to punish and one action is intended to control.

Because of the gravity of the I.A.C. actions the requisite due process safeguards must be strictly adhered to in order to avoid violating an inmate's constitutional rights. I.C.C. actions are more flexible and, in emergencies, Judge Merhige has held that temporary security status changes may occur in the absence of due process procedures.[61] The prison authorities must, however, demonstrate that a compelling interest to dispense with the safeguards occurred, and that adequate alternative procedures were made available.[62]

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59. 333 F. Supp. at 653.

60. Holland v. Oliver, 350 F. Supp. 485, 487 (E.D. Va. 1972). *See* note 34 *supra* for the facts of the case. The I.A.C. in *Holland* sentenced the plaintiff to thirty days in solitary confinement, thus invoking *Landman*-type due process safeguards. However, in a subsequent hearing to determine the plaintiff's security status, the I.C.C. permanently changed the plaintiff's security status to maximum security, consequently requiring less extensive due process safeguards than the similar, but less severe, I.A.C. action due to the non-punitive motive. While Judge Merhige held that I.C.C. hearings trigger less extensive due process safeguards than I.A.C. hearings, he has argued for the right to counsel in an I.C.C. hearing. *See* Patterson v. Riddle, 407 F. Supp. 1035, 1038 n.3 (E.D. Va. 1976). In *Patterson,* Judge Merhige hinted that a lawyer should be present at an I.C.C. hearing in which pending criminal charges are involved since the inmate is faced with the choice of testifying at the I.C.C. hearing and incriminating himself, or remaining silent, thereby increasing the chances that the I.C.C. will raise his security status while his ability to defend the charges are effectively waived. The best solution to the dilemma, according to Judge Merhige, is to promptly dispose of the pending criminal charges. This might mitigate the necessity for counsel in the I.C.C. hearing even though Judge Merhige does not so expressly state. *Id.*

61. Miller v. Oliver, 367 F. Supp. 77, 79 (E.D. Va. 1973). The plaintiff and the entire prison population were placed in padlock status for several days following a riot. The general lockup was instituted in order to enable prison authorities to identify the instigators of the riot and to segregate them. No hearings were afforded the affected prisoners prior to the lock-up. Judge Merhige permitted this because he felt that the emergency justified this action. Although an inmate is always entitled to a hearing as soon as practicable, flexibility is inherent in such a rule. *Id. See also* Faison v. Riddle, 425 F. Supp. 648, 650 (E.D. Va. 1977); and Patterson v. Riddle, 407 F. Supp. 1035, 1037 (E.D. Va. 1976), *aff'd,* 556 F.2d 574 (1977). Both cases held that a suspicion that an inmate is engaged in criminal conduct is sufficient to authorize a temporary security change without providing the normal due process safeguards.

62. *Cf.* Cousins v. Oliver, 369 F. Supp. 553, 557 (E.D. Va. 1974). But, in Patterson v.

The United States Supreme Court did not express its opinion on due process safeguards in intraprison disciplinary proceedings until *Wolff v. McDonnell.*[63] The Court held that, in such disciplinary proceedings, due process requires that the inmate be afforded written notice of the charges,[64] a written statement by the factfinders as to the evidence relied on and the reasons for the disciplinary action taken, and the right to call witnesses and present documentary evidence in his defense so long as it will not jeopardize the institution.[65] Confrontation and cross-examination of adverse witnesses, the Court held, are not constitutional rights within the due process clause,[66] nor is the right to retained or appointed counsel.[67]

While *Wolff* did incorporate many of the procedural safeguards enumerated in *Landman* as constitutional mandates for an intraprison disciplinary proceeding,[68] it limited the extent of those procedures. *Wolff* did not specifically indicate whether an impartial tribunal was necessary and whether the facts relied upon in the decision-making process had to be limited to those presented at the hearing.[69] Moreover, *Wolff* held that the constitution did not confer upon an inmate the right to counsel or the right to confront and cross-examine adverse witnesses.[70] Judge Merhige's post-

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Riddle, 407 F. Supp. 1035, 1038 (E.D. Va. 1976), *aff'd,* 556 F.2d 574 (1977), Judge Merhige held that while a temporary change in custody status is permissible where an emergency occurs, a point exists where the temporary change begins to appear to be a long term disciplinary action, and at that point the more extensive due process safeguards attach.

63. 418 U.S. 539 (1974). *Wolff* involved a suit by Nebraska prison inmates alleging that disciplinary proceedings did not meet constitutional standards.

64. 418 U.S. at 563-64. Notice must be given at least 24 hours in advance. *Id.*

65. 418 U.S. 563-66.

66. 418 U.S. at 567-68. The Court reasoned that these rights should not be read into the constitutional framework and that a valid decision could be reached without resorting to these rationales. Moreover, the Court held that to allow confrontation and cross-examination of adverse witnesses in disciplinary action would increase the possibility in danger in the prison. The Court noted, as Judge Merhige did in *Landman,* that subsequent changes in the penal system and its goals may require otherwise.

67. *Id.* at 570. The Court reasoned that allowing counsel to attend such proceedings would transform them into adversary proceedings hereby diminishing the value of the hearing. The Court did concede that, if the inmate was illiterate and the issues were complex, then he could seek a fellow inmate or a staff member to aid him in his defense. *But see* Graham v. Hutto, 437 F. Supp. 118 (E.D. Va. 1977), upholding a prohibition on passing legal materials from one inmate to another and holding this not to be bar to access to the courts for illiterate inmates.

68. *Wolff* specifically addressed the loss of good time, but the Court stated that these procedures applied only when disciplinary confinement was involved. *Id.* at 571-72, n. 19. The Court, however, declined to require these procedures when lesser penalties were involved. In Peterson v. Davis, 421 F. Supp. 1220, 1223 (E.D. Va. 1976), *aff'd,* 562 F.2d 48 (1977), Judge Merhige held that the *Wolff* procedural requirements do not apply to I.C.C. hearings.

69. *See* 333 F. Supp. at 651-56.

70. *See* notes 67 and 68 *supra.*

Wolff decisions indicate that he has accepted the *Wolff* due process safeguards and has displaced inconsistent safeguards.[71]

V. THREE FUNDAMENTAL RIGHTS

A. THE FIRST AMENDMENT

The first amendment[1] freedoms of speech, religion and assembly are particularly cherished. Because most citizens have such high regard for these freedoms, any judicial opinion interpeting these rights would have special significance. But when a judge, like Judge Merhige, has written well-reasoned opinions in controversial first amendment areas, closer study is deserved. This section examines Judge Merhige's opinions on student free speech rights, the free exercise of religion and the Bar's restrictions on lawyer advertising.

1. *Student Free Speech Rights*

Tinker v. Des Moines School District[2] is perhaps the clearest recognition by the Supreme Court of the first amendment rights of students. *Tinker* did not, however, hold these rights to be absolute.[3] Reconciling the conflict between the student's rights and the school's authority has posed a problem for the courts ever since[4]—especially in light of the growth of

71. *See* Davenport v. Howard, 398 F. Supp. 376, 378 (E.D. Va. 1974), *aff'd per curiam*, 520 F.2d 940 (1975). The plaintiff complained that a certain disciplinary action violated due process. In granting a summary judgment, Judge Merhige held that due process was not violated where the plaintiff received written notice of the charges at least 24 hours in advance of the hearing, a written statement of the fact findings as to the evidence relied on and the reasons for the disciplinary action taken and the opportunity to call witnesses and present evidence in his defense. He did not mention the right to counsel or a legal inmate advisor, cross-examination, or confrontation of adverse witnesses. His decision mirrored the *Wolff* decision and the *Landman* decision in so far as *Landman* was consistent with *Wolff*. *See also* Patterson v. Riddle, 407 F. Supp. 1035, 1037 (E.D. Va. 1976), *aff'd*, 556 F.2d 574 (1977).

1. U.S. CONST. amend. I provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

2. 393 U.S. 503 (1969).

3. *Tinker*, 393 U.S. at 513. Mr. Justice Stewart, in his concurring opinion, emphasized his belief that the first amendment rights of school children are not necessarily "co-extensive with those of adults." 393 U.S. at 515.

4. *See* Gyory, *The Constitutional Rights of Public School Pupils*, 40 FORDHAM L. REV. 201 (1971).

"underground" newspapers.[5]

Judge Merhige faced this conflict in *Leibner v. Sharbaugh.*[6] At issue was the constitutionality of a school regulation requiring submission and approval of student publications prior to distribution.[7] While recognizing that prior restraints on the exercise of first amendment rights may in some cases be constitutional, Judge Merhige labeled the instant regulation a "monument to vagueness."[8] Although *Leibner* may have been received as another chink in the school administration's authority, the decision was premised on firm precedent.[9] Judge Merhige's conclusion that the "chill" on first amendment rights was sufficient irreparable injury to support a temporary injunction was indeed principled, although not exactly novel.[10]

2. *The Free Exercise Clause*

The term "Free Expression" also encompasses the Free Exercise clause of the first amendment.[11] The Free Exercise clause embraces both the freedom to believe and the freedom to act according to those beliefs, but only the former right is absolute.[12] This distinction was the basis for the United States Supreme Court's decision in *Braunfeld v. Brown.*[13]

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5. *See* Abbott, *The Student Press: Some First Impressions,* 16 WAYNE L. REV. 1 (1969).

6. 429 F. Supp. 744 (E.D. Va. 1977).

7. In *Leibner* the plaintiff was suspended from his Arlington Co. high school for failing to observe the school regulation concerning distribution of "underground" newspapers. The regulation in question stated that a student publication "should conform to journalistic standards of accuracy, taste, and decency maintained by the newspapers of general circulation in Arlington; it should not contain obscenity, incitements to crime, material in violation of law or lawful regulation or libelous material." 429 F. Supp. at 747, quoting Section IIIC, Student Responsibilities & Rights, Arlington Public Schools.

8. 429 F. Supp. at 748.

9. *See* Nitzberg v. Parks, 525 F.2d 378 (4th Cir. 1975); Baughman v. Freienmuth, 478 F.2d 1345 (4th Cir. 1973); and Quarterman v. Byrd, 453 F.2d 54 (4th Cir. 1971). In *Baughman* the Fourth Circuit announced that it would approve a prior restraint only when the regulation contained a narrow, objective and reasonable standard by which the material would be judged. 478 F.2d at 1350.

10. 525 F.2d at 384.

11. *U.S. Const.* amend. I provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise, thereof. . . ." The first of these clauses, the establishment clause, is also encompassed in "free expression" but it will not be addressed in this note. The development of the establishment clause doctrine and its related tests may be traced in Committee for Pub. Educ. v. Nyquist, 413 U.S. 756 (1973) (the political entanglement test); Lemon v. Kurtzman, 403 U.S. 602 (1971) (the administrative entanglement test); Walz v. Tax Comm'n, 397 U.S. 664 (1970) (administrative entanglement); and Abington School District v. Schempp, 374 U.S. 203 (1963) (government purpose and effect must be secular).

12. Cantwell v. Connecticut, 310 U.S. 296 (1940).

13. 366 U.S. 599 (1961). *Braunfeld* upheld a challenge to the Pennsylvania Sunday law by Orthodox Jewish businessmen. Mr. Chief Justice Warren wrote:

Braunfeld and its companion cases,[14] however, were undercut only two years later by *Sherbert v. Verner.*[15] The effect of *Sherbert* was to confuse the law with respect to the Free Exercise clause.[16]

The confusion had not been resolved when Judge Merhige was confronted with *Dawson v. Mizell,*[17] a case strikingly similar to *Sherbert.*[18] In both cases the plaintiffs followed religions that observed the Saturday sabbath and consequently were denied either benefits or employment for their choice to follow their convictions. Not surprisingly, *Dawson* relied on *Sherbert;* but Judge Merhige ruled against the plaintiff. Thus, the important question is whether *Sherbert* was adequately distinguished.

Judge Merhige rejected the sweeping interpretation of *Sherbert* which Mr. Justice Stewart had expounded.[19] In attempting to discern some order

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> [I]f the State regulates conduct by enacting a general law within its power, the purpose and effect of which is to advance the State's secular goals, the statute is valid despite its indirect burden on religious observance unless the State may accomplish its purpose by means which do not impose such a burden.

366 U.S. at 607.

14. Gallagher v. Crown Kosher Supermarket, 366 U.S. 617 (1961); Two Guys from Harrison—Allentown, Inc. v. McGinley, 366 U.S. 582 (1961); and McGowan v. Maryland, 366 U.S. 420 (1961).

15. 374 U.S. 398 (1963). In *Sherbert,* the plaintiff, a Seventh Day Adventist, had been discharged from her job for refusing to work on Saturday, her Sabbath. She was subsequently denied unemployment compensation under a South Carolina statute barring payments to anyone who refused "without good cause . . . to accept suitable work." *Id.* at 401. The Court held this statute unconstitutional as an impermissible burden on the free exercise of religion. The Court noted, without relying on the fact, that another South Carolina statute insured that Sunday worshipers would not be denied benefits or discharged from employment for observance of their Sabbath.

16. In his *Sherbert* concurring opinion, Mr. Justice Stewart, citing Mr. Justice Brennan's dissent in *Braunfeld,* wrote: "In other words, the issue in this case—and we do not understand either appellees or the Court to contend otherwise—is whether a State may put an individual to a choice between his business and his religion." 374 U.S. at 417. Mr. Justice Stewart was not convinced that the majority had distinguished *Braunfeld.* For a discussion of an oblique problem arising from *Sherbert,* encompassing when protection of the free exercise of religion approaches establishing a religion, *see* Note, 25 PITT. L. REV. 711, 716 (1964).

17. 325 F. Supp. 511 (E.D. Va. 1971).

18. Dawson, who was a Seventh Day Adventist, received a career appointment with the Post Office. Under the terms of his union's agreement with the Post Office, Dawson was required to work on Saturdays, his Sabbath. Initially he expended his vacation and sick leave days to keep from working on the Sabbath, but he was later given an ultimatum by the Post Office. Dawson was dismissed soon after for refusing to work on Saturday and brought this suit alleging that the regulation ordering him to work on Saturday was a violation of the Free Exercise Clause.

19. An interpretation like Mr. Justice Stewart's, that *Sherbert* stands for the proposition that a state cannot force a choice between a citizen's religion and anything else, would have far-reaching effects. Under this rationale a plaintiff challenging a statute or regulation under

in the post-*Sherbert* confusion, Judge Merhige chose to reconcile *Sherbert* and *Braunfeld* by way of the least drastic alternative test.[20] This rationale seems not only to reconcile the two cases but also to provide the basis for distinguishing *Dawson.*[21] And while Judge Merhige's distinction may be subject to criticism from those urging the courts to read *Sherbert* broadly, there was an additional basis for ruling in the defendant's favor. The efficacy of the Union contract which assured the Post Office adequate personnel was held to be a compelling state interest which was not present in *Sherbert.*[22]

Moreover, the *Dawson* decision is noteworthy in another respect. Judge Merhige, in searching for the ground between *Braunfeld* and *Sherbert* reminded the plaintiff that failure to accomodate should not be equated with discrimination.[23] Presumably this was the basis for summarily rejecting plaintiff's alternate challenge under the Civil Rights Act of 1964.[24] But

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the free exercise clause could easily prevail by alleging that the state is forcing him to make just such a choice.

20. Under this rationale a statute supporting a legitimate and secular government interest would survive a constitutional challenge even though it may impede the exercise of religion if the state's purpose could not be achieved through less drastic means. It is reminiscent of Mr. Justice Frankfurter's opinion in McGowan v. Maryland, 366 U.S. 420 (1961).

21. *Dawson* was distinguished from *Sherbert* largely on the basis of this least drastic alternative approach. The Post Office Union regulation survived constitutional challenge because it achieved a permissible end by the least burdensome means. Judge Merhige said:

> Having concluded that in order to accomodate plaintiff's request to select his day off would require a violation on the part of the defendant of a binding contract affecting 700,000 people, it is obvious that any *incidental burden felt by the plaintiff is certainly justified when one considers that it would be literally impossible to accommodate the religious preference of every employee* of the Post Office Department.

325 F. Supp. at 514 (emphasis added).

This was not, however, the sole basis for distinguishing *Sherbert.* Judge Merhige noted that the regulation assigning Saturday work was neutral, while in *Sherbert* South Carolina had a law expressly saving Sunday worshipers from making the choice forced upon Saturday worshipers. And Judge Merhige concluded that the Post Office was not interfering with plaintiff's exercise of his religion, but only scheduling its work in accordance with the demands of the business community. 325 F. Supp. at 515.

22. In *Sherbert* the possibility of fraudulent claims was held not to be a compelling interest, especially in light of the fact that the state's funds could be protected with less burden on religion. 374 U.S. at 406-09. In *Dawson,* however, Judge Merhige noted that the Saturday work rule was part of an agreement with the Union affecting 700,000 Post Office employees. This agreement assured the Post Office an adequate number of personnel to complete its important duties. Even one exception would undermine the agreement's continued vitality. 325 F. Supp. at 515-16.

23. 325 F. Supp. at 515-16.

24. 42 U.S.C. §2000e-2(a) (1) provides:

> (a) It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms,

while the decision seems correct, it also appears that the plaintiff's claim had sufficient merit to receive a more complete explanation.

Judge Merhige did, however, enunciate his principles of reasonable accommodation. It is particularly interesting that the Supreme Court advanced many of the same principles in its subsequent opinion in *TWA v. Hardison,*[25] which addressed the issue "How far must an employer go in accomodating the religious preferences of his employees?" Like Judge Merhige, the Court was clear in establishing that reasonable accomodation does not mean accomodation at all costs.[26] Another belief shared by the two opinions was the idea that failure to accomodate does not equal discrimination.[27] And, in the absence of discriminatory intent, neither Judge Merhige nor the Supreme Court would strike down a *bona fide* seniority system in favor of an individual's religious preferences.[28] The employer's willingness to accomodate, if the Union had consented, was significant to the Supreme Court and to Judge Merhige, too.[29]

3. *Lawyer Advertising*

a. First Amendment Elements

Whether the first amendment would invalidate prohibitions on professional advertising has been a subject of debate for years. *Goldfarb v. Virginia State Bar*[30] was the first clear indication that bans on lawyer advertis-

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conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

In response to questions as to whether an employee could be discharged for refusing to work on religious grounds, the Equal Employment Opportunity Commission formulated a guideline, published at 29 C.F.R. §1605.1 (1966) (as amended in 1967). This ruling required employers "to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodation can be made without undue hardship on the conduct of the employer's business." The inescapable conclusion, then, is that Judge Merhige was convinced that the Post Office had made a "reasonable accommodation."

25. 97 S. Ct. 2264 (1977). In *Hardison* the plaintiff refused to work on Saturday, which was his Sabbath. TWA was willing to assign Hardison to different duties or shifts, but not without the Union's approval, for reassignment would violate the seniority provisions of the Union-TWA contract. After several meetings with Hardison and the union representative, the plaintiff was discharged. TWA prevailed by persuasively arguing that Hardison's duties in airplane maintenance were crucial, that substitution of supervisory personnel during his absences was a burden on an already under-staffed team and that an exception in this case could disrupt an important union agreement.

26. *Id.*, at 2274.

27. *Id.*, at 2276.

28. *Id.*, at 2275.

29. *Id.*, at 1173.

30. 421 U.S. 773 (1975). Although specifically concerned with the legality of minimum fee schedules, *Goldfarb* did raise implications about attorney advertising. Two points in favor of

ing might fall prey to the "right to know."[31]

But four months prior to the *Goldfarb* decision, *Consumer's Union of the United States v. ABA*[32] was filed in the Federal District Court for the Eastern District of Virginia. *Consumer's Union* was a direct challenge to the Bar's restrictions on advertising.[33] Contemporaneously, three other challenges to Bar regulations were filed.[34]

In setting the stage for *Consumer's Union,* two other events of significance should be noted. The first was the meeting of the ABA House of Delegates to reconsider the profession's ban on advertising,[35] which resulted in amendments to the applicable Disciplinary Rules.[36] The second event was the Supreme Court's decision in *Virginia State Board of Pharmacy v. Virginia Citizen's Consumer Council.*[37]

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lawyer advertising were: 1) the fact that attorneys play an important role in commercial intercourse (at 787); and 2) the fact that the State Bar is, for some purposes, a state agency, does not create an impenetrable shield (at 791). The Court did recognize, however, that holding some activities subject to the Sherman Act did not diminish the power of the state to regulate professions (at 793).

31. The right to know was first given constitutional recognition in Martin v. City of Struthers, 319 U.S. 141 (1943) and was later substantiated in Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969).

32. 427 F. Supp. 506 (E.D. Va. 1976) (filed Feb. 27, 1975).

33. The plaintiffs alleged that the Disciplinary Rules of the ABA and the Virginia State Bar prevented Arlington County attorneys from answering their questionnaire which was scheduled for publication. The Consumers Union publication would have violated DR2-102(a)(5) and (6) in two respects: 1) it had not been approved by either the State Bar or the ABA and 2) it would contain impermissible information. Specifically, the plaintiffs argued that the State Bar rule violated their right to receive information.

34. Hirshkop v. Virginia State Bar, Civil No. 74-0243-R (E.D. Va., filed May 23, 1974); Person v. Association of the Bar, Civil No. 75-C-987 (E.D. N.Y., filed June 25, 1975); Cairo v. State Bar, Civil No. 74-C-606 (E.D. Wis., filed Oct. 12, 1975).

35. Carrington, *The Major Problems of the Legal Profession During the Seventies,* 30 SW. L.J. 665, 676 (1976).

36. Summary of Action of the House of Delegates at midyear meeting, Philadelphia, February 1976, reaction on report No. 100, at 4-6. The most significant amendment was to DR2-102(a)(6); enabling listing in a "directory published by a state, county, or local bar association, or the classified section of telephone company directories . . ." and publication of credit arrangements, office hours, fees for initial consultation or availability of a written fee schedule.

37. 373 F. Supp. 683 (E.D. Va. 1974), *aff'd,* 425 U.S. 748 (1976). *Pharmacy* was a landmark case in the right to know field, for the doctrine was used to strike down a ban on the advertising of prescription drug prices. Unlike prior, unsuccessful challenges, the plaintiffs in *Pharmacy* were private citizens (rather than pharmacists) who alleged that the restriction hindered their economic decision making. (Where pharmacists were plaintiffs it was felt their claim was too self-serving to be based on a right to know basis). *See* 21 S.D.L. REV. 310 (1976). The *Pharmacy* case was a significant prelude to *Consumers Union* in another respect: Judge Merhige sat on the three judge panel which invalidated the Pharmacy Board Regulation.

As would be expected, *Consumer's Union* placed much reliance on *Pharmacy* and, not surprisingly, Judge Merhige accepted as a general proposition the idea that "advertising . . . nonetheless is dissemination . . . of information"[38] and in a free enterprise economy is a matter of public interest. Judge Merhige acknowledged, however, that commercial speech is not free from regulation.[39] Thus, the issue was narrowed to the permissibility of the State Bar regulation.[40]

The State Bar was unable to sustain its burden of proof and Judge Merhige was not convinced that defendants had shown the Disciplinary Rule to be either a permissible regulation of commercial speech or a regulation justified by a compelling interest. He rejected arguments based on a footnote in *Pharmacy*[41] as well as the notion that lawyer advertising is inherently deceptive.[42] Nor was Judge Merhige convinced that the Disciplinary Rule was a necessary complement to state law.[43] In ruling for the plaintiff, Judge Merhige noted the importance of striving for equality in the availability of legal services[44] and the probability that any deceptiveness could be regulated by more narrow guidelines.[45] It should be empha-

38. *Consumer's Union*, 427 F. Supp. at 517, citing *Pharmacy*, 425 U.S. at 765.

39. 427 F. Supp. at 518, citing *Pharmacy*, 425 U.S. at 771. One necessarily permissible regulation of commercial speech would be to insure against false, deceptive and misleading advertising. 477 F. Supp. at 521.

40. The State Bar regulation was the sole prohibition in issue because the ABA was dismissed for want of state action. State action was not established by ABA-State Bar interdependence because their contacts were insufficient, as evidenced by the State Bar's refusal to adopt the more permissive amendments to DR 2-102(a)(6) passed by the ABA House of Delegates.

41. In note 25, the majority stated that the Court's opinion was limited to the peculiar facts and was not indicative of its views on lawyer advertising. In addition, he acknowledged that regulations of different professions might require consideration of different factors. 425 U.S. at 773, n. 25.

42. In rejecting the argument that even truthful advertising by attorneys was inherently deceptive, Judge Merhige noted that this would require him to accept either that attorneys are brash, extravagant and self-laudatory or that the public was ill-equipped to distinguish misleading advertising. The first alternative was summarily rejected. With respect to the second, Judge Merhige noted that the cure is to provide the public with more information, not less.

43. The State Bar argued that the Disciplinary Rules were a necessary adjunct to VA. CODE ANN. §18.2-216 (Repl. Vol. 1973) (declaring unlawful the advertisement for services containing untrue promises, deception, etc.) because the latter could be applied only after the harm was done. Judge Merhige felt that this argument would require the court to believe that the state's attorneys would break the law were it not for DR 2-102(a)(6), ignore the reality that prosecution would be easier if the deception was in advertising and elevate an administrative burden to compelling interest status. Judge Merhige was unwilling to accept any of these propositions.

44. 427 F. Supp. at 520, citing Curran & Spalding, *The Legal Needs of the Public* (1974).

45. Judge Merhige did not abandon the qualified commercial speech protection. In fact,

sized that while the *Consumer's Union* decision had profound implications for the Bar, it was based on strong precedent and traditional first amendment analysis.[46]

Much of Judge Merhige's *Consumer's Union* reasoning was echoed by the Supreme Court in June 1977 when it rendered its opinion in *Bates v. Arizona State Bar.*[47] The challenge in *Bates* rested on commercial speech and antitrust principles.[48] As in *Consumer's Union*, the Court was convinced that *Pharmacy* was controlling,[49] that advertising by attorneys is not inherently misleading[50] and that advertising would facilitate, rather

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he reiterated that some types of advertising may still be regulated. For example, some non-fee information such as "areas of specialization" might need to be regulated. And, he admitted that advertising a set fee for some services could be inherently misleading. However, not all fee advertising is misleading, as evidenced by the fact that the State Bar circulated minimum fee schedules prior to *Goldfarb*.

46. When the question is considered solely in terms of first amendment principles, it seems clear that the State Bar regulation was not permissible (for the legitimate state purpose could be achieved with less burden) nor supported by a compelling state interest. Moreover, it was a responsible opinion in not opening the Pandora's box of unregulated advertising. Instead the decision found the middle ground between first amendment freedom and the practical necessities of the profession. In striking this balance, Judge Merhige tried to answer what may be the most perplexing problem, and one which was shared by Mr. Justice Powell. During the oral argument in *Bates, infra.* Mr. Justice Powell asked, "The question is what limits, rationally, fairly, constitutionally, may be imposed, who imposes those limits, and how are they to be enforced?" Reprinted at 13 A.B.A.J. 341 (1977).

47. 97 S. Ct. 2691 (1977). In March, 1974, appellants John R. Bates and Van O'Steen established a "legal clinic" in Phoenix. Their aim was to provide low cost legal services to middle income persons who usually feel they cannot afford professional advice but earn too much to qualify for government funded legal aid. To achieve this goal, appellants decided to accept only routine, ministerial cases such as uncontested divorces and adoptions, name changes and personal bankruptcies. In order to generate the volume necessary to make the "clinic" profitable, appellants advertised their services and fees in the February 22, 1976 *Arizona Republic,* admittedly in violation of DR 2-101(b). This rule, in pertinent part provides:

> (B) A lawyer shall not publicize himself, or his partner, or his associate, or any other lawyer affiliated with him or his firm, as a lawyer through newspaper or magazine advertisements, radio or television announcements, display advertisements in the city or telephone directories or other means of commercial publicity, nor shall he authorize or permit others to do so in his behalf.

DR 2-101(B) is embodied in Rule 29(a) of the Supreme Court of Arizona, 17A ARIZ. REV. STAT. (1976 Supp.).

48. Only the commercial speech application will be considered at this point. The antitrust argument construing the limits of Parker v. Brown, 317 U.S. 341 (1943) (state action exemption) will be considered in a slightly different context. *See* notes 57-72 and accompanying text, *infra.*

49. 97 S. Ct. at 2700: "We have set out this detailed summary of the *Pharmacy* opinion because the conclusion that Arizona's disciplinary rule is violative of the First Amendment might be said to flow *a fortiori* from it."

50. *Bates, supra* at 2703-04. Although many legal services are unique, some, like those the

than hinder, the administration of justice.[51] The Court was also convinced that any enforcement problems associated with freer advertising could be overcome.[52] The Supreme Court did, however, discuss other factors favoring lawyer advertising which were not mentioned in *Consumer's Union*.[53]

Since the reasoning of *Consumer's Union* and *Bates* was so similar, it is not surprising that the final decisions were similar, too. Like *Consumer's Union*, the *Bates* decision recognized that some regulation of lawer advertising was permissible.[54] Neither opinion, however, would open the door to advertising of the quality of legal services,[55] but both acknowledged the role of the Bar in setting the parameters of acceptable advertising.[56]

b. Antitrust Elements

Bates also contained a challenge to the Arizona disciplinary rules based upon the Sherman Antitrust Act.[57] While *Consumer's Union* did not approach the issue from this aspect, Judge Merhige did have occasion to apply antitrust law to State Bar regulations in *Surety Title Insurance Co. v. Virginia State Bar*.[58] Though not within the confines of free expression,

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appellants were advertising, are standardized and needn't be inherently misleading because: 1) the public is likely to know the service required, at least to the extent of the generality of the advertisement; 2) fee schedules, prior to *Goldfarb* had been used by the Bar; 3) current ABA rules permit advertising of consultation fees in telephone directories, and there is no evidence this would be deceptive if printed in a newspaper; and 4) while fees are not the entire basis for selecting an attorney, the solution is *to give more, not less information*, citing *Pharmacy*, 425 U.S. at 770. *Bates*, 97 S. Ct. at 2704-05.

51. Instead of adversely affecting the administration of justice, advertising may promote that goal; (citing ABA Revised Handbook on Prepaid Legal Services: Papers and Documents assembled by the Special Committee on Prepaid Legal Services 2 (1972)), and would be in accord with the duty to "facilitate the process of intelligent selection of lawyers and to assist in making legal services fully available." ABA Code of Professional Responsibility EC 2-1 (1976).

52. Bates, *supra* at 2706-07. The Court did not anticipate enforcement problems and noted that it was "somewhat incongruous for the opponents of advertising to extol the virtues and altruism of the legal profession at one point, and, at another, to assert that its members will seize the opportunity to mislead and distort." The Court emphasized that self-enforcement was a good possibility since attorneys should perceive that disciplining over-reachers is in their self-interest.

53. Additionally, the Court found that advertising, through its openness, may help dispel some of the public's distrust of the profession, Bates, *supra* at 2701 and should not contribute to higher legal fees, Bates, *supra* at 2706.

54. Bates, 97 S. Ct. at 2708. *Cf.* Consumer's Union, 427 F. Supp. at 521.

55. Bates, 97 S. Ct. at 2709. *Cf.* Consumer's Union, 427 F. Supp. at 521.

56. Bates, 97 S. Ct. at 2709. *Cf.* Consumer's Union, supra at 522.

57. 15 U.S.C. §1.

58. Surety Title Ins. Agency, Inc. v. Virginia State Bar, 431 F. Supp. 298 (E.D. Va. 1977). Plaintiff alleged that the State Bar's method of rendering advisory opinions concerning the

a brief comparison of *Bates* and *Surety Title* is deserved.

In *Parker v. Brown*[59] the Supreme Court recognized the state action exemption to the Sherman Act.[60] The Court hinted that this exemption was not absolute, but did not articulate how it was qualified.[61] *Goldfarb* severely limited the exemption[62] but neither it nor the next significant case in point, *Cantor v. Detroit Edison Co.*,[63] resolved much of the doubt present in the area.[64]

The first requirement of the state action exemption is clear—the action must have been compelled by the state.[65] But this is only a threshold inquiry, and the difficulty lies in determining the other tests to be applied. Judge Merhige acknowledged the difficulty[66] and by analyzing opinions of other circuits[67] decided "these different formulations share the common

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unauthorized practice of law violated §§1 and 2 of the Sherman Act. The State Bar is authorized to publish these opinions pursuant to the Rules of the Supreme Court of Virginia, Part VI, 6:IV; ¶9(i), 216 Va. 1146 (1976). Specifically, the plaintiff challenged Unauthorized Practice of Law Opinion No. 17 (stating that only attorneys may certify title) as applied with DR 3-101(A) (subjecting attorneys to disciplinary action should they assist a non-lawyer in the unauthorized practice of law). The effect of these provisions is that the plaintiff is precluded from the title insurance market. The alleged restraint operates in the following manner: a transfer of real estate requires a deed prepared by an attorney, and, for all practical purposes, a title insurance policy. Since Opinion No. 17 states that certification of title is the practice of law, attorneys will not prepare deeds (under threat of DR 3-101(A)) if the title was certified by the plaintiff.

59. 317 U.S. 341 (1943).

60. *Parker* is not so much an exemption as it is a recognition that Congress did not intend to subject all state action to anti-trust law proscription. *See* Handler, *The Current Attack on the Parker v. Brown State Action Doctrine*, 76 COL. L. REV. 1, 9 (1976).

61. P. Slater, *Antitrust and Government Action: A Formula For Narrowing Parker v. Brown*, 69 Nw. L. REV. 71, 73-78 (1974). For a discussion of Slater's solution to the problem of *Parker*, *see* pages 104-109.

62. *Goldfarb* limited the *Parker* exemption by requiring that the regulation be mandatory under state law.

63. 428 U.S. 579 (1976). In *Cantor* the plaintiff challenged a state-sanctioned light bulb distribution program by the defendant utility. While the bulbs were provided to electrical customers free of charge, their cost was added in to figures computing the rate approved by the Michigan Public Service Commission. The court held that the *Parker* doctrine did not shield the defendant utility.

64. Six justices concurred to the effect that the state action doctrine was inapplicable. A plurality of four justices rested this conclusion on the fact that the practice was almost wholly private conduct. 428 U.S. at 591, 602. The Chief Justice concurred for want of a state policy relating to the distribution of light bulbs. 428 U.S. at 604-05. And, Mr. Justice Blackmun concurred because the benefits of the program were exceeded by its anti-competitive harms. 428 U.S. at 610.

65. *Goldfarb*, *supra* at 790.

66. *Surety*, 431 F. Supp. at 306.

67. This difficulty is reflected in the different reasoning announced by the Fifth Circuit, which has ruled that the *Parker* doctrine applies only where *Goldfarb* is satisfied and the

thread of focusing on the relationship between the anticompetitive activity and the state interest it purports to advance. If that relationship is tenuous, the activity must fall."[68] In applying this test to the regulation in *Surety,* Judge Merhige found the balance to be in the plaintiff's favor. He noted that the method by which Unauthorized Practice of Law opinions were formulated was not sufficiently related to the state's goals[69] to justify the anticompetitive effects.[70]

The Supreme Court reached the opposite result in *Bates,* but *Surety* can be reconciled with that decision. In *Bates* the rules which caused the anticompetitive effects were necessary to achieving the state's goal.[71] These rules also were promulgated by the Arizona Supreme Court[72] and were subject to review by the state.[73] In contrast, the formulation of Unauthorized Pratice of Law Opinions by the Virginia State Bar contained none of these redeeming features.[74]

4. *Conclusion*

In concluding the free expression discussion, it is clear that Judge Merhige applies authority with the best of judicial principles. This demonstrates a thorough understanding of the law which can be best appreciated

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anticompetitive restraint is within the intent of the authorizing mandate of the state. City of Lafayette v. Louisiana Power & Light, 532 F.2d 431 (5th Cir. 1976). The Ninth Circuit has held that in addition to meeting the *Goldfarb* inquiry, the restraint must serve the purpose for which the profession exists—serving the public. Boddicker v. Arizona Dental Assoc., 549 F.2d 626 (9th Cir. 1977). The District of Columbia Court of Appeals intimated that ethical rules with anticompetitive effects might survive a Sherman challenge where such practices are "narrowly confined to interdiction of abuses." United States v. National Soc. of Prof. Eng'rs., 555 F.2d 978, 984 (D.C. Cir. 1977).

68. *Surety,* 431 F. Supp. at 306.

69. The accepted and admirable goals of the Unauthorized Practice of Law Opinion process were to insure that only qualified practitioners to the Code of Professional Responsibility. 432 F. Supp. at 307 citing Rules of the Supreme Court of Virginia, Part Six, Rule 6:II, 216 Va. 1064 (1976).

70. The relationship between goals and burdens was too tenuous because the criminal code provided an adequate penalty; the opinions would not deter the unauthorized practice of law since only those licensed to practice law could obtain opinions and because the opinions could not be justified as a necessary part of the disciplinary rules. Surety, 431 F. Supp. at 307-08. Judge Merhige also noted that the opinions on title certification had not been reviewed by the Supreme Court, thereby allowing attorneys to define the extent of their monopoly and were shown to be not solely motivated by the public interest. *See* note 7 *supra,* at 304.

71. *Bates, supra* at 2698.

72. *Id.,* at 2697.

73. *Id.,* at 2698.

74. The Unauthorized Practice of Law Opinions of the Virginia State Bar were subject to review by the Supreme Court of Virginia, but that court had not passed on the opinions relating to the question of title certification.

through comparison with Supreme Court decisions which were rendered after Judge Merhige's opinions. With the exception of his desegregation cases, Judge Merhige may be best noted for his free expression decisions. And while they may appear controversial to some, a close examination of precedent and the applicable law reveals that his opinions are logical, well-reasoned and principled.

B. The Right to Privacy

The right to privacy is not mentioned in the body of the United States Constitution,[1] rather it is a judicially created concept. The specific amendment of the constitution from which it derives is far from being a settled point among the justices of the Supreme Court. In years past, the Court has held that the right to privacy emanates from the first amendment,[2] the fourth amendment,[3] the fourteenth amendment,[4] the ninth amendment,[5] and the penumbras of the ninth amendment.[6] Irrespective of the origin of the right to privacy, the Court has held it to be a fundamental interest,[7] and any government action invading it must be justified by a compelling state interest or it will be found unconstitutional.[8]

Judge Merhige's conception of privacy[9] is similar to that which Justice Harlan enunciated in his concurrence in *Griswold v. Connecticut*,[10] and

1. *See* Roe v. Wade, 410 U.S. 113, 152 (1973).

2. *See* N.A.A.C.P. v. Alabama, 357 U.S. 449,462 (1958), holding that the right to privacy emanates from the first amendment guarantee of freedom of association, and Stanley v. Georgia, 394 U.S. 557,564 (1969), holding that privacy derives from the first amendment guarantee of freedom of speech.

3. *See* Terry v. Ohio 392 U.S. 1, 8-9 (1967) holding that privacy is within the fourth amendment protection against unreasonable searches and seizures. *See also* Katz v. United States, 389 U.S. 347,350 (1967).

4. *See* Loving v. Virginia, 388 U.S. 1, 12 (1967), where the Court held that the fourteenth amendment due process clause protects marriage.

5. *See* Griswold v. Connecticut, 381 U.S. 479, 496 (1965) (Goldberg, J., concurring) holding that the ninth amendment protects the right to privacy even though it is not expressly mentioned elsewhere in the Constitution.

6. *Id.* at 484-85. The majority, through Mr. Justice Douglas, held that a zone of privacy emanates from the ninth amendment. The penumbras are those guarantees that emanate from a specific amendment giving it life and substance.

7. *See supra,* notes 3 through 7.

8. *See* Roe v. Wade, 410 U.S. 113, 155 (1973), Loving v. Virginia, 388 U.S. 1 (1967), Griswold v. Connecticut, 381 U.S. 479 (1965).

9. *See* Lovisi v. Slayton, 363 F. Supp. 620 (E.D. Va. 1973), *aff'd sub nom.*, 539 F.2d 349 (4th Cir. 1976), *cert. denied,* 429 U.S. 977 (1977).

10. 381 U.S. 479, 500 (1965).

that which the Supreme Court utilized in deciding *Roe v. Wade*.[11] Namely, the right to privacy derives from the fourteenth amendment due process clause which "provides substantive protection for fundamental values implicit in the concept of ordered liberty."[12] The remaining provisions of the Bill of Rights merely give guidance to the values which are protected by the right of privacy.[13] Judge Merhige considers the court "duty bound to apply not only what the Constitution expressly states is the law, but also what by necessary implication from the values on which it is based the Constitution implies is the law."[14] To date, Judge Merhige has considered the right to privacy only as it relates to grooming standards and sexual relations between consenting adults.

Judge Merhige found that freedom of grooming is protected by the Constitution,[15] and when it involves a matter of preference, as opposed to an expression of symbolic speech,[16] grooming standards are protected by the right of privacy under the equal protection clause of the fourteenth amendment. If a governmental action infringes on an individual's right to choose his personal standards of grooming, then the burden is on the government to establish a compelling interest in order for the action to be permissible within the limits of the Constitution.[17]

Accordingly, Judge Merhige ruled unconstitutional Navy[18] and Air Force[19] grooming regulations which allowed personnel to wear a wig or hair piece for cosmetic reasons,[20] but not to cover long hair so as to meet military grooming standards. He found this classification to be constitutionally impermissible because the government failed to establish a compelling interest.[21] However, a prison regulation which restricted inmates' hair

11. 410 U.S. 113 (1973).

12. 363 F. Supp. at 624.

13. *Id.* Judge Merhige contends that in defining the values to be included within the right of privacy the courts are using the "somewhat discredited, concept of natural law."

14. *Id.*

15. *See* Ethridge v. Schlesinger, 362 F. Supp. 198, 203 (E. D. Va. 1973); Brown v. Schlesinger, 365 F. Supp. 1204 (E.D. Va. 1973); Howard v. Warden, Petersburg Reformatory, 348 F. Supp. 1204 (E.D. Va. 1972).

16. 362 F. Supp. at 203. If the length of one's hair, for example, is a symbolic expression of speech, then it is protected by the penumbras of the first amendment, but where it is merely a matter of preference, it is protected by the right of privacy under the fourteenth amendment.

17. *See* note 9 *supra*.

18. *See* Ethridge v. Schlesinger, 362 F. Supp. 198 (E.D. Va. 1973).

19. *See* Brown v. Schlesinger, 365 F. Supp. 1204 (E.D. Va. 1973).

20. In both cases the military grooming regulation permitted the wearing of wigs or hairpieces by bald or disfigured men, but not by longhaired personnel who wear the wig to meet grooming standards for their reserve duty.

21. The classification made by the regulation was not justified by a legitimate government

length and facial growth,[22] although it triggered constitutional protection in the right of privacy, was upheld because the government met its burden of establishing a compelling interest.[23] Judge Merhige found that the prison's interest in orderly prison administration, fostered by easy identification of prisoners and by eliminating the concealment of contraband in long hair and beards, was so compelling as to override the prisoner's interest in being able to choose his own standards of grooming.[24]

The right of consenting adults to engage in certain sexual activities has been recognized by Judge Merhige to be protected under the Constitution by the right of privacy.[25] He views privacy in this context to refer to acts done behind closed doors or within the privacy of one's home.[26] Thus, "a mature individual's choice of an adult sexual partner, in the privacy of his or her home" is within this definition and is of such a "private and intimate concern" that it is protected by the right of privacy,[27] thereby requir-

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interest. Merhige held that while the military may curtail certain rights to further its needs, if it fails to curtail a right then, that right is recognized and cannot, thereafter, be arbitrarily curtailed—this amounts to a violation of the equal protection clause of the fourteenth amendment.

22. Howard v. Warden, Petersburg Reformatory, 348 F. Supp. 1204 (E.D. Va. 1972). The plaintiffs challenged the Federal Reformatory regulation, which set forth the standards for both hair length and facial growth, as violations of their constitutional rights.

23. *Id.* at 1205-06. Merhige held that lawful incarceration, by its very nature, curtails certain rights of an inmate and that where the state can demonstrate a compelling interest it may curtail others. Generally, an inmate's right to privacy is very limited. In Lanza v. New York, 370 U.S. 139 (1962), the Supreme Court set forth the precept that the normal aspects of privacy found in a home, an automobile, an office or motel differ from that of a jail because of the security need within. From this lead, lower courts have been reluctant to allow an inmate a great deal of protection under the rubric of the right of privacy. *See also* Penn El v. Riddle 399 F. Supp. 1059 (E.D. Va. 1975) (involving a skin and body cavity search); and Burns v. Wilkinson, 333 F. Supp. 94 (W.D. Mo. 1971)(search of an inmate's body and his jail cell.)

24. *Id.*

25. *See* Lovisi v. Slayton, 363 F. Supp. 620, 626-27 (E.D. Va. 1973), *aff'd sub nom.*, 539 F.2d 349 (4th Cir. 1976), *cert. denied*, 429 U.S. 977 (1976). The plaintiff challenged section 18.1-212 of the Code of Virginia. This section applied criminal sanctions on persons engaging in an act of sodomy irrespective of their relationship and irrespective of the setting. Judge Merhige upheld the plaintiffs' lower court conviction under this statute because the plaintiffs had waived their protection under the right to privacy by photographing intimate sexual acts. He stated, however, that the right to privacy includes sexual relations between a husband and wife and that this statute threatens to invade that right. If challenged by a proper plaintiff the statute could not stand.

26. 363 F. Supp. at 626-27. Merhige acknowledged that privacy in some instances such as childbearing, child rearing and marriage referred to doing an act which is personal to the one performing it and having no effect on others.

27. *See* Doe v. Commonwealth's Attorney for City of Richmond, 403 F. Supp. 1199, 1204 (E.D. Va. 1975) (Merhige, J., dissenting), *aff'd* 425 U.S. 901 (1976), *reh. denied* 425 U.S. 985 (1976).

ing a showing of a compelling state interest in order to regulate it.[28] In dictum, he has indicated that a state sodomy statute[29] would be unconstitutional as applied to married couples[30] and to consenting unmarried heterosexual adults in the privacy of their home[31] since it attempts to regulate such an interest. By asserting such a position, Judge Merhige implies that the state lacks the compelling interest which is necessary in order to regulate this activity.

In a dissenting opinion, Judge Merhige, relying on the rationale of *Griswold v. Connecticut*[32] and *Eisenstadt v. Baird*,[33] extended the protection of the privacy concept to include sexual relations between consenting homosexual adults in the privacy of their homes.[34] Although the participants are homosexual, the activity is still on that falls within Judge Merhige's definition of privacy and, therefore, triggers the compelling interest test which he reasons the state cannot meet.[35] While the United States Supreme Court has not accepted this position,[36] it appears to be the better reasoned view.[37] Perhaps the Supreme Court will eventually adopt the

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28. *See supra* note 9.

29. VA. CODE ANN. § 18.2-361 (Cum. Supp. 1978).

30. *See supra* note 26.

31. *Id.* 363 F. Supp. at 625. Judge Merhige held that the Supreme Court's decision in *Eisenstadt v. Baird*, 405 U.S. 438 (1972), extending *Griswold v. Connecticut*, 381 U.S. 479 (1965), indicates that the married—non-married distinction is inapplicable. Thus, he reasoned that if privacy protects the sexual relations of a married couple in the privacy of their home, then it should also protect a non-married couple. The protected relations are the "nature of the sexuality or something private to the individual that calls for constitutional protection" and not the marriage vows. Since the plaintiffs in this case had waived their right to privacy, Judge Merhige did not reach the constitutionality of the statute as it applied to non-marital couples, but strongly indicated that if he were to decide this issue he would invalidate the statute.

32. 381 U.S. 479 (1965).

33. 405 U.S. 438 (1972).

34. Doe v. Commonwealth's Attorney for the City of Richmond, 403 F. Supp. 1199, 1204 (E.D. Va. 1975), *aff'd.* 425 U.S. 901 (1976), *reh. denied* 425 U.S. 985 (1976). The plaintiffs were challenging Virginia's sodomy statute [VA. CODE ANN. § 18.2-361 (Cum. Supp. 1978)] claiming it was an unconstitutional violation of the plaintiffs' right to privacy as protected by the fourteenth amendment. The plaintiffs were homosexual males who were being prosecuted under this statute. The majority of the Court upheld the statute by construing *Griswold v. Connecticut*, 381 U.S. 479 (1965) to apply only to its own facts, and by finding that Virginia need only prove a rationale basis to enact the statute. The Court found a rational basis in the state's contention that it was controlling homosexual behavior in order to prevent moral delinquency and to promote moral decency.

35. *Id.*

36. While the Supreme Court upheld the majority's decision in *Doe*, it did so without an opinion.

37. In *Griswold* and *Eisenstadt*, the Supreme Court held that sexual relations between consenting adults are protected by the right of privacy. The Court made no distinction

Merhige view at such future time as it sees American society as being prepared to accept such a holding.

C. The Right to Vote

For almost a century, the United States Supreme Court has considered the right to vote "as a fundamental political right, because preservative of all rights."[1] The importance of this right has been continuously reinforced by the Supreme Court's consistent application of the compelling state interest criteria where an infringement of this right is alleged.[2] The Supreme Court has stated:

> No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined. Our Constitution leaves no room for classification of people in a way that unnecessarily abridges this right.[3]

Judge Merhige has had but one opportunity to address the issue of one's right to vote. In *Manard v. Miller*,[4] as part of a Three Judge District Court, Judge Merhige in a vigorous dissent stressed the importance of the free exercise of the franchise and the evils of unconstitutional prerequisites to access to the polls. Due to the importance of the right, Judge Merhige

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between married and non-married persons. The sole difference between these decisions and *Doe* is the fact that the plaintiffs in *Doe* were homosexual. The majority in *Doe* made a homosexual-heterosexual classification and concluded that privacy does not attach to sexual relations between the former and the state need only establish a rational basis in order to regulate this type of behavior. Judge Merhige reasons that privacy attaches in the nature of the act—sexuality—and not to the relationship involved, be it married-unmarried or heterosexual-homosexual. Consequently, the protection afforded by the constitution under the right of privacy should be triggered any time sexuality in the privacy of one's home is involved. If so, the compelling state interest test applies and the rational basis test employed by the majority in *Doe* was incorrect. Hence, the statute should be ruled unconstitutional.

1. Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886).

2. Oregon v. Mitchell, 400 U.S. 112 (1970); Evans v. Cornman, 398 U.S. 419 (1970); Ciprianо v. Houma, 395 U.S. 701 (1969); Kramer v. Union Free School Dist., 395 U.S. 621 (1969).

3. Wesberry v. Sanders, 376 U.S. 1, 17-18 (1964).

4. 53 F.R.D. 610 (E.D. Va. 1971). Action by University of Virginia students claiming the right to vote in Virginia by challenging a state law which made it more difficult for out of state students to establish residency in Virginia than for out of state non-students. The majority of the court abstained from deciding the issue of the right to vote, but retained jurisdiction where such students could reapply for registration, and if rejected, they could appeal to the state courts.

argued that college students challenging the Virginia residency requirements should be allowed a provisional vote, to be counted among the valid returns, contingent upon the outcome of the case, notwithstanding the $12,000 cost of such a procedure.[5]

Judge Merhige expressed his disagreement with the majority that the claim was not a class action,[6] and voiced his disapproval of the majority's use of the abstention doctrine to avoid the constitutional issue. After citing authority that a court should not abstain solely because the same claim might have been adjudicated in a state forum,[7] Judge Merhige noted that requiring plaintiffs to exhaust state remedies would, in effect, prevent plaintiffs from participating in the forthcoming election.[8] In light of the fundamental nature of the constitutional rights in issue, the limited costs of protecting the students' rights and the substantial likelihood of their eventual success, Judge Merhige argued for a preliminary injunction allowing the students a provisional vote. In doing so, Judge Merhige said:

> It is my view that the rights involved are of such a vital concern to all citizens that the number so affected, be it 1 or 1000, is of little consequence. My concern admittedly is perhaps somewhat more intensified by the belief that if the widely disseminated expressed concern of many of our fellow citizens in reference to the youth in our country is of any validity, then Courts, of all

5. *Id.* at 615-16.

6. Concerning the issue of class action, Judge Merhige stated:

> The class is readily identifiable as students of voting age attending college in Virginia. My fellow judges conclude that this is not a class action and support that bare conclusion on a finding that "the facts and circumstances controlling the right of applicants to register may vary in respect to each of them . . . as well as in regard to the nature and content of the questions propounded to them . . . at the time they first sought registration."
>
> A class of plaintiffs need not be composed of individuals identifical in all respects. The rule, in this type of case, requires beside the general demand of numerosity, questions of law or fact common to the class; that the claims of the plaintiffs, original and intervening, be typical of the class and will adequately protect class interests; that the party opposing the class has acted or refused to act on the grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole, Fed. R. Civ. P. 23. The rule does not require that all persons in the class desire to take advantage of the rights they may have, nor that each member have in fact been identically treated by the defendants.

Manard, *supra,* note 4 at 612.

7. *See* Askew v. Hargrave, 401 U.S. 476 (1971); McNeese v. Board of Education, 373 U.S. 668 (1963).

8. Manard, *supra* note 4 at 614. "In today's ruling, therefore, the court abstains without suggesting what problem-solving eventuality it awaits and by the same act compels the plaintiffs to exhaust State remedies which, for the practical purposes of the upcoming election, are not available." *Id.*

> our institutions, ought to be extremely alert to the rights of those young people who by their very attempt to participate in the voting process have expressed their conviction that the system is indeed worthy of participation.[9]

VI. EQUAL PROTECTION

A. Traditional Analysis Intensified

Traditional equal protection analysis is two-tiered.[1] In judging a legislative classification a court must determine whether the classification employed is to be tested by the rational basis test or the strict scrutiny test. The latter is employed only in cases in which the classification is "suspect" or where the right at issue is "fundamental." In all other instances, at least historically, the courts have used the rational basis test. Recent Supreme Court decisions, however, reveal that a broader, more spectrum-like approach is being utilized in equal protection analysis.[2] The equal protection decisions handed down by Judge Merhige are consistent with this new approach.

At issue in every equal protection case is a legislative or administrative classification, for every statute which treats some citizens differently from others may be challenged on equal protection grounds. To reconcile the inherent conflict between the right of a legislature to classify and the right of an individual to equal protection of law, the judiciary has relied on the "test of reasonable classification."[3] According to this concept, a classification "is valid if it includes all . . . persons who are similarly situated with respect to [the] purpose of [the] law."[4] The relation between a classification and its articulated purpose is the essence of equal protection analysis. Often referred to as the means-end analysis, it is usually held that all legislative classifications (means) must not only promote a valid purpose (end), but that they must also further the achievement of that purpose.

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9. *Id.* at 615.

1. Gunther, *The Supreme Court, 1971 Term—Foreward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection,* 86 Harv. L. Rev. 1, 12 (1972).

2. *See generally* James v. Strange, 407 U.S. 128 (1972); Eisenstadt v. Baird, 405 U.S. 438 (1972); Reed v. Reed, 404 U.S. 71 (1971).

3. Tussman and tenBroek, *The Equal Protection of the Laws,* 37 Calif. L. Rev. 341 (1949).

4. Note, *Developments In the Law—Equal Protection,* 82 Harv. L. Rev. 1065, 1076 (1969).

1. *Purpose Inquiry*

Traditionally, the purpose inquiry in equal protection analysis has been slight. Assuming a classification is to be analyzed by the rational basis test the courts have presumed the state's purpose in classifying to be legitimate. In addition, if the legislature failed to articulate a purpose for the classification, the courts would "attribut[e] to the classification the purpose thought to be most probable."[5]

The majority of a three-judge court for the eastern district of Virginia followed this traditional approach in *Brown v. Supreme Court of Virginia*[6] by holding that the Virginia Supreme Court had a right to separately classify applicants seeking admission via the bar exam from those foreign attorneys who sought admission by reciprocity. In concluding that there was a rational basis for the separate classification, the court went so far as to state: "We are not here concerned with the wisdom of the Rule under attack and the Equal Protection Clause does not countenance speculative probing into the purposes of the rule as long as it is not plainly arbitrary or discriminatory."[7]

Judge Merhige avoided such a speculative purpose inquiry in *Rogers v. Miller*.[8] In holding that a massage parlor tax did not constitute a violation of equal protection, Judge Merhige, utilizing traditional analysis, stated that, "within the constraints of the Fourteenth Amendment, state governing units have large latitude in making classifications. . . ."[9] Similarly, in *United Mine Workers of America v. Industrial Commission of Virginia*[10] Judge Merhige refused to look behind the articulated state purpose of a workmen's compensation waiver statute. In dismissing the equal protection claim the district court merely reiterated the purpose which the Virginia Supreme Court had detailed for the statute and added, "[i]t would be inappropriate for this Court to say that such a balancing of interests was beyond legislative competence. . . ."[11]

Even though Judge Merhige professes an adherence to the traditional rational basis test and, at times, conforms to it, a careful reading of his

5. *Id.* at 1078. In addition, if the most probable purpose for a classification is impermissible, the courts will "attribut[e] to the legislature any reasonably conceivable purpose which would support the constitutionality of the classification." *Id.* at 1078.

6. 359 F. Supp. 549 (E.D. Va. 1973) (2-1 decision) (Merhige, J., dissenting). This opinion dealt with two actions: Titus v. Supreme Court of Va., 213 Va. 289, 191 S.E.2d 789 (1972), and Brown v. Supreme Court of Va., 213 Va. 282, 191 S.E.2d 812 (1972).

7. *Id.* at 554.

8. 401 F. Supp. 826 (E.D. Va. 1975).

9. *Id.* at 828.

10. 374 F. Supp. 1294 (E.D. Va. 1974).

11. *Id.* at 1298.

cases reveals that, on occasion, the test is present in name only. In *Cohen v. Chesterfield County School Board,*[12] while purportedly utilizing a rationale basis analysis, the district court held that a school board regulation requiring pregnant teachers to take a leave of absence at the end of the fifth month of pregnancy violated the equal protection clause. In so holding the district court did not, despite its disclaimer, use the rational basis test. The court stated that there were no medical, psychological, or "tenable" administrative reasons for the regulation.[13] The state's articulated purposes behind the regulation that it prevented potential injury to the fetus, avoided possible inabilities on the part of the teachers to carry out the full scope of their responsibilities, and aided continuity of instruction—were declared "nugatory and based on no empirical data whatsoever."[14] The district court clearly disregarded the fact that the traditional rational basis test does not even require an articulated purpose, much less data to support the purpose. Labeling articulated purposes as "nugatory" implies, in addition, that Judge Merhige has been engaged in "speculative probing," an activity which rational basis equal protection analysis ostensibly does not "countenance."[15] Further evidence that Judge Merhige strayed from strictly traditional equal protection analysis in *Cohen* can be found in *LaFleur v. Cleveland Board of Education*[16] and the Fourth Circuit Court of Appeals' opinion[17] reversing *Cohen.*

Kruse v. Campbell[18] is another example of Judge Merhige taking liberty with the traditional rational basis test. At issue was a state statute which provided for partial reimbursement, to families of handicapped children, of the cost of privately educating their children, assuming public educa-

12. 326 F. Supp. 1159 (E.D. Va. 1971).

13. *Id.* at 1160.

14. *Id.*

15. Brown v. Supreme Court of Va., 359 F. Supp. 549 (E.D. Va. 1973) (2-1 decision) (Merhige, J., dissenting).

16. 326 F. Supp. 1208 (N.D. Ohio 1971). In *LaFleur* the district court for the northern district of Ohio applied the traditional rational basis test to almost the identical facts of *Cohen.* In contrast to *Cohen,* however, the *LaFleur* district court concluded that "the regulation in question is entirely reasonable, and most adequately meets the prescribed [rational basis] tests." *Id.* at 1213-14.

17. Cohen v. Chesterfield County School Bd., 474 F.2d 395 (4th Cir. 1973). The Fourth Circuit Court of Appeals concluded that Judge Merhige erred in his mode of interpreting whether the facts provided a rational basis for the regulation. The court stated: "[s]chool officials have a duty to provide, as best they can, for continuity in the instruction of children and, to that end, they have a legitimate interest in determing reasonable dates for the commencement of maternity leaves and a right to fix them." *Id.* at 397.

Ultimately Judge Merhige's holding was affirmed in the Supreme Court, but not on equal protection grounds. Instead the Supreme Court decided the case on a due process-irrebuttable presumption doctrine. 414 U.S. 632 (1974).

18. 431 F. Supp. 180 (E.D. Va. 1977).

tional facilities were unavailable.[19] The statute was challenged under the equal protection clause on the grounds that it unfairly discriminated against handicapped children of poor parents. Once again, the district court stated that it was applying the rationale basis test, but once more, the rational basis was not what was utilized. Essentially, the court manipulated the asserted purpose of the statute to make it less likely to withstand the court's test. According to the court, the principal purpose of the statute was to "provide an appropriate education to handicapped children who are not accommodated within the public school system."[20] While this purpose is accurate as far as it goes, its incompleteness renders it suspect as a proper traditional rational basis purpose articulation. A more accurate purpose to ascribe to the statute would be the affording of an appropriate education to handicapped children who were not accommodated within the public school system *to the degree it was financially practical for the state to do so.*

In light of *Cohen* and *Kruse* it appears clear that Judge Merhige, despite disclaimers to the contrary, was not following the traditional rational basis test. Although the traditional test is used with most legislative classifications, Judge Merhige did not hesitate to abandon the rigid two-tiered approach in order to achieve a certain result. Indeed, Judge Merhige appeared to be using a heightened purpose inquiry as one element of achieving what Gerald Gunther labels "equal protection bite without 'strict scrutiny.' "[21]

2. *Means Inquiry*

A second element of equal protection analysis which Judge Merhige has utilized to achieve a heightened rationality equal protection test is an intensified means inquiry. Like heightened purpose inquiry, intensified means scrutiny has been employed by Judge Merhige in order to arrive at a result unreachable under traditional equal protection analysis.

Under traditional analysis, rational basis means scrutiny is lenient. The judicial inquiry is limited to whether the classification drawn in the regulation serves any rational purpose.[22] So long as the statute or administrative classification is not clearly illegitimate under any conceivable set of facts,

19. In order to qualify for the statutory disbursement families had to provide a set percentage of the cost themselves. Plaintiffs were financially unable to meet the initial cost of participation in the program.

20. 431 F. Supp. 180, 187 (E.D. Va. 1977).

21. *See* Gunther, *supra* note 1, at 12.

22. McLaughlin v. Florida, 379 U.S. 184, 191 (1964).

the statute is held constitutional. The Supreme Court's articulation of this approach is found in *McGowan v. Maryland*,[23] where the court stated:

> The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power. . . . A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.[24]

This very approach, however, is implicitly criticized by Judge Merhige in his dissent in *Brown v. Supreme Court of Virginia*.[24.1] Judge Merhige acknowledges that the means scrutiny in this area is very differential and therefore courts will presume that legislators have considered facts which might justify the classification.[25] In fact, this is what the majority of the three-judge court in *Brown* did. After articulating a valid purpose for the court rule, the majority summarily concluded that the means were rationally related to the accomplishment of the purpose by stating, "[q]uantitatively and qualitatively there is a solid basis for the distinction drawn."[26] Once again, however, Judge Merhige was unwilling to merely accept the traditional presumptions which courts often make in the rational basis arena of equal protection analysis. The majority is faulted for not articulating a reasonable factual basis for treating people similarly situated differently. According to Judge Merhige's concept of the equal protection test, the requirement that a classification rest on grounds relevant to the achievement of the state's objective is not met by the conclusory statement that "[q]uantitatively and qualitatively there is a solid basis for the distinction drawn."[27] In spite of the holding of *McLaughlin*,[28] that judicial means inquiry is limited to whether the classification drawn in the regulation serves any rational purpose,[29] Judge Merhige contends that the classification in *Brown* cannot be sustained only on the basis of judicial conclusions unsupported by facts. In light of *McLaughlin, McGowan, Brown* itself, and a myriad of other rational basis equal protection cases, the classification in *Brown* passes rational basis muster, yet Judge Merhige, if permitted, would have found "no rational basis for the separate classifications. . . ."[30]

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23. 366 U.S. 420 (1961).
24. *Id.* at 425-26.
24.1 359 F. Supp. 549 (E.D. Va. 1973) (2-1 decision) (Merhige, J., dissenting).
25. *Id.* at 563.
26. *Id.* at 554.
27. *Id.* at 563.
28. 379 U.S. 184 (1964).
29. *Id.* at 191.
30. 359 F. Supp. at 563.

Additional support for the premise that Judge Merhige applies a higher means scrutiny than is traditionally utilized is found in *Kruse v. Campbell.*[31] In *Kruse,* Judge Merhige held that the deprivation of education which was suffered by the handicapped children of poor parents was "not rationally related . . . to its [the state's] interest in preserving its financial resources. . . ."[32] In dismissing the result of the law as being irrationally related to the purpose for the statute, the district court engaged in the very type of conclusory statements which it criticized the majority in *Brown* for using. According to Judge Merhige, handicapped children being excluded from school was a result "not rationally related . . . to the [state's] interest in preserving its resources, since the grant [was] fully available to those whose economic need [was] less, and unavailable as a practical matter to those whose economic need [was] greatest."[33] Under Judge Merhige's application of the rational basis test, the discriminatory impact of the law of poor handicapped children was enough, when weighed against the state's interest in its fiscal integrity, to merit overturning the statute. Under the traditional rational basis test, however, the mere fact that the classification used by the state had some discriminatory impact did not justify a failure of the test and a resultant holding of the state statute as unconstitutional. If Judge Merhige had employed the lenient rational basis means scrutiny the statute would have been presumed to have a rational relationship to the necessity of the state to limit its aid to the handicapped within its fiscal limitations.

Neither did Judge Merige utilize the lenient means scrutiny in *Cohen v. Chesterfield County School Board.*[34] Assuming that it was determined that the purpose of pregnancy leave regulation was to ensure the safety of the expectant mother and child, while assuring continuity of classroom instruction, it would be easy to hypothesize a set of facts which would justify it. For example, if a child were to push the pregnant teacher, it would be possible that injury to the fetus might result. Additionally, the school board was justified in wanting to avoid a situation where a pregnant woman had to depart in the middle of a semester without leaving adequate time for a replacement to be trained. Granted, these facts were not present in the instant case, yet traditional rational basis means scrutiny only requires a hypothetically reasonable set of facts to justify the purpose. There were a myriad of these hypothetically reasonable factual rule justifications available to the district court in *Cohen,* yet the court chose to label them

31. 431 F. Supp. 180 (E.D. Va. 1977).

32. *Id.* at 187.

33. *Id.*

34. 326 F. Supp. 1159 (E.D. Va. 1971). See text accompanying note 12 for a factual synopsis of Cohen.

"nugatory"[35] and ignore them. By ignoring facts that could conceivably support the regulation Judge Merhige once more underscored his willingness to manipulate the rational basis test to achieve results once attainable only through the use of the strict scrutiny standard.

B. Lenient Rational Basis Scrutiny

Not all classifications, however, trigger the use of Judge Merhige's heightened means scrutiny. *United Mine Workers of America v. Industrial Commission of Virginia*[36] contains what can be labeled a classic example of lenient rational basis means scrutiny. After articulating the purpose of the workman's compensation waiver statute, the district court satisfied the means inquiry with the conclusory statement that, "[i]t would be inappropriate for this court to say . . . that the use of a waiver provision applicable to those found susceptible to occupational diseases bore no rational relation to that end."[37] It is difficult to reconcile this means inquiry with the one Judge Merhige demanded the majority in *Brown* apply, that is, one where facts must be offered to assure that the means furthers the purpose.

Judge Merhige had no difficulty applying the lenient means scrutiny in *Rogers v. Miller*.[38] In response to the plaintiff's contention that massage parlors should not be treated differently than other businesses giving massages, the district court cited several factors which conceivably could further the articulated purpose of the statute. What is not clear is why the factors cited to support the purpose of the regulation in *Rogers* were more valid and less nugatory than those cited to support the pregnancy leave of absence regulation in *Cohen*. The answer is that they are not. The result reached depended not on the validity of the means utilized by the state to achieve its ends, but rather on the test utilized to measure the validity of the regulation.

A thorough analysis of Judge Merhige's opinions in the equal protection field reveals that, although he nominally subscribes to a two-tiered judicial review of equal protection cases, his decisions are a more accurate reflection of the position Justice Marshall would have the Supreme Court utilize in equal protection analysis.[39] Frankly acknowledging that most cases defy "easy characterization in terms of one or the other of these 'tests'. . . ." Justice Marshall would have concentration placed on "the character of the

35. *Id.* at 1160.
36. 374 F. Supp. 1294 (E.D. Va. 1974).
37. *Id.* at 1298.
38. 401 F. Supp. 826 (E.D. Va. 1975).
39. *See* Dandridge v. Williams, 397 U.S. 471 (1970).

classification in question, the relative importance to individuals in the class discriminated against of the governmental benefits that they do not receive, and the asserted state interests in support of the classification."[40]

C. Spectrum—Like Approach Prevails

This spectrum-like approach to equal protection review appears to more closely parallel Judge Merhige's results and rationale than a traditional approach does. In essence, Judge Merhige is using this approach as an "interventionist tool"[41] in areas the courts have traditionally approached with deference. For example, under strict two-tier equal protection analysis the statute in *Kruse v. Campbell*[42] would most likely be upheld. Under traditional rational basis analysis the classification rationally furthered the purpose of the state in wanting to educate its handicapped within its fiscal limitations. On the strict scrutiny plane, it is also doubtful the classification could have been overturned.[43] Conceivably, as Judge Merhige acknowledges, the statute could have been attacked on strict scrutiny grounds on the theory that an "absolute deprivation of a meaningful opportunity to enjoy the benefits of an appropriate education. . . ."[44] violates a fundamental right. Such an approach was risky, however, in light of the Burger Court's reluctance to expand the number of categories which trigger strict scrutiny.[45] In light of the inability of the rigid two-tiered equal protection test to adequately deal with the problem at hand Judge Merhige turned to a heightened rationality model.[46] Its requirement that the legislative purposes have a "substantial basis in actuality"[47] provided Judge Merhige with the necessary ammunition to overturn *Kruse.*

Additional evidence that Judge Merhige has utilized an intermediate level test to certain statutory classifications is found in *Dyson v. Lavery.*[48] In *Dyson,* the district court, in light of precedent, applied a heightened rationality test to an equal protection challenge of alleged sexually discriminatory employment practices. The key to *Dyson,* for our purposes, is that *Cohen* appears to have applied the same test under the guise of ra-

40. *Id.* at 520-21.

41. *See* Gunther, *supra* note 1, at 12.

42. 431 F. Supp. 180 (E.D. Va. 1977).

43. This is the case because *San Antonio Independent School District v. Rodriguez,* 411 U.S. 1 (1973), held that wealth was not a suspect classification and that any educational deprivation resulting from the classification was not an interference with fundamental rights.

44. 431 F. Supp. 180, 187 (E.D. Va. 1977).

45. *See* Gunther, *supra* note 1, at 12.

46. *Id.* at 20-24.

47. *Id.* at 21.

48. 417 F. Supp. 103 (E.D. Va. 1976).

tional basis five years earlier at a time when the intermediate equal protection sex test had not been adopted. A pregnancy leave of absence provision can and should satisfy the traditional rational basis scrutiny, yet the one scrutinized by Judge Merhige in *Cohen* did not. The explanation lies, of course, in the test the district court utilized. While nominally adhering to rational basis analysis, the district court applied, in essense, the test embodied in *Reed v. Reed*[49] and *Eslinger v. Thomas*,[50] that is, whether, in cases of sex discrimination, there is a "fair and substantial relation between the basis of the classification and the object of the classification."[51]

Since stepping up to the federal bench, Judge Merhige has been utilizing the approach Justice Marshall has urged for the Supreme Court.[52] Judge Merhige's equal protection opinions reveal that he is willing to scrutinize a legislative classification and weigh it against a realistic ascertainment of the detriment it imposes on the individuals it touches. In weighing the value for the state in maintaining the classification against the deprivation it inflicts on the individual, Judge Merhige has been unwilling to consistently and blindly "load" the scales in favor of the state in the way traditional rational basis analysis has done. Judge Merhige has sought to pierce the rational basis veil and accurately determine whether the state has a truly significant interest to protect with its classification. Although it is possible to criticize this approach as *Lochner*[53] revisited, it is more accurate to view it as a heightened judicial awarness which is intended to reconcile the oft-conflicting needs of the individual and the state in a realistic, sensitive, and judicious fashion.

D. School Desegregation

Nowhere has equal protection analysis played a more important role than in the area of school desegregation. The classic embodiment of this fact is found in *Brown v. Board of Education*.[54] In most school desegregation cases, however, the more vexing problems began rather than ended, with the finding that the plaintiff had been denied equal protection of the laws. It was at this juncture that courts had to struggle to articulate what the Supreme Court intended when it stated that the remedy for school discrimination equal protection violations was to require the school officials to do all that was "necessary and proper to admit [pupils] . . . to public schools on a racially nondiscriminatory basis with all deliberate

49. 404 U.S. 71 (1971).
50. 476 F.2d 225 (4th Cir. 1973).
51. 417 F. Supp. 103, 106 (E.D. Va. 1976).
52. See note 40 and accompanying text.
53. Lochner v. New York, 198 U.S. 45 (1905).
54. 347 U.S. 483 (1954).

speed."[55] Like many other federal judges, Robert Merhige was confronted with a series of cases which required amplification and explication of the *Brown* mandate.

1. *Discriminatory Placement*

The majority of rulings Judge Merhige made in this area stemmed from the case of *Bradley v. School Board of the City of Richmond.*[56] *Bradley* was initiated in 1962, prior to Judge Merhige's appointment to the federal bench and at a time when Richmond was operating under a pre-*Brown* pupil placement plan, a "feeder school system."[57] The plaintiffs, parents of eleven black students, requested that the Richmond school system be enjoined from operating, via the feeder school system, racially segregated schools.[58] Judge Butzner granted the individual plaintiffs the right to be assigned irrespective of the feeder system but declined to enjoin its use.[59] Since the pupil placement board had begun measures designed to eliminate racially discriminatory enrollment in several of the school attendance zones and numerous black students had been admitted to white schools for the 1962-1963 school year, the district court concluded that the school board had made a reasonable start toward achieving a non-discriminatory school system.[60] The Fourth Circuit Court of Appeals disagreed. Upon weighing the facts, the court of appeals concluded that the Richmond plan did not "evidence a reasonable start toward maintaining a non-discriminatory school system . . . consistent with the true concept of equal constitutional protection of the races."[61] The fact that the present plan was an effective instrument for maintaining segregation, when coupled with

55. Brown v. Bd. of Educ., 349 U.S. 294 (1955).

56. 7 Race Rel. L. Rep. 713 (E.D. Va. 1962) (Bradley I).

57. A typical feeder school system might operate as follows:

> The city schools are divided into six sections, numbered I to VI. A pupil, when he first enters the city's school system, is assigned to an elementary school in one of the sections. When he graduates from the elementary school, he is automatically assigned to the junior high school which serves that same section . . . Under this arrangement, the initial assignment . . . effectively determines what schools he will attend during his entire school career. . . .

Green v. School Bd. of Roanoke, 304 F.2d 118, 120 (4th Cir. 1962).

58. In addition the plaintiffs requested that their children be transferred to white public schools.

59. Bradley I, 7 Race Rel. L. Rep. 713, 715 (E.D. Va. 1962).

60. *Id.* at 615. According to the district court such a start appeared reasonable in light of the Supreme Court's statement that "equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs." Brown v. Bd. of Educ., 349 U.S. 294, 300 (1955), *cited in*, Bradley I, 7 Race Rel. Rep. 713, 715 (E.D. Va. 1962).

61. Bradley v. School Bd. of Richmond, 317 F.2d 429, 434 (4th Cir. 1963) (Bradley II).

the fact that there was no commitment to use the system in a non-discriminatory manner, led the appeals court to conclude that the requested injunction was an appropriate remedy. To the Fourth Circuit Court of Appeals, mere theoretical freedom to choose one's school was an inadequate remedy when past discriminatory practices demonstrated it as ineffective in providing true, voluntary freedom to attend the school of one's choice.[62] In rejecting the "feeder system" as a viable desegregation tool, the Fourth Circuit Court of Appeals appeared to be indicating its willingness to accept "freedom of choice" as a viable means of effectuating desegregation within the mandate of *Brown.* The question of whether the school board's "freedom of choice" plan complied with *Brown* was squarely presented to the district court on remand.

The plan which the school board presented to the district court on remand based pupil assignment on a number of factors such as: distance a student lived from school, available school programs, school building capacity, and the pupil's own preference. Significantly, the plan also provided that students would continue in the schools in which they were presently enrolled unless their parents requested a transfer by a certain date.[63] Plaintiffs' objections to the plan were rebuffed on the grounds that "[t]he plan, as presently administered, generally conform[ed] with the description of a voluntary system found in *Jeffers v. Whitley*. . . ."[64] In rebutting each of the plaintiffs' contentions, however, the court implied that approval of the plan was conditioned on the plan's being utilized in a racially non-discriminatory manner.

2. *Freedom of Choice*

The Fourth Circuit Court of Appeals affirmed the district court's holding and, in so doing, fully legitimated "freedom of choice" as a means of complying with *Brown.* According to the Fourth Circuit Court of Appeals, as long as a school board gave every pupil an "unrestricted right to attend the school of his choice . . . ,"[65] it would meet its constitutional duty.[66] In response to plaintiffs' contention that freedom of choice was an inadequate remedy because it failed to end segregation, the Fourth Circuit replied that

62. *Id.* at 438.

63. Bradley v. School Bd. of Richmond, 9 Race Rel. L. Rep. 219, 221 (E.D. Va. 1964) (Bradley III).

64. *Id.* at 222.

65. Bradley v. School Bd. of Richmond, 345 F.2d 310, 313 (4th Cir. 1965) (Bradley IV).

66. Ironically, the Fourth Circuit Court of Appeals immediately removed much of the force of this "unrestricted right" by agreeing with the district court that limiting factors such as school capacity and transfer application deadlines were reasonable and did not impinge, at least not any more than theoretically, on one's freedom to choose.

the fourteenth amendment did not entitle the plaintiffs to an integrated classroom, rather it only guaranteed them a right not to have discrimination influence their school assignments.[67]

The plaintiffs took the case to the U.S. Supreme Court and pressed their claim that "freedom of choice" was inadequate to meet the mandate of *Brown*, but the court declined to reach the issue.[68] Absent new developments the plaintiffs, and others similarly situated, where entitled only to a theoretically "unrestricted right" to attend the school of their choice, and not to affirmative desegregation of the schools.

New developments were not long in coming in the 1960's in the area of school desegregation, and on May 27, 1968, the Supreme Court held, in *Green v. County School Board of New Kent County*,[69] that school boards had an affirmative duty to "take whatever action [that] may be necessary to create a unitary, nonracial system."[70] The Supreme Court rejected "freedom of choice" as a means of effectuating the transition to a unitary system specifically because it had proven itself ineffectual in accomplishing the task. The Supreme Court articulated what the plaintiffs in *Bradley* had been contending for years, that is, that "freedom of choice" did not comply with the mandate of *Brown*. No longer could school boards be content merely to be nondiscriminatory in pupil placement; there was now a new mandate. All schools had an affirmative duty not only to create unitary districts but to do so both completely and quickly. As the Supreme Court stated, "the time for mere deliberate speed has run out."[71] In light of the implications *Green* had for the *Bradley* litigation, the Supreme Court was well justified in stating that: "[o]pen[ing] the doors of the former 'white' school to Negro children and of the 'Negro' school to white

67. *Id.* at 316.

68. Bradley v. School Bd. of Richmond, 382 U.S. 103, 105 (1965). The Court sidestepped the issue by vacating and remanding the case on another issue the plaintiffs had presented. Among plaintiffs' original arguments for reversal of Richmond's "freedom of choice" plan was the contention that the plan was invalid because it contained no provision regarding integration of faculty and staff assignments among the schools. The Supreme Court concluded that the plaintiffs were entitled to an evidentiary hearing on this contention before any plan could be approved. Thus, instead of reaching the merits of the submitted desegregation plans, the court vacated and remanded the case to the district court for evidentiary hearings.

In light of the Supreme Court's failure to address the issue, the plaintiffs consented to a district court order approving the school board's "freedom of choice" plan. Bradley v. School Bd. of Richmond 11 Race Rel. L. Rep. 1289 (E.D. Va. 1966) (Bradley V).

69. 391 U.S. 430 (1968).

70. Bowman v. County School Bd. of Charles City County, 382 F.2d 326, 333 (4th Cir. 1967) (Sobeloff, J., concurring), *cited in*, Green v. County School Bd. of New Kent County, 391 U.S. 430, 440 (1968).

71. Griffin v. County School Bd. of Prince Edward County, 377 U.S. 218, 234 (1964), *cited in*, Green v. County School Bd. of New Kent County, 391 U.S. 430, 438 (1968).

children merely begins, not ends, our inquiry whether the Board has taken steps adequate to abolish its dual, segregated system."[72]

3. *Unitary Dilemma in Richmond*

The implications of *Green* soon filtered into the *Bradley* litigation for on March 10, 1970 the plaintiffs filed a motion for further relief on the ground that the recent appellate decisions entitled them to such. Two days later, Judge Merhige ordered the defendants to advise the court whether the Richmond schools were "unitary." The defendants conceded that the schools were not being operated in a unitary manner. Judge Merhige responded on April 1, 1970 by vacating the March 30, 1966 order which judicially endorsed Richmond's "freedom of choice" plan and by ordering the defendants to establish a unitary school system in Richmond. Defendants were also ordered to present a plan to the court by May 11, 1970 which would accomplish this end. Hearings on the plan were to be conducted in June, 1970.

It was in the memorandum of law that resulted from the June 19-26 hearings that Judge Merhige first began to fully articulate, interpret, and apply the judicial precedents relating to school desegregation. These precedents were set forth to approve or to reject various plans with which the defendants and plaintiffs provided the district court in hopes that the court would adopt one of them as the means to achieve a unitary system for Richmond schools.[73]

a. H.E.W. Plan Inadequate

The district court began its August memorandum concerning the June hearings by rejecting the H.E.W. plan as inadequate for Richmond's needs. The fact that it was essentially a "neighborhood plan" led the court to conclude that it could never work in light of Richmond's rigidly segregated residential patterns.[74] The plan was also considered inadequate in that it did not take race into account in making school assignments. Race, the district court stated, was an essential factor to consider in formulating a unitary school plan and it was a factor that Judge Merhige made abundantly clear he wanted considered in the formulation of a Richmond plan.[75]

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72. *Id.* at 437.

73. The defendants submitted two school desegregation plans, one of their own making and one supplied by the Department of Health, Education and Welfare, while the plaintiffs submitted one plan which was devised by a noted desegregation planning expert, Gordon Foster.

74. Bradley v. School Bd. of Richmond, 317 F. Supp. 555, 564 (E.D. Va. 1970) (Bradley VI).

75. *Id.* at 564. Awareness of these and other shortcomings in the H.E.W. plan led to judicial

b. Foster Plan Inappropriate

In contrast to the H.E.W. plan which the court concluded was incapable of creating a unitary system, the district court found that the plaintiff's Foster plan "would result in a unitary system."[76] In spite of this fact, and the mandate of *Green* which required the submission of a plan designed to work realistically and immediately, Judge Merhige chose to adopt an interim plan which admittedly "fail[ed] to create a unitary system."[77] An analysis of the rationale behind the decision delineates the hard lines that must be drawn to meet the conflicting mandates of the law and community. On a strict legal constructionist level, Merhige could have compelled the school board to implement the Foster plan immediately. Upon citing *Alexander v. Holmes County Board of Education,*[78] the district court could have concluded that both of the plans submitted by the school board would not result in the immediate termination of Richmond's dual school system and that this fact, in light of *Green,* mandated the adoption of the Foster plan. From Judge Merhige's point of view, however, the solution could and should not be one of absolutes. Any plan before being adopted must meet the "test of reasonableness."[79] The test of reasonableness which Judge Merhige follows is that articulated by the Fourth Circuit Court of Appeals in *Swann v. Charlotte-Mecklenburg Board of Education.*[80] Applied to desegregation conflicts the test embodied a judicial recognition that local exigencies often render it impossible for a local school board to realistically achieve a completely unitary school system, and therefore school districts should be allowed a modicum of flexibility in their approaches. Quite simply, the test of reasonableness was that "school boards must use all reasonable means to integrate the schools in their jurisdiction."[81] The implication of the test as stated was that only "reasonable" plans merited approval. The Foster plan failed this test, at least for the 1970-71 interim school year, because its adoption would "result in a system which would be detrimental to the educational values which the court [was] satisfied [could] be maintained by less precipitous action."[82] "Less

criticism of the Department of Health, Education and Welfare as being overly concerned with implementing its own policies rather than with evaluating Richmond as a unique school district with unique problems.

76. *Id.* at 568.

77. *Id.* at 576.

78. 396 U.S. 19 (1969).

79. Bradley VI, 317 F. Supp. at 575.

80. 431 F.2d 138 (4th Cir. 1970). The Fourth Circuit Court of Appeals chose to adopt the test of reasonableness in the arena of school desegregation because it served so well in other areas of the law.

81. *Id.* at 142.

82. Bradley VI, 317 F. Supp. at 571.

precipitous action" at this time was the school board's plan, in spite of the fact that it failed to create a unitary system. With Richmond's unique residential pattern, the lack of time to implement any better plan, and the value of maintaining educational viability, the district court was satisfied with a plan that was merely "a start toward the disestablishment of a dual system. . . ."[83]

The importance which Judge Merhige attached to the *Swann* standard of reasonableness is underscored in his memorandum in response to plaintiffs' request to have the Foster plan put into effect during the second semester of the 1970-71 academic year.[84] In spite of three Supreme Court decisions[85] rejecting delay on such grounds as lack of attendance plans, equipment, or disruption of the educational process, Judge Merhige reaffirmed postponement of the institution of a unitary plan for Richmond schools. Although, once again, the principle justification for delay was the reasonableness standard, it appeared clear that Judge Merhige did not want to go too far too fast while significant desegregation cases were pending in the Supreme Court. According to Judge Merhige, the delay was justified as reasonable by "[t]he prospect of a semester's delay in intergration, balanced against the possibility that forthcoming rulings might alter current law so that substantial effort and expense, now required to achieve a unitary system, might later be seen to have been spent needlessly. . . ."[86]

In light of *Carter, Singleton,* and *Northcross,* Judge Merhige appeared to be avoiding school board unpreparedness to implement a unitary plan as the rationale for a reasonable delay. Instead, the possibility that new Supreme Court rulings might date his rulings now provided Judge Merhige with fodder for his reasonableness standard. In spite of the fact that there was some evidence that other courts were holding decisions in abeyance for similar reasons, Judge Merhige's supporting of his delay on similar grounds is surprising in light of his comment in *Bradley VI* where he stated, "[t]his Court . . . does not render judicial pronouncements on the basis of what it believes an appellate court might or might not do."[87] Despite what the court appeared to proffer as the primary rationale for delay in implementing a unitary school system in Richmond, it would appear that the underlying rationale was that Judge Merhige did not want to adopt a

83. *Id.* at 576.

84. Bradley v. School Bd. of Richmond, 324 F. Supp. 456 (E.D. Va. 1971) (Bradley VII).

85. Northcross v. Bd. of Educ., 397 U.S. 232 (1970); Carter v. W. Feliciana Parish School Bd., 396 U.S. 290 (1970); Alexander v. Holmes County Bd. of Educ., 396 U.S. 19 (1969).

86. Bradley VII, 324 F. Supp. at 459.

87. Bradley VI, 317 F. Supp. at 575.

desegregation scheme that would lead to substantial disruption of the educational process.

c. Delay Helps Plan III

The end of the delay in implementing unitary schools in Richmond began with Judge Merhige's April 5, 1971 memorandum of law.[88] The question before the court was which plan was to be adopted by the school board for the 1971-72 academic year. The issue of delay was broached by the defendants who asked the court to delay further desegregation action pending Fourth Circuit Court of Appeals review of the court's August 17, 1970 decision not to accept the H.E.W. plan. In a complete reversal of his January 29, 1971 position, Judge Merhige concluded "further delays . . . cannot be justified either by precedent or practicality."[89] Ironically, some of the very authority Judge Merhige utilized to bolster this contention[90] was present, yet ignored, when delay was originally granted. That delay would no longer be tolerated was also manifested by the fact that before accepting the school board's new plan for a unitary system, the court rejected a plan similar to the type utilized during the 1970-71 school year. In rejecting the plan, the court noted that the considerations which once prompted approval of the plan "no longer appear to the Court to outweigh the imperative to afford each child . . . what the constitution says is his."[91]

In addition, since appellate courts were issuing integration decisions without Supreme Court clarification, delay was no longer justified on the grounds that upcoming appellate rulings might change the law. The inconsistency of the stands Judge Merhige took with regard to whether appellate uncertainty justified delay reinforces the conclusion that it was never the primary rationale for the interim delay. Appellate uncertainty appears to have served as a convenient rationale for a delay which otherwise appeared constitutionally suspect. Judge Merhige reinforced this conclusion when he noted: "The delays heretofore granted were based primarily on the impossibility of implementing a unitary plan in a manner so as not to conflict with the defendants' proposed scheduling of the opening of school. . . ."[92]

With school board uncertainty as to what was expected of them, and the problem of immediate school opening no longer a bar to implementation of a unitary school system, Judge Merhige was ready to accept a school board plan which would lead to a unitary school district.

88. Bradley v. School Bd. of Richmond, 325 F. Supp. 828 (E.D. Va. 1971) (Bradley VIII).
89. *Id.* at 831.
90. *See* Carter v. West Feliciana Parish School Bd., 396 U.S. 290 (1970); Alexander v. Holmes County Bd. of Educ., 396 U.S. 19 (1969).
91. Bradley VIII, 325 F. Supp. at 834.
92. *Id.* at 832.

According to the court, the school board's obligation was to

> eliminat[e] the racial identifiability of each facility to the extent feasible within the City of Richmond. [In addition] to do away with a system under which one may confidently predict those schools which a given child may attend, and those from which he is effectively barred, by reference to his race.[93]

In choosing a plan which meets this obligation the school board was under a "heavy burden . . . to justify its choice. . . ."[94] It was under these standards that the court evaluated both the school board's plan III and the Foster plan and concluded that the school board had met its burden and shown that its plan would result in a unitary school system.

As Judge Robert R. Merhige interpreted Supreme Court desegregation cases, there was an affirmative duty on each school board to eliminate the racial identifiability of each school in the city of Richmond. The dilemma, of course, was how to accomplish this in a city which was already 66% black and becoming increasingly more so. The defendant Richmond School Board members initiated the issue of consolidation by requesting and receiving joinder of the school boards of the surrounding counties as third party defendants.[95] The plaintiffs, intrigued but wary of the concept of consolidation, amended their complaint for relief in the alternative for consolidation or inter-district busing.

4. *Consolidation of Independent School Districts*

With these procedural matters accomplished, Judge Merhige was left in the unenviable position of determining whether the United States Constitution, *Brown*, and its progeny permitted consolidation of three politically independent school districts[96] for the purpose of achieving racially non-identifiable schools in the Richmond metropolitan area. In a mammoth opinion which consistently reflects Judge Merhige's firm conviction that racial discrimination in the Richmond metropolitan area public schools

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93. *Id.* at 835.

94. *Id.* at 844.

95. In addition to joining the school boards of Henrico and Chesterfield Counties, the defendants also joined the members of the Virginia State Board of Education, the State Superintendent of Public Instruction, and the Board of Supervisors of the respective counties. See Bradley v. School Bd. of Richmond, 51 F.R.D. 139 (1970).

96. In the fall of 1970 the Richmond School District encompassed 63 square miles and educated 47,824 pupils. Henrico County and School District was 288 square miles and educated 34,080 school children. Chesterfield County School District drew 24,069 students from 445 square miles. Bradley v. School Bd. of Richmond, 462 F.2d 1058, 1062 (4th Cir. 1972) (Bradley IX).

must be eliminated root and branch, consolidation was ordered to accomplish such elimination.[97]

The crux of Judge Merhige's decision is that desegregation cannot be subordinated to political boundaries. Citing past beneficial cooperation across county boundaries, the court concluded that, at least with regard to schools, there were few strong state concerns in the maintenance of the boundaries as barriers to achievement of integration.[98] Additionally, the counties were not sovereign in the same manner as the individual states, rather they were mere subdivisions of the state and thus, as the state, were required to rid themselves of *de jure* segregation. "The state [could not] escape its constitutional obligation by relinquishing or delegating to local officials the authority to discriminate. . . ."[99] The court denied that mere separate existence as a political subdivision explained or justified a desire to retain similar school boundary lines, especially since never, "until recent history, have such boundaries been deemed barriers to student assignment."[100] Segregative policies in and between each of the school systems allegedly aided and abetted by state school officials, cooperation between the school districts when it served their purposes, lack of any compelling justification for keeping a subdivision's schools exclusively for its children, and the inability of either of the three subdivisions to have anything but racially identifiable schools absent consolidation—all of these convinced the court that consolidation was both permissible under, and a logical extension of, other Supreme Court cases guaranteeing each school child the right to attend a racially non-identifiable school.[101]

5. *Dilemma Resolved*

The Fourth Circuit Court of Appeals and the Supreme Court disagreed.[102] In reversing,[103] the Fourth Circuit decided that there was not sufficient evidence to conclude that invidious state action resulted in the establishment or maintenance of the racial composition of the three districts. Absent such evidence "it was not within the district judge's authority to order consolidation of these three separate political subdivisions. . . ."[104]

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97. Bradley v. School Bd. of City of Richmond, 338 F. Supp. 67 (E.D. Va. 1972) (Bradley X).

98. *Id.* at 84.

99. *Id.* at 102.

100. *Id.* at 112-13.

101. *Brown* and its progeny.

102. The decision of the Fourth Circuit Court of Appeals was affirmed by an evenly divided Supreme Court in School Bd. of Richmond v. State Bd. of Educ., 412 U.S. 92 (1973).

103. Bradley v. School Bd. of Richmond, 462 F.2d 1058 (4th Cir. 1972).

104. *Id.* at 1069.

Even if such evidence were present it is not clear that the Fourth Circuit would have upheld the consolidation. This view is garnered from the fact that the court considered the remedy of consolidation in this case a quota—and thus a remedy beyond the power of the district court to grant.[105] Such interference by the district court also violated principles of federalism. In light of the fact that one of these principles is that a state has great leeway in the structuring of its internal government, wide latitude should be given to the Virginia tradition of local control over schools.[106] Simply enough, once the vast vestiges of state-imposed segregation are removed from a school district the constitutional violation ends and so does the duty of the district court.[107]

The so-called duty of the court, however, is not so clearly defined as the appellate court implies. Such factors as precedent, practicality and passage of time have an impact on each judge's perception of what his duty is. In 1968, in spite of *Green's* rejection of "freedom of choice" as a viable integration alternative, Judge Merhige, in *Bowman v. County School Board of Charles City County,*[108] denied plaintiffs further relief from the Charles City County's "freedom of choice" plan. In spite of the fact that each school in the county was racially identifiable[109] the court concluded that it was enough that every white student attended an "integrated school."[110] Justification for the lack of an integrated student body was found in the fact that failure of such integration was caused:

> not by the failure of school officials to take affirmative steps toward the conversion to a unitary system in which racial discrimination would be eliminated, root and branch . . . but more by the fact that the racial composition of the residents of Charles City County is such as to make it impossible to have any significant proportion of White students in each of the schools.[111]

Ironically, however, this is the very justification that Judge Merhige denied the defendants in *Bradley* four years later. Quite clearly, then, Judge Merhige's views on the extent to which it is proper for a federal court to implement school desegregation underwent a significant transformation. Despite this transformation of philosophy, Judge Merhige appears to have retained a firm desire to implement the mandates of the Constitution in

105. *Id.* at 1064.

106. *Id.* at 1068.

107. *Id.* at 1070.

108. 293 F. Supp. 1201 (E.D. Va. 1968).

109. Three of the four schools in the county were 90% composed of one minority. Samaria was 95% Indian, Barnett was 92% black, and Ruthville High School was 99% black.

110. Bowman v. County School Bd. of Charles City County, 293 F. Supp. 1201, 1205-06 (E.D. Va. 1968).

111. *Id.* at 1205.

light of both precedent and practicality. Throughout his decisions on school desegregation the emphasis was on "reasonableness." "Freedom of choice" was sanctioned in *Bowman* because no other methods of desegregation were "reasonable"; delay was approved for the 1970-71 school year because the alternatives were "unreasonable." The search for the goal—completely non-racially identifiable schools—was never abandoned. It is a tribute to Judge Merhige, both as a man and as a judge, that he did not retreat from the pursuit of the goal of an integrated education for all through the tremendously unpopular method of consolidation. Although consolidaton was rejected as unnecessary by the appellate court, it is indeed gratifying to know that there are judges willing to pursue politically unpopular concepts into constitutional grey areas in order to assure each his constitutional due.

VII. CONCLUSION

Throughout his career on the bench, Judge Robert R. Merhige has established himself as a widely respected member of the judiciary. Although reputed to be controversial in his decisions, Judge Merhige employs innovative, though clearly precedented, legal reasoning with the flexibility necessary to safeguard individual rights. As the scope of federal litigation changes in accordance with Supreme Court pronouncements, Judge Merhige's decisions continue to transcend the efficacy of political pressures and adverse publicity. His appointment to the bench being contemporaneous with the increased utilization of the federal judiciary as a forum for confronting emotionally charged social issues, such as school busing, prisoners' rights and sex discrimination, Judge Merhige has weathered the storm somewhat admirably; and, at this point in his career, it is the conclusion of this analysis that the disputatious judicial figure is much more deserving of his self-perceived "strict constructionist" image.