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Judge J. Braxton Craven, Jr.: Portrait of a Pragmatist

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JUDGE J. BRAXTON CRAVEN, JR.: PORTRAIT OF A PRAGMATIST

The scope of this commentary is difficult to define. It is in part a survey, in part a memorial and in part a critical analysis of Judge Craven's contributions to the jurisprudence of the Fourth Circuit. Other pieces in this issue have provided a personal sketch of Judge Craven by those who knew him. This comment attempts to complement that picture by a consideration of Judge Craven's opinions in several areas of the law.

This consideration can be broken down into three main elements. First is a description of Judge Craven's thoughts about his role as a federal judge. Next is a discussion of his view of the function of the federal courts and their proper relationship to state tribunals. The remaining sections examine a variety of substantive areas in which Judge Craven was especially active.

This commentary is not a comprehensive survey of Judge Craven's opinions. It is instead a thematic development of his attitudes toward the problems he faced as a federal judge and his contributions to their solution. There are certainly many of Judge Craven's opinions that are not discussed here; we hope that those that are presented give a fair picture of his career on the federal bench.

THE ROLE OF THE FEDERAL JUDGE

J. Braxton Craven, Jr., was by his own admission an "introspective" judge.[1] Throughout his judicial career he never tired of reflecting upon the tensions and contradictions implicit in the simple query posed by Cardozo: "What is it that I do when I decide a case?"[2] Judge Craven was quick to confess that he was a "result-oriented" judge.[3] He did not pretend to "define justice, but . . . [was] quite certain that it exist[ed], both abstractly and in the context of every adversary proceeding."[4] For him "legal prob-

1. Craven, *Paean to Pragmatism*, 50 N.C.L. REV. 977, 977 (1972) [hereinafter cited as *Paean to Pragmatism*]. Other law review articles written by Judge Craven include: Craven, *Foreword to Corrections: A Symposium on Prison Reform*, 45 MISS. L.J. 601 (1974) [hereinafter cited as *Foreword*]; Craven, *The Impact of Social Science Evidence on the Judge: A Personal Comment*, 39 LAW & CONTEMP. PROB., Winter 1975, at 150 [hereinafter cited as *Personal Comment*]; Craven, *Integrating the Desegregation Vocabulary—Brown Rides North, Maybe*, 73 W. VA. L. REV. 1 (1970-71) [hereinafter cited as *Vocabulary*]; Craven, *Personhood: The Right to Be Let Alone*, 1976 DUKE L.J. 699.

2. B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 10 (1921).

3. *Paean to Pragmatism*, *supra* note 1, at 977.

4. *Id.* at 980.

lems"[5] were "only people's problems for which the law sometimes [could] afford answers."[6] He professed to feel no discomfort in those instances when the binding hand of precedent absolutely precluded a just result. In such instances the decisionmaking process was neither long nor arduous. The judge simply had to "plunge the knife with averted gaze."[7] Of greater interest were those situations when he was not bound by precedent. Here Judge Craven felt free, through creative interpretation of the law, to reach a just result in the case before him. If presented with a choice between certainty of application and fairness of result, he would most likely choose the latter: "Certainty in the administration of justice is not the valued goal it was once thought to be, for it is increasingly recognized that the search for certainty sometimes produces only certitude."[8]

Inevitably, Judge Craven would strive to find a means of "drawing the line at another angle, of staking the path along new courses, of making a new point of departure."[9] Nevertheless, he was a careful innovator. He was quick to recognize that the freedom to make a choice was necessarily inhibited by the knowledge that in such situations the judge might easily inject "into judicial decisions value judgments that may not have enduring validity and may even turn out to be wrong."[10] He was acutely aware that the standards of justice must be found in "the life of the community"[11] and not exclusively through a judge's own private notions of right and wrong. Similarly, he knew that judicial activism had to find expression as an extension of custom and precedent. He was careful in his opinions not to sever links to custom, precedent and community, for he realized that without proper external restraints the path of creative interpretation was prone to degenerate into whim, caprice and bias. Judge Craven never hesitated, when possible, to adapt the path of the law to the exigencies and uncertainties of life. His steps in that direction, however, were measured and cautious, for he was aware that even rigid adherence to precedent was preferable to unprincipled decisionmaking.

In four opinions, remarkable for their candor and immediacy, Judge Craven was able to give some insight into the philosophy, emotions and limitations inherent in his process of decisionmaking.[12] In *Perkins v. North*

5. *Id.* at 979.
6. *Id.*
7. *Id.* at 978.
8. Sivertsen v. Guardian Life Ins. Co. of Am., 423 F.2d 443, 446-47 (4th Cir. 1970) (Craven, J., dissenting).
9. B. CARDOZO, *supra* note 2, at 113.
10. *Paean to Pragmatism*, *supra* note 1, at 977.
11. B. CARDOZO, *supra* note 2, at 105.
12. United States v. Snider, 502 F.2d 645 (4th Cir. 1974); United States v. Miller, 361 F.

Carolina,[13] Perkins, in a petition for habeas corpus, challenged the constitutionality of his conviction under the North Carolina "acts against nature" statute.[14] Perkins contended that the statute was unconstitutionally vague and that the length of his sentence constituted a cruel and unusual punishment. He also contended that he had been denied effective assistance of counsel. On the merits, Judge Craven found the statute to be constitutional[15] but granted Perkins relief on the ground that he had been denied effective assistance of counsel.[16] In the course of his pungent opinion, however,

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Supp. 825 (W.D.N.C. 1973); Lawton v. Tarr, 327 F. Supp. 670 (E.D.N.C. 1971); Perkins v. North Carolina, 234 F. Supp. 333 (W.D.N.C. 1964).

13. 234 F. Supp. 333 (W.D.N.C. 1964).

14. At the time *Perkins* was decided, the statute read in its entirety as follows: "If any person shall commit the abominable and detestable crime against nature, with mankind or beast, he shall be imprisoned in the State's prison not less than five nor more than sixty years." 25 Hen. 8, c. 6 (1533), *as adopted by* Rev. Code of N.C. ch. 34, § 6 (1854), *and amended by* Law of Apr. 10, 1869, ch. 167, § 6, 1868-69 N.C. Pub. Laws 407 (formerly codified, as amended, at N.C. GEN. STAT. § 14-177(1953))(amended 1965). The subsequent statutory history is discussed in note 21 *infra*. Judge Craven reviews the history of the statutory language at 234 F. Supp. at 335. Perkins had been convicted for committing fellatio.

15. 234 F. Supp. at 336. Judge Craven held that the vagueness of the statutory language had been cured by the numerous interpretations of the statute by the North Carolina Supreme Court. He also held that Perkins' 20 to 30 year sentence, although unreasonable, could not constitute "cruel and unusual punishment" because it was within the "astounding" statutory limits of 5 to 60 years. *Id.* at 337. For further discussion of the sentencing issue in *Perkins*, see note 48 *infra*.

In Hart v. Coiner, 483 F.2d 136 (4th Cir. 1973), *cert. denied*, 415 U.S. 983 (1974), Judge Craven was again faced with the question of the constitutionality of a statutorily mandated sentence. The issue was whether a mandatory life sentence under West Virginia's recidivist statute was cruel and unusual punishment because it was based on prior convictions for forgery, interstate transportation of forged checks and perjury. Unlike his decision in *Perkins*, Craven was able to find a basis for holding the statute unconstitutional.

For the appropriate interpretation of the eighth amendment, Judge Craven looked to the Supreme Court's decision in Weems v. United States, 217 U.S. 349 (1910). Under *Weems*, the punishment for a crime should be in proportion to the offense, for it is possible that a prison sentence could be so out of proportion to the offense as to violate the eighth amendment's ban on cruel and unusual punishment. Furman v. Georgia, 408 U.S. 238 (1972), provided Craven with the proper test for determining whether Hart's sentence was so disproportionate. The test involved consideration of a combination of objective factors.

The first factor was the nature of Hart's offense. Judge Craven's emphasis here was on the fact that none of Hart's three convictions involved any violence or danger to the person. 483 F.2d at 140-41. The second factor was the legislative purpose of the punishment, which Craven found to be deterrence of crime and protection of society from habitual criminals. *Id.* at 141. He expressed his belief that a life sentence for a person who committed 3 relatively minor crimes over a 20 year period was unnecessary to accomplish these purposes. *Id.* The third factor was a comparison of Hart's punishment with the punishment he would have received in other jurisdictions. A survey of state statutes revealed, "West Virginia's recidivist scheme is among the top four in the nation in terms of severity, and may be number one." *Id.* at 142 (footnote omitted). The final factor that Judge Craven considered was a comparison of punishments in West Virginia for other crimes. First degree murder, rape and kidnapping were the only other crimes that carried a mandatory life sentence, and the penalties for a variety of violent crimes ranged from 1 to 18 years. *Id.* In light of these considerations, Craven concluded "that the sentence imposed upon Hart is constitutionally excessive and wholly disproportionate to the nature of the offenses he committed, and not necessary to achieve any legitimate legislative purpose." *Id.* at 143.

16. 234 F. Supp. at 339. Judge Craven held that counsel in *Perkins* had not been "afforded reasonable opportunity to investigate and prepare for trial." *Id.*

Judge Craven made it known that, although he was bound to find the statute constitutional, it deserved to be struck down: "Since 1869 the statute has remained unchanged—in itself a shocking example of the unfortunate gulf between criminal law, and medicine and psychiatry."[17] Judge Craven thought it unconscionable and senseless to send a homosexual to prison for up to sixty years for committing an "act against nature":

> Putting Perkins into the North Carolina prison system is a little like throwing Brer Rabbit into the briarpatch.[18] Most doctors who have studied homosexuality agree that prison environment, including close, continuous, and exclusive contact with other men, aggravates and strengthens homosexual tendencies and provides an unexcelled opportunity for homosexual practices. For the confirmed homosexual, imprisonment can accomplish no rehabilitative function; instead it provides an outlet for the gratification of sexually-deviate desires.[19]

It was characteristic of Judge Craven to articulate his dissatisfaction with the law in those instances when precedent and legislation precluded his reaching a just result. When the matter under scrutiny deserved immediate attention and discussion, Judge Craven was unwilling merely to cite the controlling law and blandly refer the parties to the legislature for change.[20] Thus, in *Perkins*, having done what was required of him by upholding the statute, he proceeded as a concerned jurist to launch a detailed attack on the statute he had just upheld. One of the most engaging qualities of the opinion in *Perkins* is the swiftness with which Judge Craven makes the transition from upholding the constitutionality of the statute to critiquing its deficiencies. The swift change in tone is attributable to his desire to dispel any aura of legitimacy that might attach to the statute as a result of its being upheld as constitutional. The sense of urgency attending the opinion reflects his view that the decriminalization of homosexual activity was an issue that could not be put off any longer. Although the issue defied judicial resolution, it was time that someone began a constructive dialogue as to possible changes in the law; Judge Craven had no reservations about being the one to do so:

> Is it not time to redraft a criminal statute first enacted in 1533? And if so, cannot the criminal law draftsman be helped by those best

17. *Id.* at 335.

18. Uncle Remus enthusiasts will remember that Brer Rabbit begged Brer Fox to roast him, hang him, skin him, snatch out his eyeballs, tear his ears out by the roots, cut off his legs—do anything but throw him in the briarpatch. Fortunately for Brer Rabbit, Brer Fox chose what he thought was the maximum punishment. Uncle Remus by Joel Chandler Harris (New York and London, D. Appleton and Company, 1916, p. 18).

Id. at 339 n.18 (footnote of the court).

19. *Id.* at 339.

20. He was also rather critical of judges who did. *See Paean to Pragmatism*, *supra* note 1, at 979-80.

> informed on the subject—medical doctors—in attempting to classify offenders? Is there any public purpose served by a possible sixty year maximum or even five year *minimum* imprisonment of the occasional or one-time homosexual without treatment, and if so, what is it? Are homosexuals twice as dangerous to society as second degree murderers—as indicated by the maximum punishment for each offense? . . . These questions, and others like them, need to be answered.[21]

The propriety of Judge Craven's outspoken style on and off the bench was questioned in the case of *Lawton v. Tarr.*[22] In *Lawton*, the United States Attorney directly challenged Judge Craven's capacity to decide a case impartially by filing a motion asking him to disqualify himself from hearing the merits of a habeas corpus petition involving a conviction under the selective service law. Judge Craven had first heard the case as an application for relief under rule 8(a) of the Federal Rules of Appellate Procedure,[23] which he denied. Lawton then filed a petition for habeas corpus[24] in the United States District Court for the Eastern District of North Carolina. As Judge Craven had already heard arguments on the merits of the case under the rule 8 petition, it was decided by Judge Craven and Chief Judge Algernon Butler[25] that in the interests of judicial economy Judge Craven should be assigned as district judge to the Eastern District of North Carolina in order to hear Lawton's habeas corpus petition. It was at this point that the United States Attorney filed a motion to recuse on the ground that Judge Craven's opposition to the Vietnam War, as expressed in an address to a county bar association, indicated hostility to the selective service law.[26] The motion to recuse filed in *Lawton* brought into question whether it was

21. 234 F. Supp. at 340. Judge Craven's plea for change did not go unheeded. In 1965, one year after the decision in *Perkins*, the General Assembly amended N.C. GEN. STAT. § 14-177 to read as follows: "If any person shall commit the crime against nature, with mankind or beast, he shall be guilty of a felony, and shall be fined or imprisoned in the discretion of the court." Law of May 9, 1965, ch. 621, § 4, 1965 N.C. Sess. Laws 676 (codified as N.C. GEN. STAT. § 14-177 (1969)). In its deletion of the phrase "abominable and detestable" from the statutory language, the General Assembly seemed to be responding to Judge Craven's suggestion that the behavior in question was a medical and psychiatric problem that called for professional treatment rather than outright condemnation. Although the crime against nature remained a felony, the 1965 amendment did away with maximum and minimum sentences, thus providing the sentencing judge with the flexibility to respond to the recommendations of medical personnel regarding the treatment of defendants. As the amended statute does not provide for "specific punishment," the maximum sentence under the statute is 10 years—a substantial improvement over the previous maximum of 60 years. *See* State v. Thompson, 268 N.C. 447, 150 S.E.2d 781 (1966); N.C. GEN. STAT. § 14-2 (Cum. Supp. 1975), *as amended by* Law of June 23, 1977, ch. 711, § 15, 1977 N.C. Adv. Legis. Serv. 459 (Pamphlet No. 10, Pt. 2).

22. 327 F. Supp. 670 (E.D.N.C. 1971).

23. *Id.* at 673; *see* FED. R. APP. P. 8(a).

24. Lawton's habeas corpus petition was filed pursuant to 28 U.S.C. § 2241 (1970).

25. Judge Butler was then Chief Judge for the Eastern District of North Carolina.

26. 327 F. Supp. at 671. For excerpts from this speech, see *id.* at 674 app.

possible for Judge Craven to criticize the laws and policies he was bound to apply and still maintain his capacity "to apply the law as written."[27]

Judge Craven's response was an angry, thoughtful, unequivocal "yes." On the immediate issue of his right to make public speeches, Judge Craven had the following tart comment:

> If my oath of office includes a vow of silence on matters of public controversy, then I have simply brought it upon myself. But I believe that a federal judge is privileged to address his local Bar Association in observance of Law Day without confining his remarks to platitudes in praise of milk and motherhood with perhaps a flat out condemnation of Hitler.[28]

Moving on to the deeper jurisprudential implications of the motion to recuse, Judge Craven defended the prerogative of a judge to forthrightly recognize his personal convictions as to laws and policies even when his professional duty forced him to uphold contrary conclusions. His response summarizes his deeply held conviction that a judge need not feel obligated to suppress his personal disagreement with the laws and policies he is bound to uphold:

> The beginning of intellectual honesty in a judge is the recognition that, like other men, he has his own predilections and preferences and intellectual and philosophical attitudes that color and influence his viewpoints. Achieving it requires that he be constantly on guard against his own bias, not in pretending that there can be none. I do not believe that a judge has a duty of loyalty to a political administration with respect to any particular policy of that administration—international or domestic. Nor do I believe that he must pretend to believe that all policies or even all laws are wise and just. But I do believe that he must read, interpret and apply laws as written without regard to whether he would like to see them changed.[29]

Looking back at his judicial record, Judge Craven could think of no instance when his deep personal opposition to a particular law or policy had interfered with his duty to "apply the law as written."[30] In particular, Judge Craven harkened back to the decision he had rendered seven years earlier in *Perkins*.[31] Judge Craven's comments on his disposition of that case provide

27. *Id.* at 672.

28. *Id.* at 671.

29. *Id.* at 671-72.

30. *Id.* at 672. Judge Craven noted that his long standing public opposition to capital punishment had not prevented him from participating in "capital cases at both trial and appellate level." *Id.* He also looked back "over the selective service cases in which [he had] participated as a member of the Fourth Circuit," and noted that "[t]ime and again [he had] voted to affirm sentences of imprisonment inflicted upon those who had violated the selective service law by refusal to serve in the armed forces." *Id. See generally Paean to Pragmatism*, *supra* note 1, at 978.

31. Judge Craven was a district judge at the time he decided *Perkins*.

us with a vivid glimpse into the thoughts and emotions that crossed the mind of the judge in the process of deciding a difficult case:

> In *Perkins v. North Carolina* . . . I expressed my contempt for the North Carolina statute making the so-called "crime against nature" punishable by imprisonment up to 60 years. Never in my life have I wanted more to find a statute invalid, and the opinion plainly discloses my wish in that regard; but, nevertheless, I found it impossible under the law to do so, and I held it valid and enforceable.[32]

Ultimately Judge Craven did disqualify himself from considering the *Lawton* case, but not because of any doubts concerning his "capacity to adjudge and decide the merits fairly both to the petitioner and to the respondent."[33] Rather, he felt that, in light of the motion to recuse, his request to hear the habeas corpus petition as a district judge might give the appearance that he had sought out the case and was "eager for an opportunity to interpret that part of the selective service law at issue."[34] Worried that the assignment of the case to him as a district judge "could be interpreted as a reaching out for jurisdiction,"[35] he withdrew.

Judge Craven's frank recognition in *Lawton* that like other men he had his own "predilections and preferences"[36] complemented his extreme sensitivity to the perils of unprincipled decisionmaking. Thus, his staunch defense in *Lawton* of the judge's right to express publicly whatever personal feelings or attitudes he might entertain toward the subject matter of a case was qualified by a reluctance to decide a case on the basis of such feelings or attitudes. His awareness of the dangers inherent in such decisionmaking was especially apparent in his careful analyses of a judge's sentencing discretion in *United States v. Miller*[37] and of a judge's contempt power in *United States v. Snider*.[38]

In *Miller*, Judge Craven, sitting as a district judge by designation, had occasion to resentence a convicted bank robber. As he sought to determine an appropriate sentence, Judge Craven reflected upon the difficulties and dangers inherent in the sentencing process. He had earlier sentenced peti-

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32. 327 F. Supp. at 672.

33. *Id.* at 673.

> I do not believe that my strong aversion to the Vietnam War and my belief that it is the most tragic national mistake made in my lifetime will have the slightest effect or influence upon my judgment as to the time of termination of exposure under the selective service law.

Id.

34. *Id.*

35. *Id.* at 674.

36. *Id.* at 672.

37. 361 F. Supp. 825 (W.D.N.C. 1973).

38. 502 F.2d 645 (4th Cir. 1974).

tioner Miller and his confederate Carver for bank robbery.[39] Having served approximately four years of his sentence, Miller filed a petition to vacate, set aside or correct sentence,[40] contending that in determining his original sentence Judge Craven had improperly considered prior convictions that were now void by reason of *Gideon v. Wainwright*.[41] Judge Craven could not specifically recall whether he had actually considered the void convictions in determining Miller's sentence. However, as he always took a defendant's prior criminal record into account in determining a sentence, he concluded that the void convictions, being the most serious and recent ones in Miller's record at the time of his original sentencing, "contributed to the formulation of [his] sentence and enhanced punishment."[42] Miller was thus "entitled to vacation of his sentence and to be resentenced."[43]

As he sought to formulate a new sentence for Miller, Judge Craven recalled the uneasiness he always felt when as a trial judge he was called upon to sentence a convicted criminal: "What is now an appropriate sentence? All of my judicial life I have wished for precision in the art of sentencing, and it eludes me. It seems to me incongruous that trial judges without either training or experience in penology, are accorded finality in the determination of punishment."[44] Judge Craven recalled that as a trial judge he had attempted to familiarize himself with the field of penology; however, he did not confuse those efforts with the mastery of penology he felt was essential to the sentencing process.[45]

Judge Craven worried that the broad discretion accorded the sentencing judge, combined with the typical judge's unfamiliarity with the science of penology, would force even the most conscientious judge to "impose a

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39. Judge Craven was a district judge at the time he originally sentenced Miller. 361 F. Supp. at 826.

40. Miller's petition was filed pursuant to 28 U.S.C. § 2255 (1970).

41. 372 U.S. 335 (1963). Miller was relying on United States v. Tucker, 404 U.S. 443, 449 (1972), in which the United States Supreme Court held that a sentencing judge may not consider previous convictions of a defendant now void by reason of *Gideon* in formulating an appropriate sentence. As Judge Craven had been Miller's sentencing judge, it was decided that he was the judge best qualified to determine whether the void conviction of Miller had contributed to the formulation of his original sentence.

42. 361 F. Supp. at 827.

43. *Id.*

44. *Id. See generally Foreword, supra* note 1.

45. When I was a trial judge, and charged with the responsibility of sentencing, I used to make myself scan and sometimes read the quarterly entitled "Federal Probation" devoted to the science of penology. That, plus attendance at a sentencing institute and visits to three prisons comprised neary all of my training and experience for the sentencing function. I think it not enough. I have about concluded that the trial judges I have known (including me especially) are not as qualified by education and experience as are those from other disciplines to decide whether a man should go, nor how long should he remain in prison.

361 F. Supp. at 828.

pattern of his personal reactions, philosophy, and animosity" in his sentencing decisions.[46] In effect, the government was asking the sentencing judge to engage in unprincipled and inherently unreliable decisionmaking in an area where the need for humane and objective guidelines was essential.[47] Clearly, Judge Craven did not relish or trust the autonomy given the sentencing judge:

> The truth is that passing sentence is far too delicate a power and too consequential to be lodged in any man's hands entirely unsupervised. It jars with our traditional notions of human freedom to say that the exercise of such vast power by one man shall remain beyond review by anyone else.[48]

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46. *Id.* at 827. The subjective, imprecise and unguided nature of this decision is amply illustrated by Judge Craven's description of the determining factors behind the original sentence imposed on Miller:

> I sentenced Miller and his confederate, Carver, for bank robbery. Carver got ten years. . . . He carried the weapon used in the robbery, and in my opinion, was the more culpable of the two. Miller got eight years. I thought then, and think now, that he is not violence-prone, and probably would not deliberately harm another person, even to escape apprehension and punishment for a serious offense. Nevertheless, bank robbery is a serious matter, and I believe somewhat in the validity of the deterrent theory, despite there being much evidence to the contrary.

Id. at 826.

47. Judge Craven noted that the urgency of this problem was heightened by the fact that "[n]ine out of ten defendants plead guilty without trial. For them the punishment is the only issue, and yet we repose in a single judge the sole responsibility for this vital function." *Id.* at 827.

48. *Id.* (quoting address by Judge Sobeloff, Symposium on the Appellate Review of Sentences, Judicial Conference of the United States Court of Appeals for the Second Circuit (Sept. 24, 1962), *reprinted in* 32 F.R.D. 249, 268 (1962)). Judge Craven's fears of the absolute discretion given the sentencing judge had been realized earlier in *Perkins*, when the state judge, for reasons best known to himself, gave Perkins a 25 to 30 year sentence instead of the usual 5 year sentence given those convicted of committing "crimes against nature." *See generally* notes 14 & 15 and text accompanying notes 13-15 *supra*.

Judge Craven was able to implement some of his ideas on the proper exercise of sentencing discretion in United States v. Williams, 407 F.2d 940 (4th Cir. 1969). After his plea of guilty, defendant in *Williams* was examined by a psychiatrist who recommended that Williams receive treatment for drug addiction. All of the evidence presented to the judge before sentencing showed that Williams was a drug addict. Defense counsel requested that the judge direct the Attorney General to examine Williams in order to determine his eligibility for treatment. The trial judge thought that this examination would be carried out even without his recommendation and refused to give such a directive. On appeal, Williams requested to be resentenced and considered for treatment under the Narcotic Addict Rehabilitation Act, 18 U.S.C. § 4252 (1970), which provides that the court may put an offender believed to be an addict in the custody of the Attorney General for a determination of whether he is an addict likely to be rehabilitated by treatment.

Judge Craven found that the trial record made no mention of the Act and that the trial judge did not exercise his discretion under the Act because it was not brought to his attention sufficiently. 407 F.2d at 944. According to Craven, such a failure to exercise discretion was error on the part of the trial judge, for Williams had a right to the exercise of the judge's discretion. *Id.* at 944-45. Craven apparently viewed the Act as an aid in determining the sentence, and he seemed to feel that such an aid should not be ignored by a sentencing judge.

This notion of a right to the exercise of discretion at sentencing has been extended to a number of sentencing alternatives. In United States v. Wilson, 450 F.2d 495 (4th Cir. 1971), the

Perhaps in no other instance is a judge more likely to inject personal value judgments into his decisionmaking than in the exercise of the criminal contempt power for misbehavior in court. In *United States v. Snider*,[49] Judge Craven considered whether a court should hold a person in contempt for refusing to engage in a symbolic act required of all those in attendance. The precise question before the court in *Snider* was "whether a failure to stand (accompanied only by such interruption of proceedings as are thought necessary by the district judge to explain the consequences of contempt and cite the alleged contemnor for his actions) [was] 'misbehavior' within the meaning of [the federal contempt statute]."[50] This issue raised intriguing questions regarding the relationship between the judiciary and citizenry in a pluralistic, democratic society:

> How much respect is it right for the judicial branch of the government to demand from citizens, and why is respect demanded and even ritualized as it is? Is a showing of respect either necessary or desirable to maintain a good judicial system, or is it merely a cultural bias?[51]

Judge Craven's response recognized that in a democratic society " 'real respect of the citizenry for the judiciary is earned, not commanded.' "[52] He stressed that the limited purpose of the contempt power in the federal courts was to ensure the efficient administration of justice. The most that a federal judge could demand of those in the courtroom was that they not interfere with the conduct of a fair trial. Judges in the heat of trial tended to forget that the contempt powers were not designed to perpetuate the

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judge, through inadvertence, failed to consider the Young Adult Offenders Act, Pub. L. No. 85-752, § 4, 72 Stat. 846 (1958) (formerly codified as amended at 18 U.S.C. § 4209 (1970)) (current version at 18 U.S.C.A. § 4216 (West Cum. Supp. 1977)). The Fourth Circuit, citing *Williams*, held that an appellate court can look at a sentence to see whether discretion was exercised and remanded for resentencing. 450 F.2d at 498. Similarly, in United States v. Ingram, 530 F.2d 602 (4th Cir. 1976), the Fourth Circuit found error in a failure to exercise discretion in a trial judge's policy not to sentence armed bank robbers under the Federal Youth Corrections Act, ch. 1115, 64 Stat. 1086 (1950) (formerly codified as amended at 18 U.S.C. §§ 5005-5026 (1970)) (current version at 18 U.S.C.A. §§ 5005-5026 (West Cum. Supp. 1977)).

49. 502 F.2d 645 (4th Cir. 1974). *Snider* was a criminal tax case. Defendant, a devout Quaker opposed to the Vietnam War, had claimed three billion dependents on a tax withholding form. Defendant was prosecuted for wilfully supplying false or fraudulent information that would require an increase in the tax to be withheld. For a discussion of this aspect of the case, see text accompanying notes 368-76 *infra*.

50. 502 F.2d at 658. The federal contempt statute is found at 18 U.S.C. § 401 (1970) and provides in relevant part: "A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice."

51. Dobbs, *Contempt of Court: A Survey*, 56 CORNELL L. REV. 183, 201 (1971).

52. 502 F.2d at 660 (quoting *In re* Chase, 468 F.2d 128, 137 (7th Cir. 1972) (Stevens, J., dissenting)).

dignity of the court at the expense of an individual's rights. Thus, if the rising requirement was not essential to the functioning of the court, the judge, even though offended, must tolerate those who silently choose not to rise:

> [T]he fact that the authority of federal courts to punish contempt has been codified is recognition of the fact that such a power, unrestrained by judicial discretion, can encroach upon the very rights and privileges which the courts are designed to foster. For that reason the language of the statute defining the authority to use such power must be closely considered and the judges who are given that authority are admonished to be "men of fortitude, able to thrive in a hardy climate," and continually "on guard against confusing offenses to their sensibilities with obstruction to the administration of justice."[53]

Applying these principles, Judge Craven concluded that "[t]he rising requirement seems . . . not essential to the functioning of the court; as such, the failure to rise does not constitute a material obstruction."[54] He conceded "[t]hat the custom of rising contributes to the functioning of the court by 'marking the beginning and end of the session' and by 'serv[ing] to remind all that attention must be concentrated upon the business before the court' ";[55] however, he noted that "the words of the clerk or the judge may serve this function as well."[56] Moreover, Judge Craven doubted "that failure to rise per se, whether stemming from religious belief, conscience or symbolic protest [could] be punished as 'misbehavior' within the meaning of [the federal contempt statute] without violating the Constitution."[57] To require an individual who had not disrupted court proceedings to rise against his will by a threatened use of the contempt power was hardly distinguishable from requiring a school child to salute a flag against his will.[58] In the course of the opinion Judge Craven refused to follow the rule adopted by the Seventh Circuit that permitted a contempt citation for mere failure to rise if the judge found that such behavior had obstructed the administration of

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53. *Id.* at 658 (quoting Craig v. Harney, 331 U.S. 367, 376 (1947), and Brown v. United States, 356 U.S. 148, 153 (1958), respectively).

54. *Id.* at 659.

55. *Id.* (citations omitted).

56. *Id.*

57. *Id.* Although Judge Craven did not premise the decision on constitutional grounds, he noted that such a construction of the statute might raise serious first amendment questions: "Where behavior in the courtroom reaches the level of speech or expression, it is protected absent 'an imminent . . . threat to the administration of justice. . . .' " *Id.* (quoting *In re* Little, 404 U.S. 553, 555 (1972)) (footnote omitted).

58. *Id.* at 660 (citing West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624 (1942)). Judge Craven noted that "improper language or gestures accompanying such a refusal [to rise] may be separately punishable as contempt." *Id.* at 659.

justice.[59] Such a rule was unacceptable in Judge Craven's view because it improperly invited a judge to apply a subjective standard based on the offensiveness of the conduct to him:

> Under the [Seventh Circuit rule] the same conduct in one court would be contempt while in another it would not, depending upon the judge. We find it difficult to accept such a subjective interpretation of "misbehavior." Either it is or it is not contemptuous, and such a judgment should not rest on the judge's sensibility but upon the purposes served by the requirement.[60]

Judge Craven's functional approach to the symbolic act-contempt cases epitomizes his fine sense of the limits of judicial power. Judge Craven was among those few judges who could penetrate through the personal emotion inherent in an open defiance of the court to analyze objectively the competing values involved and to establish priorities.[61] His analysis in *Snider* perceived that a refusal to engage in symbolic acts "involve[d] neither an actual disruption of the trial nor an obstruction of judicial processes, but rather an invasion of the court's claims to respect and dignity."[62] Such behavior would rarely disrupt the trial in fact but was bound to offend the judge's ideology or social values. The use of the contempt power in such situations would not preserve order but rather would enforce the values of the judge "by requiring symbolic acts not directly related to the needs of judicial administration."[63]

Judge Craven had a strong opinion about the appropriate use of the contempt power. He thought that it should not give to the judge the prerogative of enforcing respect for his social values; rather, it should give to the judge the means by which to assure an orderly search for truth and justice. Underlying the discussion in *Snider* is the notion that in the American system of justice the judge is no better than the man he tries or the law he is bound to uphold.[64] The judge holding court must tolerate expressions

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59. The Seventh Circuit, on facts similar to *Snider*, found that the mere failure to rise coupled with the interruption of the trial by reason of the time consumed in citing defendant for contempt constituted misbehavior obstructing the administration of justice. *In re* Chase, 468 F.2d 128 (7th Cir. 1972). Thus, depending on the patience of the district court judge, mere failure to rise could easily constitute contempt of court in the Seventh Circuit.

60. 502 F.2d at 659.

61. For a survey indicating the capricious and arbitrary decisions of judges in symbolic act-contempt cases, see Dobbs, *supra* note 51, at 201-02.

62. *Id.* at 200.

63. *Id.* at 204.

64. *See generally* 502 F.2d at 648 n.7A (account of trial of William Penn). One writer has noted that in England the contempt power traditionally was not used solely to ensure the efficient administration of justice. English judges also exercised the contempt power to enforce class distinctions between themselves and litigants. The traditional English view of the contempt power continues to plague the American cases. Dobbs, *supra* note 51, at 201-03.

of dissent that do not threaten the proceedings, for the judge is not an autocrat but a public servant. It was this simple but nevertheless profound insight into the role of the judge in a democratic society that enabled Judge Craven to dismiss confidently predictions of the dire consequences that would follow from the holding in *Snider*:[65]

> To so hold will not, we think, tend to diminish respect for the judiciary and for the administration of justice. We do not envision, as the result of our decision today, disorder flourishing in the courtroom. Instead, we anticipate the custom of rising upon the convening and adjournment of court will continue and become more significant because wholly voluntary. There was a time when an unwary parishioner was tapped by the warden to enforce traditional religious observance, including rising, the bowing of knee and head. The gestures of piety are still observed—but without coercion.
>
> We have no doubt that the judges of this circuit will continue to maintain order in the courtroom and to conduct business expeditiously. We think they fully share our belief that "real respect of the citizenry for the judiciary is earned, not commanded."[66]

The opinions in *Miller* and *Snider* underscore Judge Craven's insistence in *Perkins* and *Lawton* that an innovative, result-oriented judicial philosophy has no validity unless it functions within the framework of law, precedent and community standards. Thus in *Miller* Judge Craven expressed his discomfort with the autonomy given him to sentence prisoners because when passing sentence he had no need to justify his decision in light of statutory or precedential guidelines. Lacking any countercurrents to temper and constrain his thinking, Judge Craven exercised his sentencing discretion with extreme caution lest his decision reflect merely personal opinion. Similarly, in *Snider* Judge Craven carefully refrained from permitting the use of the contempt power to impose the trial judge's ideology and values on litigants and courtroom spectators; rather, he condoned its exercise solely to ensure the efficient administration of justice.

On the other hand, when there was a legal framework to provide restraint and stability, Judge Craven did not hesitate, when not bound by precedent, to interpret the applicable law in a manner that would permit a just result. Only in such a context, he felt, was there sufficient assurance that a judge's propensity to inject personal values into his decisionmaking

65. See Judge Widener's dissent in *Snider* to the effect that the judge's inability to enforce the "Everyone rise" order through the contempt sanction "could only lead to a further degradation of the courts." 502 F.2d at 665.

66. *Id.* at 660 (quoting *In re* Chase, 468 F.2d 128, 137 (7th Cir. 1972) (Stevens, J., dissenting)).

would not convert a principled search for justice into an exercise in judicial tyranny and paternalism. When the just result had to be justified in light of current legal doctrine the decision taking shape would have to find a niche in the established framework or fall. If the desired result could not be viewed as a tenable extension of existing doctrine then the judge had warning that to reach such a result would be tantamount to imposing his personal views on the litigants before him. In such cases, then, Judge Craven felt free to analyze the relevant law exhaustively in order to determine whether an interpretation that would satisfy justice was attainable. Judge Craven's vigorous dissent in *Atkins v. Schmutz Manufacturing Co.*,[67] where he scrutinizes the scope of the *Erie* doctrine in order to determine whether *Erie* principles prevented a just result, presents a marked contrast to his reluctance in *Miller* and *Snider* to exercise the sentencing discretion and contempt powers accorded to federal judges.

STATE-FEDERAL RELATIONS: IN PURSUIT OF COOPERATIVE FEDERALISM

The appealing facts and peculiar disposition of the heavily litigated *Atkins* case set the stage for a classic exposition of Judge Craven's result-oriented judicial philosophy.[68] The majority of the Fourth Circuit panel that initially heard *Atkins* thought that the rule of *Guaranty Trust Co. v. York*[69] compelled them to deny plaintiff Atkins a trial on the merits. Judge Craven, however, argued strongly that the law controlling the disposition of Atkins' appeal was sufficiently in flux that Atkins need not be denied a trial on the merits. Moreover, the branch of the *Atkins* litigation before the Fourth Circuit raised serious questions about the scope and import of the Supreme Court's decisions in *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*[70]

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67. 401 F.2d 731, 734 (4th Cir. 1968) (Craven, J., dissenting), *rev'd on rehearing en banc*, 435 F.2d 527 (4th Cir. 1970), *cert. denied*, 402 U.S. 932 (1971). The prior litigation of *Atkins* in the Sixth Circuit was reported at 372 F.2d 762 (6th Cir.), *cert. denied*, 389 U.S. 829 (1967).

68. Judge Craven filed a lengthy dissenting opinion.

69. 326 U.S. 99 (1945). In *Guaranty Trust* the Supreme Court held:

> that a state statute of limitations must be applied by a federal court in a diversity case, even though statutes of limitations may be regarded as "procedural" for some other purposes, in order to ensure that "the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court."

C. WRIGHT, LAW OF FEDERAL COURTS § 59, at 273 (3rd ed. 1976) (quoting 326 U.S. at 109). The outcome determinative test announced in *Guaranty Trust* tended to favor state substantive interests at the expense of federal procedural interests for "[i]t is difficult to conceive of any rule of procedure that cannot have a significant effect on the outcome of a case." *Id.* Although the scope of the *Guaranty Trust* rule was uncertain, it was clear that under the rule federal procedural interests were to take a back seat to state substantive interests in cases of conflicts between the two.

70. 356 U.S. 525 (1958). In *Byrd*, a diversity action for injuries from negligence, defendant raised the defense that plaintiff was its employee under the South Carolina Workmen's Compensation Act, and that the Act provided plaintiff's sole remedy. A South Carolina court had

and *Hanna v. Plumer*.[71] Thus, rather than briefly note his disagreement, Judge Craven undertook to demonstrate, through an extensive analysis, why the federal courts were not compelled to deny Atkins a trial on the merits. Perhaps Judge Craven hoped that his lengthy dissent would provoke an en banc rehearing in which his position would be vindicated. If he did, his hopes were fulfilled a year later, when the Fourth Circuit, sitting en banc, withdrew its earlier opinion in *Atkins* and granted plaintiff a trial on the merits.[72]

On the merits, Donald Atkins could hardly have presented stronger equities in his favor. On June 22, 1961, while working in Virginia, Atkins became entangled in a machine manufactured and sold by defendant. As a result of his injury, Atkins had both of his feet amputated. He brought suit against the manufacturer alleging negligence in the design and construction of the machine.[73]

There were several aspects of the substantive injury suffered by Atkins from which he could draw a limited measure of consolation. At least he could comprehend the physical forces that had injured him. He also knew there were others who had suffered similar injuries and that there was a possibility of recovering damages to compensate for his injuries. The procedural injuries suffered by Atkins in pursuit of his rights against the defendant, however, were of another magnitude. The "procedural booby traps"[74] that prevented Atkins from having the merits of his case heard must have been, to him, incomprehensible and unique. Even worse, Atkins could not hope to receive money damages to assuage the hurt caused by these "procedural" injuries.

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held that this defense was to be passed on by the judge rather than the jury. Smith v. Fulmer, 198 S.C. 91, 15 S.E.2d 681 (1941). The Supreme Court held that in federal court a jury must pass on this defense. In *Byrd* the Court did not engage in the *Guaranty Trust* analysis of determining whether the federal procedural rule, if adopted, would change the outcome of the state litigation, but rather compared the relative strengths of the conflicting state substantive and federal procedural interests being asserted. The Court concluded that since the South Carolina rule was not "intended to be bound up with the definition of the rights and obligations of the parties," the state substantive interest in this rule was slight. 356 U.S. at 536. On the other hand, the Court found that there was "a strong federal policy against allowing state rules to disrupt the judge-jury relationship in the federal courts." *Id.* at 538.

71. 380 U.S. 460 (1965). In *Hanna* the Court held that "*Erie* is not the proper test when the question is governed by one of the Federal Rules of Civil Procedure. If the rule is valid when measured against the standards contained in the Enabling Act and the Constitution, it is to be applied regardless of contrary state law." C. WRIGHT, *supra* note 69, § 55, at 258 (footnotes omitted). Further, the Court in *Hanna* reaffirmed *Byrd's* balancing approach in those instances when there is no federal rule directly on point and the court has to make "the typical, relatively unguided *Erie* choice." 380 U.S. at 471.

72. 435 F.2d 527 (4th Cir 1970) (en banc), *cert. denied*, 402 U.S. 932 (1971).

73. 401 F.2d at 731.

74. *Id.* at 735 (Craven, J., dissenting).

Atkins' procedural troubles began when his lawyers discovered that the defendant's only place of business was in Kentucky. Since Virginia had no "long-arm statute" in 1961,[75] it was determined that the defendant would have to be sued in Kentucky. At this juncture, a consideration of the Kentucky and Virginia statutes of limitations applicable to Atkins' cause of action became crucial. Kentucky prescribed one year[76] and Virginia two years[77] as the period of limitations. At the time of suit "Kentucky decisions were understood in the federal courts to hold that in a suit filed in Kentucky, based upon a cause of action arising in another state, 'the statute of limitations of another state, if longer, is applicable.' "[78] Consequently, suit was filed in the United States District Court for the Western District of Kentucky on June 19, 1963, more than one year but less than two years after the injury.[79] Unfortunately, while the suit was pending, the Kentucky Court of Appeals held that in such cases the Kentucky one-year statute of limitations would prevail over a longer period of another state and that this rule should apply retrospectively.[80] Thus, unexpectedly, Atkins' suit in Kentucky was doomed. Taking advantage of these changes in Kentucky's conflicts law, defendant had the suit dismissed. The judgment was upheld by the Sixth Circuit.[81] Atkins' only recourse was to file suit in Virginia. On March 13, 1967, almost six years after the injury occurred, but before the decision of the Sixth Circuit was issued, Atkins filed suit in the United States District Court for the Western District of Virginia,[82] taking advantage of that state's new long-arm statute.[83] This time, defendant raised the bar of Virginia's two-year statute on a motion for summary judgment. The district judge granted the motion.[84]

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75. Virginia passed a long-arm statute in 1964. It is currently codified as VA. CODE §§ 8.01-328 to -330 (1977).

76. Ky. Gen. Stat. ch. 71, art. III, § 3 (1873) (formerly codified as KY. REV. STAT. § 413.140 (1972)).

77. Law of Apr. 6, 1954, ch. 589, 1952-54 Va. Acts, 1954 Reg. Sess. 764 (formerly codified as VA. CODE § 8-24).

78. 401 F.2d at 732 (quoting Collins v. Lambert Mfg. Co., 229 F.2d 362, 364 (6th Cir. 1962)) (citations omitted).

79. *Id.* at 731.

80. Seat v. Eastern Greyhound Lines, Inc., 389 S.W.2d 908 (Ky. 1965) (statute of limitations); Wethington v. Griggs, 392 S.W.2d 56 (Ky. 1965) (retrospective application); *see* 401 F.2d at 732.

81. 372 F.2d 762 (6th Cir.), *cert. denied*, 389 U.S. 829 (1967). The Sixth Circuit decision was controlled by Klaxon Co. v. Stenton Elec. Co., 313 U.S. 487 (1941), which holds that a federal court in a diversity action must apply the forum state's conflict of laws rule. *Klaxon* was recently reaffirmed in Day & Zimmermann, Inc. v. Challoner, 423 U.S. 3, 4 (1975) (per curiam).

82. 401 F.2d at 732.

83. *See* note 75 *supra*.

84. 268 F. Supp. 406 (W.D. Va. 1967). The court found "that plaintiff could not fit himself into any of the instances in which Virginia suspends the running of the statute." 401 F.2d at 732; *see* 268 F. Supp. at 408.

On appeal, the issue before the Fourth Circuit panel was whether the tolling effect of a pending federal suit on Virginia's statute of limitations should be governed by state or federal law. The majority agreed with the Sixth Circuit that the "equities strongly favor[ed] appellant"[85] and noted that the pendency of the Kentucky claim would satisfy any legislative purpose on the part of Virginia "to guard against slumbering claims and would have provided ample opportunity for discovery and presentation of relevant evidence."[86] Nevertheless, the majority felt it was precluded by the rule of *Guaranty Trust* from applying federal law to determine whether Virginia's statute of limitations was tolled by the pendency of the action in Kentucky.[87] There was no discussion of the possible effect the Supreme Court's more recent decisions in *Byrd* and *Hanna* might have on the application of the *Guaranty Trust* rule. Apparently the majority thought that *Guaranty Trust*, involving as it did a state statute of limitations, could not be distinguished. Thus, the majority agreed with the district judge that Virginia's tolling statute was dispositive of the case.[88]

Judge Craven did not agree that *Guaranty Trust* was controlling on whether state or federal rules should determine the tolling effect of a pending federal action on Virginia's statute of limitations. Rather, he believed that the Supreme Court's decisions in *Byrd* and *Hanna* had introduced a principle of flexibility in determining choice of law in those instances in which state substantive interests and federal procedural interests collide.[89] In light of *Byrd* and *Hanna* Judge Craven thought that a federal court no longer had to apply the mechanical "outcome determinative" test of *Guaranty Trust* that tended to favor state substantive interests unduly. Thus, "a mechanistic resort to Virginia tolling statutes and imprecise

85. 401 F.2d at 733-34.
86. *Id.* at 734.
87. *Id.*
88. *Id.*
89. There has been sharp disagreement among the lower courts as to the scope and import of the *Byrd* and *Hanna* decisions in determining choice of law in cases of conflict between state substantive and federal procedural interests. *See* C. WRIGHT, *supra* note 69, § 59, at 277. One group of cases limits *Byrd* and *Hanna* to their facts and continues to apply the rule of *Guaranty Trust* in all other instances; "[o]ther cases continue to consider whether a state rule is one of substance or procedure and to balance the strength of the competing federal and state interests." *Id.* For an analysis critical of the initial *Atkins* decision and advocating a broad reading of *Byrd* and *Hanna*, see Note, *Federal Courts—The "Erie Doctrine" and Tolling of the State Statute of Limitations*, 47 N.C.L. REV. 715 (1969); for critical analyses of the en banc *Atkins* decision, advocating a narrow view of *Byrd* and *Hanna*, see Note, *State Statutes of Limitations In Federal Courts: By Whom Is The Statute Tolled?* 1971 DUKE L.J. 785; Note, *Erie Doctrine—Tolling Effect on Statute of Limitations of Prior Pending Suit in Federal Court Is a Question of Federal Law*, 50 TEX. L. REV. 162 (1971). For a survey of the literature on this subject, see C. WRIGHT, *supra* § 59, at 271 n.1.

Virginia state court decisions interpreting them"[90] was no longer compelled: "I regret that I am unable to persuade the court that we may faithfully follow the *Erie-Guaranty-Byrd-Hanna* doctrine without necessarily denying this plaintiff a trial on the merits."[91] Under *Byrd* and *Hanna*, federal procedural interests that conflicted with state substantive law were to be considered carefully and, when "affirmative countervailing considerations"[92] existed, federal law was to prevail. Following this line of thought, Judge Craven was convinced that a path existed by which Donald Atkins could be given a trial on the merits in a manner that would not offend the concept of federalism embodied in the *Erie* doctrine. Judge Craven's dissent tracked this delicate path.

The dissent was premised on the contention that the tolling effect of pending litigation in the federal courts was a "purely procedural [problem] involving the method of operation of the federal courts."[93] In support of this contention, he drew an analogy to federal procedure under the transfer of venue statutes,[94] under which the tolling effect of a suit pending in federal district court was determined as a matter of federal law without regard to state tolling statutes.[95] He noted that under the transfer of venue statutes the filing of suit in the original district court had the effect of tolling all applicable statutes of limitations. Thus, when "an obstacle to an expeditious and orderly adjudication on the merits"[96] arose in the original district court, a plantiff could "transfer" the original proceeding to another district instead of commencing a new proceeding that might then be barred by the applicable statute of limitation.[97] In the federal system, then, one needed to commence a particular suit only once. By timely filing suit, the plaintiff satisfied the substantive policies of diligence, avoidance of stale claims, and

90. 401 F.2d at 735 (dissent).

91. *Id.* at 734 (dissent).

92. Byrd v. Blue Ridge Elec. Coop., Inc., 356 U.S. at 537.

93. 401 F.2d at 736 (dissent).

94. 28 U.S.C. §§ 1404, 1406 (1970). Judge Craven's analogy focused on § 1406, which deals with transfer in cases when venue is improper. Section 1404 deals with those instances when venue is proper but inconvenient. Section 1406(a) provides: "The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought."

95. The equitable statutory policy of permitting a transfer rather than requiring dismissal of suits when venue was improper or inconvenient is thoroughly discussed in Goldlawr, Inc. v. Heiman, 369 U.S. 463 (1962).

96. 401 F.2d at 736 (dissent). Judge Craven suggested that where such obstacles to reaching the merits were present, venue had been laid "in the wrong division or district" as contemplated by the statute. *Accord*, Mayo Clinic v. Kaiser, 383 F.2d 653, 655 (8th Cir. 1967); Dubin v. United States, 380 F.2d 813, 815 (5th Cir. 1967).

97. 28 U.S.C. § 1406(a) (1970); *see* Goldlawr, Inc. v. Heiman, 369 U.S. 463, 466-67 (1962).

repose embodied in a state statute of limitations.[98] The configuration of a suit, once it was filed, was a matter for federal determination.

Judge Craven suggested that Atkins' predicament was virtually identical to that of a plaintiff who unexpectedly discovered he was in the wrong forum and applied for a transfer of venue. Like the plaintiff whose case was dismissed for improper venue, Atkins was exposed to the danger that his subsequent suit would be barred by the statute of limitations. The filing of a suit by Atkins in Virginia district court while his Kentucky litigation was pending but no longer viable was the equivalent of a statutory transfer of venue. Thus, the tolling effect of pending litigation, like the transfer of venue, should be recognized as a "purely procedural [problem] involving the method of operation of the federal courts"[99] and should be determined as a matter of federal rather than state law. As a transfer of venue case involved the same procedural concerns as the tolling effect of pending litigation in a subsequent suit on the same cause of action, the federal policy of tolling in the former situation ought to be extended to the latter.

Having determined that there was a strong federal procedural interest in allowing Atkins to have a trial on the merits, Judge Craven, in compliance with the teachings of *Byrd* and *Hanna*, examined Virginia's tolling statute[100] and the case construing it cited by the majority.[101] He pointed out that the case relied upon by the majority was dated, readily distinguishable[102] and could not be read "as a statement or an analysis of state policy."[103]

98. *Accord*, 401 F.2d at 734 (opinion of the court).

99. *Id.* at 736 (dissent).

100. VA. CODE § 8.01-229 (1977).

101. Jones v. Morris Plan Bank, 170 Va. 88, 195 S.E. 525 (1938).

102. Plaintiff in *Jones* had commenced his action in the wrong state forum while plaintiff in *Atkins* had filed suit in the proper federal forum—the only forum available to him at the time. Thus, the precise holding in *Jones*—"that the statute of limitations of Virginia was not tolled by the commencing of an action in the *wrong* state forum," 401 F.2d at 740 (Craven, J., dissenting)—did not necessarily control the tolling problems presented by *Atkins*. Moreover,

> In *Jones*, the plaintiff began a second action *after* the dismissal of a prior, timely proceeding and sought to exclude from the statutory period the time during which the earlier action was pending. The [court] held that this period could not be excluded and barred the later-commenced action. . . . Atkins, in fact, commenced the present Virginia action while the Kentucky proceedings were still pending and during the period in which those proceedings continued to toll the running of the Virginia statute.

Id. at 741. Judge Craven's point was that the majority was not duty bound to follow the broad dicta in *Jones* for the purposes of determining how the highest court in Virginia would dispose of *Atkins*. In effect, *Atkins* presented a "fact situation not previously considered by Virginia's highest court." *Id.* at 735. Thus, assuming that *Guaranty Trust* controlled the disposition of *Atkins*, a federal judge was free to find that, as a matter of Virginia law, Atkins' pending suits in Kentucky tolled Virginia's statute of limitations. *Accord*, Atkins v. Schmutz Mfg. Co., 435 F.2d 527 (4th Cir. 1970) (en banc), *cert. denied*, 402 U.S. 932 (1971) (analyzing parallel Virginia authorities).

103. 401 F.2d at 741 (dissent). As the holding in *Jones* was narrowly based, it could hardly be cited as an authoritative source of Virginia's tolling policy.

Further, Virginia's statute of limitations and its companion tolling statute certainly did "not enunciate a state policy that a Virginia resident who is injured in Virginia shall not be entitled to a trial on the merits against a nonresident tort-feasor."[104] Thus, the *Byrd-Hanna* balancing of state substantive interests against federal procedural interests revealed no strong state policy contrary to the federal goal "of removing whatever obstacles may impede an expeditious and orderly adjudication of cases and controversies on their merits."[105] In fact, Virginia's recent enactment of a long-arm statute indicated a similar desire by the state to facilitate trial on the merits in such instances. Upon close scrutiny, then, the apparent conflict between state and federal policies on tolling discerned by the majority through its mechanical application of the *Guaranty* test was nonexistent.

Judge Craven's dissent in *Atkins* demonstrated the positive and constructive nature of his result-orientation. His method went beyond mere statement of preconceived conclusions. All the judges who heard the *Atkins* case agreed that Atkins ought to be granted a trial on the merits.[106] To Judge Craven the initial question presented was whether the law dispositive of Atkins' case was capable of being responsibly interpreted in a manner that would produce this desired result. Operating from this beginning point, he reasoned that the recent Supreme Court warnings in *Byrd* and *Hanna* against compromising the institutional integrity of federal procedure in the application of the *Erie* doctrine warranted a holding that the tolling effect of pending litigation in a federal court was to be determined as a matter of federal rather than state law. The interpretive challenge for Judge Craven in *Atkins* was to show how the tolling effect of pending litigation "involv[ed] the method of operation of the federal courts"[107] and why it fell within the rationale of the *Byrd-Hanna* doctrine. This was the essence of Judge Craven's method: to make the search for just results and principled, innovative interpretation of the law indispensable one to the other.

Judge Craven's dissent in *Atkins* was subsequently adopted in an en banc hearing of the case. On resubmission the full court reversed the panel opinion and held instead "that the tolling effect of the pendency of an identical suit in another federal court is to be determined as a matter of federal rather than state law and that the Virginia statute of limitations was tolled by the action brought by Atkins in the Western District of Ken-

104. *Id.* at 740-41 (dissent).

105. Goldlawr, Inc. v. Heiman, 369 U.S. 463, 466-67 (1962), *quoted in* 401 F.2d at 737 (dissent).

106. 401 F.2d at 733-34 (opinion of the court) (quoting Atkins v. Schmutz Mfg. Co., 372 F.2d at 764 (6th Cir.)).

107. *Id.* at 736 (dissent).

tucky."[108] Chief Judge Haynsworth fully developed Judge Craven's previous suggestion in dissent that the *Erie* doctrine as modified by *Byrd* and *Hanna* safeguarded the institutional integrity of federal procedure against unwarranted interference by conflicting state substantive interests. The broad interpretation given *Byrd* and *Hanna* in *Atkins* has since found increasing acceptance by the other courts of appeals.[109]

The crucial insight emerging from Judge Craven's dissent in *Atkins* was a recognition that when state substantive and federal procedural interests "come into conflict, there [can] be no wholly satisfactory answers."[110] Thus, blind reliance on such simplistic formulae as "substance-procedure" and "outcome determination" would inevitably produce distorted results unduly favoring either state law or federal law depending on the standard being used. Such questions, as Judge Craven's analysis in *Atkins* demonstrated, had to be left to "the ad hoc determination of judges keenly aware of their responsibilities to two sovereigns."[111] Judge Craven also used this balancing approach to deal with difficult abstention questions in the cases of *Crawford v. Courtney*[112] and *Lynch v. Snepp*.[113] Taken together, Judge Craven's applications of the *Erie* and abstention doctrines exhibit a pragmatic, even handed attitude toward the problems of state-federal relations. In considering the appropriateness of abstention, he carefully guarded against undue federal interference with state affairs. On the other hand, when faced with the *Erie* task of determining on which issues state law was controlling, Judge Craven sought to check the intrusion of state law into matters that involved the method of operation of the federal courts.

The litigation in *Crawford v. Courtney*[114] "began as a land condemnation action in a state court of West Virginia."[115] Pursuant to the power of eminent domain, a state court condemned a piece of church property and

108. 435 F.2d at 527-28 (en banc).

109. *See* Aerojet-General Corp. v. Block Land, Inc., 511 F.2d 710 (5th Cir.), *appeal dismissed*, 423 U.S. 908 (1975); Miller v. Davis, 507 F.2d 308 (6th Cir. 1974); Prashar v. Volkswagen, Inc., 480 F.2d 947 (8th Cir. 1973), *cert. denied*, 415 U.S. 994 (1974); Sun Sales Corp. v. Block Land, Inc., 456 F.2d 857 (3d Cir. 1972); Johnson Chem. Co. v. Condado Center, Inc., 453 F.2d 1044 (1st Cir. 1972).

110. C.WRIGHT, *supra* note 69, § 59, at 278.

111. *Id.*; *accord*, Atkins v. Schmutz Mfg. Co., 435 F.2d 527 (4th Cir. 1970) (en banc), *cert. denied*, 402 U.S. 932 (1971); Szantay v. Beech Aircraft Corp., 349 F.2d 60 (4th Cir. 1965).

112. 451 F.2d 489 (4th Cir. 1971).

113. 472 F.2d 769 (4th Cir. 1973), *cert. denied*, 415 U.S. 983 (1974). Other abstention decisions by Judge Craven included: AFA Distrib. Co. v. Pearl Brewing Co., 470 F.2d 1210 (4th Cir. 1973); Webster v. Perry, 367 F. Supp. 666 (M.D.N.C. 1973) (three-judge court; McMillan, J., concurring and dissenting), *vacated and remanded for entry of new judgment for appeal to the court of appeals*, 417 U.S. 963 (1974).

114. 451 F.2d 489 (4th Cir. 1971).

115. *Id.* at 490.

awarded compensation to the landowners in the amount of $29,400. The fund from the condemnation was deposited in that court pending determination of who was entitled to the money. The trustees of the condemned church property and the heirs of the grantor of the church property asserted conflicting claims to the fund. The heirs based their title on the deed to the church, which contained a reversion clause in favor of the heirs of the grantor in the event that the property ceased to be used as a place of worship. West Virginia law provided that conflicting claims to the fund created by the condemnation were to be resolved as part of the original condemnation proceeding.[116] While the state proceedings were pending, the heirs brought a diversity suit for declaratory relief in federal district court "to establish their asserted right to the fund."[117]

Judge Craven noted initially that, when asked to adjudicate the rights of a litigant to a fund in the possession of a state court, a federal court had to consider carefully the " 'ancient and important rule, not confined to those cases which are technically in rem but applicable to all cases involving specific property, that where the property is in the actual possession of one court of competent jurisdiction, such possession cannot be disturbed by any other court.' "[118] In fact, when the action in the federal court was in rem, the rule of *Princess Lida of Thurn & Taxis v. Thompson*[119] absolutely barred that court from exercising its jurisdiction "if the property . . . [was] already in the custody of a state court of competent jurisdiction."[120] Judge Craven conceded that the absolute bar of *Princess Lida* did not apply to the facts in *Crawford*; however, he felt that the historic policy of federal noninterference with disputed property in the possession of a state court

116. W. VA. CODE § 54-2-18 (1966). West Virginia also provides that in the event of conflicting claims the judge may appoint a commissioner to take evidence. *Id.*; *accord*, 451 F.2d at 490.

117. 451 F.2d at 490. Suit was brought in the United States District Court for the Northern District of West Virginia. Generally,

> Mere difficulty in determining state law does not in itself justify a federal court's declining to exercise its [diversity] jurisdiction. . . . Congress has adopted the policy of opening the federal courts to litigants in diversity cases and we cannot close the door to the federal courts merely because such a case involves a difficult question of state law. . . . Thus this judge-made doctrine of abstention may be applied only where there are special circumstances.

AFA Distrib. Co. v. Pearl Brewing Co., 470 F.2d 1210, 1212-13 (4th Cir. 1973) (Craven, J.). *Compare* Meredith v. Winter Haven, 320 U.S. 228 (1943), *with* Burford v. Sun Oil Co., 319 U.S. 315 (1943), *and* Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25 (1959). *See generally* Gowen & Izlar, *Federal Court Abstention in Diversity of Citizenship Litigation*, 43 TEX. L. REV. 194 (1964).

118. 451 F.2d at 491 (quoting W. BARRON & A. HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE 245 (1960)).

119. 305 U.S. 456 (1939).

120. C. WRIGHT, *supra* note 69, § 25, at 97 (footnote omitted).

demanded that the federal court voluntarily abstain[121] from entertaining the action of the heirs for declaratory relief: "[*Princess Lida*] does not mean, we think, that the [federal] court, although having undoubted coordinate jurisdiction, may not yet go another mile in pursuit of cooperative federalism and decline to adjudicate title to a fund possessed by the [state] court in an eminent domain proceeding."[122] Judge Craven correctly perceived that the problems of comity and federalism addressed by the *Princess Lida* rule were still present when a plaintiff sought federal adjudication of his rights to a fund in the possession of a state court. The federal judgment would not immediately interfere with the possession of the state court, but a potentially intractable state-federal conflict could arise when the federal plaintiff sought to bind a state court with a federal judgment recognizing plaintiff's right to the fund:[123]

> Voluntary abstention within the sound discretion of the district court—as opposed to compulsory *Princess Lida*-type abstention—when a state court holds the property in dispute depends, we think, not upon facile applications of labels, whether "in rem" or "quasi in rem." However convenient such labels may be in a *Princess Lida* sense, beyond that they are mere abbreviated descriptions of situations pregnant with potential state-federal conflict.[124]

Judge Craven also noted that the specialized and local nature of the eminent domain proceeding involved in *Crawford* was a special circumstance justifying abstention by a federal court.[125] West Virginia had specifically provided that conflicting claims to a fund created by a condemnation

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121. "If in the interest of federalism there is some measure of discretion to decline jurisdiction, we think this case a peculiarly appropriate one for the exercise of that discretion." 451 F.2d at 491.

122. *Id.* at 492.

123. *Cf.* Markham v. Allen, 326 U.S. 490 (1946); Byers v. McAuley, 149 U.S. 608 (1893).

> [T]he federal court can entertain actions against administrators [and] executors . . . in which plaintiffs seek to establish their claims against an estate. . . . The federal action in such a case will establish claimant's right in a fashion that will be binding in the state proceedings, but the federal court cannot order actual distribution of property in the custody of the state court nor give execution on its judgment.

C. WRIGHT, *supra* note 69, § 25, at 98-99.

124. 451 F.2d at 492.

125. Judge Craven was relying on Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25 (1959), in which the Supreme Court ordered abstention, relying heavily on the "special nature of eminent domain" proceedings. *Id.* at 29. *But see* County of Allegheny v. Frank Mashuda Co., 360 U.S. 185 (1959), in which the Court denied abstention, rejecting the deference given eminent domain proceedings in *City of Thibodaux*. "The two cases, taken together, do establish that an abstention doctrine can apply in eminent domain cases." C. WRIGHT, *supra* note 69, § 52, at 223. Thus, the fact that an eminent domain proceeding could be had in the state courts would not per se mandate abstention. The availability of the eminent domain procceding, however, could be considered as a factor in determining whether the particular issue presented in federal court posed a special danger of state-federal friction. *See generally* Gowen & Izlar, *supra* note 117, at 200-06; Wright, *The Abstention Doctrine Reconsidered*, 37 TEX. L. REV. 815, 820-22 (1959).

were to be resolved as part of the original eminent domain proceeding.[126] A separate federal adjudication of this issue while the original eminent domain proceeding was still pending in state court would be contrary to the West Virginia policy of resolving such questions in one proceeding. In effect, the issue presented for resolution in *Crawford* "involved a specialized aspect of a complicated regulatory system of local law"[127] that was within the peculiar competence of local courts. Thus, by not exercising its diversity jurisdiction in *Crawford*, the federal court avoided needless and unseemly conflict with West Virginia's exercise of its eminent domain powers.[128]

The case of *Lynch v. Snepp*[129] presented Judge Craven with an abstention problem analogous to that posed in *Crawford*. Once again he was asked to determine whether a particular abstention doctrine was to be limited to the specific holding of the case in which it was first announced or was to be applied in light of the general notions of equity, comity and federalism on which the doctrine was premised. The specific rule of abstention in question was the doctrine announced in *Younger v. Harris* and its companion cases:[130] "[A] federal court should not enjoin a state criminal prosecution begun prior to the institution of [a] federal suit except in very unusual situations, where necessary to prevent immediate irreparable injury."[131] The purpose of this doctrine was to prevent improper intrusions by the federal courts on the right of states to enforce their own laws in their own courts.[132] At the time *Lynch* was decided the Supreme Court had "not yet reached or decided exactly how great a restraint [was] imposed by [*Younger*] principles on a federal court asked to enjoin state *civil* proceedings."[133] The facts of *Lynch* squarely raised this unresolved question.

126. W. VA. CODE § 54-2-18 (1966).

127. C. WRIGHT, *supra* note 69, § 52, at 222. This justification for abstention was definitively established in Burford v. Sun Oil Co., 319 U.S. 315 (1943).

128. Judge Craven's reliance on *City of Thibodaux* to support a *Burford* type abstention, *see* note 127 and accompanying text *supra*, seems proper. *See* note 125 *supra*.

129. 472 F.2d 769 (4th Cir. 1973), *cert. denied*, 415 U.S. 983 (1974).

130. Younger v. Harris, 401 U.S. 37 (1971); Samuels v. Mackell, 401 U.S. 66 (1971); Boyle v. Landry, 401 U.S. 77 (1971); Perez v. Ledesma, 401 U.S. 82 (1971); Dyson v. Stein, 401 U.S. 200 (1971); Byrne v. Karalexis, 401 U.S. 216 (1971).

131. C. WRIGHT, *supra* note 69, § 52A, at 232 (quoting Samuels v. Mackell, 401 U.S. 66, 69 (1971)).

132. *Id.* § 52A, at 229.

133. Mitchum v. Foster, 407 U.S. 225, 244 (1972) (Burger, C.J., concurring). In *Mitchum*, the Court held that 42 U.S.C. § 1983 (1970) was an express exception to the bar of the anti-injunction statute, 28 *id.* § 2283. However, the *Mitchum* Court stressed that a federal court being asked for injunctive relief under § 1983 was nevertheless subject to "the principles of equity, comity, and federalism that must restrain a federal court when asked to enjoin a state court proceeding." 407 U.S. at 243. The Court referred to *Younger v. Harris* for a discussion of these principles. *Id.*

The events that gave rise to the litigation caused an "unfortunate juxtaposition of federal and state judicial powers."[134] In the aftermath of severe disturbances in the Charlotte-Mecklenburg, North Carolina, school system, the state district solicitor obtained a preliminary injunction in state court "restraining all but students, employees, those with permission from school authorities, law enforcement officials, and parents transporting children to or from school from entering school property."[135] Plaintiffs in *Lynch* challenged this injunction in federal court by bringing suit under 42 U.S.C. § 1983,[136] contending that the state injunction violated their rights of free speech and assembly under the first amendment. The district court responded by granting a preliminary injunction that had the effect of "restraining in part the enforcement of [the] state injunction that undertook to control access to the public schools of Mecklenburg County by the public."[137]

Judge Craven recognized at the outset of his analysis that the federal and state interests asserted in *Lynch* were equally compelling:

> The state's interest in the matter and the jurisdiction of its courts is predicated upon state police power and the maintenance of peace and the preventing of disruption in the operation of the public schools. The interest of the federal court, equally legitimate, is the vindication and protection of freedom of speech and assembly pursuant to the first amendment.[138]

If the state's interest in *Lynch* had been asserted through a criminal proceeding, it was clear that the federal interest in the first amendment question would have had to yield. *Younger* had specifically held that, absent exceptional circumstances, a federal court could not enjoin a state criminal proceeding pending federal adjudication of constitutional challenges to the state action. The state enforcement action enjoined in *Lynch*, however, was a civil proceeding. The question was whether the policy of federal noninterference with state enforcement proceedings announced in *Younger* was premised on the special nature of state criminal proceedings or whether it rested primarily on "general notions of comity, equity, and federalism."[139]

It was evident to Judge Craven that the doctrine announced in *Younger* could not rest on nice distinctions between criminal and civil enforcement

134. 472 F.2d at 770.
135. *Id.* at 771-72.
136. 42 U.S.C. § 1983 (1970).
137. 472 F.2d at 770. If *Younger* were applicable to the enjoining of civil proceedings by the state then the district court, notwithstanding its authority under § 1983, had to take into account *Younger* principles before granting injunctive relief. *See* note 133 *supra*.
138. 472 F.2d at 770-71.
139. *Id.* at 773.

proceedings; rather, his analysis in *Lynch* sought to demonstrate that the *Younger* doctrine was based on "[t]he long standing public policy against federal interference with state court proceedings."[140] According to Judge Craven, this policy of comity "antedate[d] the Constitution"[141] and was founded in part on the traditional restraint exercised by courts of equity.[142] Over time these mixed notions of comity and equity had been reinforced and sharpened by the concept of federalism, which posited

> a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.[143]

From the interplay of this "jurisprudential brew of many interdependent principles and traditions"[144] had emerged the notion of federal noninterference on which *Younger* was based—" 'that the normal thing to do when federal courts are asked to enjoin pending proceedings in state courts is not to issue such injunctions.' "[145] Given the fundamental importance of the historical concept of federal noninterference with pending state proceedings, Judge Craven concluded that the rationale of *Younger* should apply to civil actions commenced by the state:

> These general notions of comity, equity, and federalism, applied since the early days of our Union of States and most recently restated in *Younger* and its companion cases, occupy a highly important place in our history and our future. Their application should never be made to turn on such labels as "civil" or "criminal" but rather upon an analysis of the competing interests in each case.[146]

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140. *Id.* at 772.

141. *Id.*

142. Generally, a court of equity will not act " 'when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief.' " *Id.* (quoting Younger v. Harris, 401 U.S. at 43-44).

143. *Id.* at 773 (quoting Younger v. Harris, 401 U.S. at 44).

144. Roy v. Jones, 484 F.2d 96, 103 (3d Cir. 1973) (Aldisert, J., concurring). Judge Aldisert found Judge Craven's discussion of the applicability of *Younger* in a civil context in *Lynch* "to be the most scholarly discussion of this point." *Id.*

145. 472 F.2d at 773 (quoting Younger v. Harris, 401 U.S. at 45).

146. *Id.* at 773. The Supreme Court has given limited approval to the proposition that the application of *Younger* principles should not depend on whether the state action sought to be enjoined is denominated as civil or criminal. In Huffman v. Pursue, Ltd., 420 U.S. 592 (1975), the Court held that a federal injunction against a civil action brought in state court by state authorities to have a film declared a nuisance under an obscenity statute was improper unless the *Younger* test was satisfied. The Court cautiously limited its holding to the facts of the case, and gave some credence to the civil-criminal distinction by noting that the obscenity proceeding before the Court was "in important respects . . . more akin to a criminal prosecution than are most civil cases." *Id.* at 604. For a broad reading of *Huffman* in accord with Judge Craven's

As the plaintiffs in *Lynch* could not show that the threat to their constitutional rights was both great and immediate and was such that it could not be eliminated by their defense of the pending state proceeding, Judge Craven reversed the district court's grant of a preliminary injunction.

Judge Craven's willingness, in appropriate circumstances, to abstain from exercising federal jurisdiction further illustrates the controlled, balanced nature of his activist philosophy. If an exercise of federal jurisdiction had the potential for creating unseemly interference with the state judicial system and the federal plaintiff could not establish that it had no adequate remedy in a state court, then Judge Craven felt that the policy of federalism demanded that the litigants resolve their problems in a state court. Admittedly, in the context of an individual case it was difficult to perceive why litigants who had established federal jurisdiction over the subject matter should be inconvenienced for the sake of federalism.[147] In any given litigation one was hard put to demonstrate that state-federal relations had been benefited by referring would-be federal litigants to the state courts. In fact, one could seriously question whether at this juncture in the nation's development one should be seriously concerned that the vigorous exercise of federal jurisdiction would imperil the fabric of the union.

Judge Craven, however, did not believe that the historical origins of federalism should be taken for granted. He was convinced that the curious diplomacy between state and federal governments required by our unique federal system was essential to the current and future well being of the union. He saw abstention as a means by which a federal court could fulfill the sensitive and vital task of easing the tensions that were bound to arise as a result of the concurrent jurisdictions of state and federal courts. He felt that to belittle the cumulative impact of repeated federal judicial intrusions into state prerogatives was to ignore the potential for discord inherent in a federal system. To Judge Craven federalism was not a static, self-executing system

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analysis in *Lynch*, see Anonymous v. Association of the Bar of N.Y., 515 F.2d 427 (2d Cir.), *cert. denied*, 423 U.S. 863 (1975): "*Huffman* thus establishes that the principles of comity and federalism which are at the heart of *Younger* are not to be discarded simply because the state action sought to be enjoined is yclept civil." *Id.* at 432; *accord*, Littleton v. Fisher, 530 F.2d 691 (6th Cir. 1976) (per curiam); Ahrensfeld v. Stephens, 528 F.2d 193 (7th Cir. 1975). For pre-*Huffman* cases in accord with *Lynch*, see Palaio v. McAuliffe, 466 F.2d 1230 (5th Cir. 1972); Cousins v. Wigoda, 463 F.2d 603 (7th Cir.), *application for stay denied*, 409 U.S. 1201 (Rehnquist, Circuit J., 1972); Erdmann v. Stevens, 458 F.2d 1205 (2d Cir.), *cert. denied*, 409 U.S. 889 (1972). The Supreme Court has followed *Huffman* with an even broader interpretation of *Younger* in Juidice v. Vail, 430 U.S. 327 (1977).

147. *See* Juidice v. Vail, 430 U.S. 327, 346-47 (1977) (Brennan, J., dissenting); Webster v. Perry, 367 F. Supp. 666, 671 (W.D.N.C. 1973) (three-judge court; McMillan, J., concurring and dissenting), *vacated and remanded for entry of new judgment for appeal to the court of appeals*, 417 U.S. 963 (1974).

of governance, but rather, one premised on the desire of the parties involved to respect the prerogatives of the other. Such mutual respect could only be fostered by a willingness to seek adjustment and compromise whenever clashes between state and federal interests were imminent.

CIVIL RIGHTS

Perhaps the most complex and farreaching of Judge Craven's judicial contributions rest within the implementation of the constitutional guarantees afforded in the area of public education by the historic case of *Brown v. Board of Education*.[148] Craven once described *Brown* as "unique for intellectual honesty,"[149] but his concern for a pragmatic approach in actually effecting the broad mandates of *Brown* and its successors remained paramount in the desegregation decisions in which he played a part.[150] The issues that arose in the wake of *Brown* and that Craven had to deal with centered primarily upon three basic questions: (1) when is a unitary school system achieved for the purposes of the fourteenth amendment;[151] (2) what remedies are available to the local governing unit or school board in order to establish or preserve such a system;[152] and (3) what relief, if any, should be

148. 347 U.S. 483 (1954). The 1954 decision (*Brown I*) was followed in 1955 by a second decision, Brown v. Board of Educ., 349 U.S. 294 (1955) (*Brown II*),which directed desegregation with "all deliberate speed," *id.* at 301.

149. *Paean to Pragmatism*, *supra* note 1, at 988.

150. He articulated the difficulties in applying the principles of *Brown* in a speech for the West Virginia Law School in 1970 in which he declared:

> It is not at all surprising that the Court has not quickly and finally answered these questions. It should not distress, I think, even the most ardent advocate of civil rights that sixteen years after *Brown v. Board of Education* we still do not know how much and to what extent the decision must be implemented. . . . Like Humpty-Dumpty, the Court sometimes means precisely what it means, neither more nor less, and quite sensibly is willing to take the time to allow the inferior courts to experiment with words, giving content and meaning to the doctrine which has been expounded. The truth is that the Court is wise enough to know that it does not know precisely what ought to be done and must be required.

Vocabulary, *supra* note 1, at 2-3; *see Paean to Pragmatism*, *supra* note 1, at 990. Such an approach was difficult for Craven to apply in light of the broad language of desegregation adopted by the Supreme Court, yet he maintained that "[i]nterpretations of the Constitution, like the Constitution itself, are intentionally . . . framed in the broadest terms. The Court is far too wise to fall into the error of precision." *Vocabulary*, *supra* at 2.

151. *See* Northcross v. Board of Educ., 397 U.S. 232, 236 (1970) (per curiam) (Burger, C.J., concurring). In Burger's concurring opinion, he defines a unitary system as one " 'within which no person is to be effectively excluded from any school because of race or color.' " *Id.* at 237 (quoting Alexander v. Holmes County Bd. of Educ., 396 U.S. 19, 20 (1969) (per curiam)). Craven likened this "cryptic" definition to the conversation between Humpty-Dumpty and Alice: "When *I* use a word . . . it means just what I choose it to mean—neither more nor less." L. CARROLL, THROUGH THE LOOKING GLASS 124 (1875), *quoted in Vocabulary*, *supra* note 1, at 2 (omission by Craven). Nevertheless, Craven remarked that the Court's definition of a unitary school system was "sort of like defining a dog as a quadruped mammal. That is perfectly true, but it does not help distinguish a dog from a cat." *Vocabulary*, *supra* at 2.

152. *See* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971).

afforded victims of discriminatory conduct by such governing authorities?[153]

Two early desegregation-related decisions by Judge Craven, *Felder v. Harnett County Board of Education*[154] and *Sparrow v. Gill*,[155] epitomize his deep concern for balancing the "rightness" of the progress achieved by a judicial decision and the "institutional needs" of the courts to be viewed not as proponents of policy but as "bodies wielding moral force."[156] In *Felder* the Fourth Circuit concluded that the efforts by a school board to establish a unitary school system through the use of freedom of choice and vague districting plans were inadequate[157] in the face of the Supreme Court's decision in *Green v. County School Board*.[158] Harnett County schools had been completely segregated until 1964 when a freedom of choice plan was implemented.[159] The district court found the freedom of choice plan inadequate in light of the fact that only 4.3% of black students were attending previously all-white schools.[160] That court also rejected the

153. *See* Wall v. Stanly County Bd. of Educ., 378 F.2d 275 (4th Cir. 1967).

It was within the framework of these questions that Craven recognized the uncertainty of the judicial task in the area of school desegregation:

> Like the rest of us, the Court learns from experience—the experience of the inferior federal courts. Trial balloons constantly soar aloft from the United States District Courts. Some are shot down in flames by the United States Circuit Courts of Appeals while others are allowed to orbit indefinitely. Implementing new constitutional dogma is largely a matter . . . of trial and error—with the lower courts trying and the Supreme Court calling the errors.

Paean to Pragmatism, *supra* note 1, at 990-91 (footnote omitted). *See also Vocabulary*, *supra* note 1.

154. 409 F.2d 1070 (4th Cir. 1969).

155. 304 F. Supp. 86 (M.D.N.C. 1969).

156. *Paean to Pragmatism*, *supra* note 1, at 990. *See also* A. Cox, THE WARREN COURT (1968). Craven suggested that "Americans do not much care to be governed by a bevy of platonic guardians. Probably the Court cannot maintain its tremendous moral force without the symbolism that the Constitution—and not merely the predilections of nine persons—controls decisions." *Paean to Pragmatism*, *supra* at 990.

157. 409 F.2d at 1073.

158. 391 U.S. 430 (1968). In *Green*, Justice Brennan indicated that freedom of choice was only a tool in implementing *Brown* and that a school board has the "affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch." *Id.* at 437-38. Craven viewed *Green* as a necessary and pragmatic step after *Brown*: "In *Green v. County School Board* the Court turned to exhortation. Only a desegregation plan that promised to work and work now would suffice. The goal to be attained was ringingly proclaimed: Neither black schools nor white schools, just schools." *Paean to Pragmatism*, *supra* note 1, at 989-90 (footnotes omitted).

159. 409 F.2d at 1071. The district court found that on August 21, 1964, there were 13,000 students in the school system, approximately half of whom were black students. There were 20 public schools in the county, 6 of which were for black students. In the face of this evidence, the district court found that the system was racially segregated and ordered that if the Board did not establish an adequate plan for pupil assignment, it was to implement a freedom of choice plan. The Fourth Circuit affirmed the district court in a per curiam opinion. 349 F.2d 366 (4th Cir. 1965) (per curiam).

160. 409 F.2d at 1073. The district court's decision was rendered on July 23, 1968.

remedial plans submitted by the Board.[161] Craven, writing for the majority in an en banc decision, acknowledged that the later plans were an improvement over those submitted earlier to the district court by the Board, but was concerned that they lacked specificity and failed to foreclose the possibility that the neighborhood districts "will be gerrymandered to perpetuate the dual school system."[162] For this reason he struck down the plans as ineffective in establishing a unitary school system. He did not, however, consider the School Board's appeal to be frivolous for the purpose of Rule 38 of the Federal Rules of Appellate Procedure and thus denied appellees' request for double costs and counsel fees.[163]

In *Felder* one finds Craven in what eventually proved to be a familiar position in the area of desegregation. The mandates of *Green* required the summary rejection of the plans submitted by the school board, but Craven's own reluctance to characterize the appeal as a "pattern of evasion and obstruction" reflected his repeated concern for the balance to be struck in such cases:

> [I]t seems to me, it is doubtful that there is any unconditional right to racial balancing in the schools, or put differently, it may be that such right must be balanced against cost and inconvenience and educational purposes other than integration for its own sake. While no one would seriously suggest, absent a non-invidious reason, that a black school and a white school located back to back may be

161. The second remedial plan was proposed by the Board on August 5, 1968, and provided for the closing of three all-black high schools in the 1968-1969 school year as well as the assigning of the students to various white high schools. There was, however, no attempt made to deal with the Harnett County elementary schools as the Board concluded that this problem called for further study. The district court rejected this plan and noted that "the time for 'study' had passed." *Id.* at 1072.

The third plan, suggested by the Board on August 19, 1968, included the same features in regard to the high school closings and assignment of the students; elementary school children were to be assigned to neighborhood schools with transportation provided for all students. The district court found this plan to be ineffective as well. *Id.* at 1073.

162. *Id.* at 1074-75. The Board's final plan also evidenced a failure to deal with future employment practices or expansion of the present system so as to dismantle the segregated facilities.

163. *Id.* at 1075. Rule 38 of the Federal Rules of Appellate Procedure provides: "If a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee." FED. R. APP. P. 38. Judges Sobeloff and Winter dissented from that portion of the opinion, declaring that the present appeal "was merely to retard compliance." They thus favored at least the award of reasonable counsel fees in order to "discourage further dilatory tactics." 409 F.2d at 1076 (Sobeloff, J., joined by Winter, J., concurring and dissenting). Sobeloff noted that the Board's legal position in its brief included the theory that "the Harnett County Board of Education does not have to work toward the objective of the correction of racial imbalance in its various public schools." *Id.* The remaining dissenter, Judge Bryan, concluded, contrary to his brothers, that the decisions at both the trial and appellate levels were "meddlesome and oppressive" and maintained that "[o]verreadiness to oversee is disruptive of school operation; too, it encourages captious faultfinding . . . ." *Id.* at 1077 (Bryan, J., dissenting).

> continued as separate institutions, neither has it been urged yet, so far as I know, that a new bridge must be built over Puget Sound or San Francisco Bay to permit pairing of black and white schools.[164]

Plaintiff in *Sparrow v. Gill* maintained that section 115-186(e) of the North Carolina General Statutes,[165] which does not compel state-provided school bus transportation to pupils residing within corporate limits of the municipality in which their school is located, and section 115-190.1 of the North Carolina General Statutes,[166] which provides that the state would not deny state transportation to residents in an area that had been incorporated into any municipality since February 6, 1957, were unconstitutional as violative of the equal protection clause.[167] Plaintiff's daughter resided within municipal limits on February 6, 1957, and attended school approximately one-and-one-half miles away. The issues for Craven were (1) whether the state's conclusion that school bus transportation was more crucial for county students than for city students was reasonable and (2) whether such transportation was more important for those city students in areas within the municipality limits after February 6, 1957.[168] In deciding these issues, he was careful to limit the scope of the equal protection challenge to the traditional test of reasonable classification:

> This is not a "civil rights" case; nor is it a voting rights case; nor does it deal with any constitutional guarantee accorded special

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164. *Vocabulary*, *supra* note 1, at 9-10.

165. N.C. GEN. STAT. § 115-186(e) (1975) provides in part:

> No provision of this Subchapter shall be construed to place upon the State, or upon any county or city, any duty to supply any funds for the transportation of pupils . . . who live within the corporate limits of the city or town in which is located the public school in which such pupil is enrolled or to which such pupil is assigned, even though transportation to or from such school is furnished to pupils who live outside the limits of such city or town.

166. *Id.* § 115-190.1 provides:

> In each and every area of the State where school bus transportation of pupils to and from schools is now being provided, such school transportation shall not be discontinued by any State or local governmental agency for the sole reason that the corporate limits of any municipality have been extended to include such area since February 6, 1957, and school bus transportation of pupils shall be continued in the same manner and to the same extent as if such area had not been included within the corporate limits of a municipality.
>
> In each and every area of the State where school bus transportation of pupils to and from school is now being provided, such school transportation shall not be discontinued by any State or local governmental agency for the sole reason that two or more municipalities have consolidated and the corporate limits of the new, consolidated municipality includes such area, and school bus transportation of pupils shall be continued in the same manner and to the same extent as if such area had not been consolidated and had not been included within the corporate limits of the new, consolidated municipality.

167. 304 F. Supp. at 88. Craven concluded that the statutes created three classes of students: (1) those residing outside municipal limits; (2) those residing in areas brought within municipal limits subsequent to February 6, 1957; and (3) those students who had resided within the municipal limits as they existed prior to February 6, 1957. *Id.* at 90.

168. *Id.* at 90.

> priority in the scale of human liberty. No one has a constitutional right to ride a school bus. His is merely the right not to be excluded from a benefit which is conferred by the state upon fellow citizens whose claim to it is no more "reasonable" than his.[169]

Craven upheld section 115-186(e) on the grounds that the legislature's distinction was reasonable in light of the fact that city students, unlike county students, generally have easier access to public transportation.[170] With regard to section 115-190.1, however, he concluded that the arbitrary date of February 6, 1957, "is wholly unrelated to the end apparently sought to be achieved" and that such a distinction between the two classes of students "runs counter to common observation."[171] He rejected the state's position that the date was necessary to limit state expenditures and suggested that such a purpose could be achieved without favoring one group of citizens over another.[172]

The decisions in *Felder* and *Sparrow* suggest, therefore, that before the advent of the major Fourth Circuit desegregation cases,[173] Judge Craven recognized the positive duties placed upon the federal judiciary under *Brown I* and *II* to dismantle segregated schools. At the same time, however, he was unwilling to hold the local and state authorities to unreasonable burdens in their attempts to comply with *Brown*:

> Fundamentally it is still true that courts exercise only a veto power in the constitutional domain. In school cases the positive duties arise out of the negative command: thou shalt not practice invidious discrimination in the public schools. . . .
>
> I think we can more profitably concern ourselves with what is

169. *Id.*

170. *Id.* at 90-91. He declined to go further and require a "measured-distance-from-school basis" on the ground that that issue was a political question for the legislature. *Id.* at 91.

171. *Id.* at 91. Craven was quick to point out that "judges need not be blind to what other men see: that cities like Charlotte or Winston-Salem may have annexed areas since 1957 that are now more 'urban' than areas long within the city limits of other towns in a declining or static growth pattern." *Id.*

172. *Id. Sparrow* had a significant effect upon North Carolina's state-provided transportation programs. As a result of the decision, many local school boards were forced to decide whether to halt transportation for children in the annexed areas alone or to discontinue such transportation altogether. The Governor and the Advisory Budget Commission eventually authorized the State Board of Education to take advantage of the Nine Months School Fund in order to provide the amounts required to begin transportation of all urban school children. *See* Styers v. Phillips, 277 N.C. 460, 468-69,178 S.E.2d 583, 588 (1971). Plaintiff in *Styers* attacked this administrative decision on two grounds: (1) the legislature did not authorize the money involved for the purpose for which it was to be used; and (2) N.C. GEN. STAT. § 115-186(e) (1975) prevented the State Board from using these funds for urban transportation of students. The North Carolina Supreme Court rejected this claim. 277 N.C. at 471, 178 S.E.2d at 590.

173. Bradley v. School Bd., 462 F.2d 1058 (4th Cir. 1972), *aff'd per curiam by an equally divided Court sub nom.* Bradley v. Virginia Bd. of Educ., 412 U.S. 92 (1973); Wright v. Council of Emporia, 442 F.2d 570 (4th Cir. 1971), *rev'd*, 407 U.S. 451 (1972); Swann v. Charlotte-Mecklenburg Bd. of Educ., 431 F.2d 138 (4th Cir. 1970), *aff'd*, 402 U.S. 1 (1971).

> reasonably practicable for a school board to do to correct inequality of educational opportunity—North and South—rather than having our attention diverted to how a particular school system may have become that way. . . .[174]

In *Brunson v. Board of Trustees*[175] the Fourth Circuit was faced with exactly this question—what constitutes "reasonable" effort on the part of a local school board to establish a unitary system through the use of a freedom of choice plan? The majority upheld the district court's finding that the board's plan was inadequate.[176] Judge Craven joined in this decision as to the invalidity of the plan but dissented from the district court's approval of an alternative Department of Health, Education and Welfare (HEW) plan.[177] The HEW plan would have resulted, he felt, in a majority of black students in each school; the white minority would range from five percent to seventeen percent.[178] In light of this result, Judge Craven feared a mass exodus of white students from the public school system, thereby defeating the principles of *Brown*.[179] He warned "that judges in fashioning remedies

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174. *Vocabulary*, *supra* note 1, at 5, 8.

175. 429 F.2d 820 (4th Cir. 1970).

176. *Id.* at 820. The school system in 1969 had 2408 black students and 256 white students. Two schools remained virtually all white and the remaining four schools in the system were attended by black students alone. The freedom of choice plan had "resulted in token desegregation only." *Id.* at 821 (Craven, J., concurring and dissenting).

177. Judge Craven was joined by Chief Judge Haynsworth and Judge Bryan.

178. 429 F.2d at 821. Judge Craven declared that "[t]his may be 'desegregation' but it is not, in my opinion, 'integration.'" *Id.*

179. *Id.* at 822. Judge Craven remarked that "the federal courts, when plunged into sociology and educational theory, are into something they know very little about." *Id.* at 821 n.1. *See also Personal Comment*, *supra* note 1, at 154. In *Brunson* Judge Craven referred to the testimony of Dr. Thomas F. Pettigrew as illustrative of the principle that "little advantage is gained for children of either race, and some harm may result, from placing children in a school where they are in a distinct racial minority" and that the ideal situation is a viable racial mix with whites in the majority. Such a situation would provide better educational opportunities for the black students in the minority. 429 F.2d at 821 n.1. Judge Craven's use of the Pettigrew thesis was questioned by Judge Sobeloff in his concurring opinion:

> [The thesis's] central proposition is that the value of a school depends on the characteristics of a majority of its students and superiority is related to whiteness, inferiority to blackness. Although the theory is couched in terms of "socio-economic class" and the necessity for the creation of a "middle-class milieu," nevertheless, at bottom, it rests on the generalization that, educationally speaking, white pupils are somehow better or more desirable than black pupils. . . . The inventors and proponents of this theory grossly misapprehend the philosophical basis for desegregation. It is not founded upon the concept that white children are a precious resource which should be fairly apportioned. It is not, as Pettigrew suggests, because black children will be improved by association with their betters. . . . But school segregation is forbidden simply because its perpetuation is a living insult to the black children and immeasurably taints the education they receive. This is the precise lesson of *Brown*.

Id. at 826 (Sobeloff, J., concurring).

Later, in Bradley v. School Bd., 462 F.2d 1058 (4th Cir. 1972), *aff'd per curiam by an equally divided Court sub nom.* Bradley v. Virginia Bd. of Educ., 412 U.S. 92 (1973), Craven expressed doubts himself as to the value of Pettigrew's "viable racial mix" theory:

> In *Brunson* . . . I wrote favorably of such an approach because of my dismay that white fleeing had actually *occurred* and would unquestionably continue until there

cannot successfully ignore reality,"[180] and on this basis he rejected the HEW plan as extreme and representing an "unyielding fidelity to the arithmetic of race."[181] In his conclusion Judge Craven revealed his fundamental adherence to the concept that the principles of *Brown* do not embrace fixed racial percentages to the detriment of both races, but rather that the implementation of *Brown* should achieve a mutuality of respect through "integration," not "desegregation":

> Perhaps my hope is too idealistic: that there can be achieved, even in Clarendon County, some degree of mutual respect, trust, confidence, even friendship, between black and white children. It won't occur without their knowing each other, and concededly there will be little contact under the HEW plan.
>
> The living insult to black people inherent in segregation as one aspect of prejudice will be eradicated when black and white people come to know and understand each other as one people in one nation. In that endeavor I am unwilling to write off even one county in one state.[182]

As *Felder*, *Sparrow* and *Brunson* suggest, *Brown*, as interpreted by Judge Craven, required that the approach employed by the courts be marked by an acute sensitivity towards "not what must be done to dismantle, but what must be done to afford equal protection in terms of equal educational opportunity for all children."[183] Craven never expressed reluctance in rejecting inadequate desegregation plans; nor did he hesitate in striking down those statutes that stood as an obstacle to the constitutional guarantees of the equal protection clause. But he was reluctant to extend the remedy afforded beyond the wrong. This reluctance probably arose from a belief that the

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were neither black schools nor white schools, but just black schools only . . . . Even so, I acknowledge doubt about my approach in that case and an increased respect for the viewpoint of Judges Sobeloff and Winter expressed in opposition.

Id. at 1063 n.5. As late as 1975, Craven's perspective on white flight as a factor to be considered changed once again; he concluded that "it still seems to me that some is better than none." *Personal Comment*, *supra* at 155.

> Only one white pupil enrolled for the 1973-74 session; thus my fears about white flight have been realized. If . . . white flight can never be a relevant factor in considering the appropriate remedy for dismantling a dual school system, then Judge Sobeloff wins. But he would not be happy to know that the schools of Clarendon County are all black (save one) nor to envision with Mr. Justice Marshall the specter of all-black schools in Detroit.

Id. (footnotes omitted); *see* Milliken v. Bradley, 418 U.S. 717, 802 (1974) (Marshall, J., dissenting).

180. 429 F.2d at 821. There was evidence that 110 white students had already left the white public schools in favor of a white parochial school in the area, and in oral argument it was revealed that approximately 100 more whites had applied for admission to the private school in September 1970. *Id.* at 822.

181. *Id.* at 822.

182. *Id.* at 823.

183. *Vocabulary*, *supra* note 1, at 8.

assessment of double fees or the implementation of a plan that might in its severity defeat the very purpose of *Brown* would serve only to aggravate the difficult and tedious progress inherent in changing attitudes as well as changing schools.

In view of Judge Craven's contributions in the area of desegregation, it is perhaps ironic that he was forced to remove himself[184] from taking part in *Swann v. Charlotte-Mecklenburg Board of Education*[185] at the appellate level. As he had dealt with similar questions in *Swann* as a district court judge,[186] he was precluded from hearing the appeal under 28 U.S.C. § 47.[187] He was able, however, to consider an ancillary proceeding in *Swann*[188] that tested the constitutionality of section 115-176.1 of the North Carolina General Statutes, the North Carolina anti-busing statute.[189] Craven found that a portion of the statute interfered with the school board's performance of its affirmative constitutional duty to comply with the equal protection requirements of the fourteenth amendment.[190] The statute was designed to

184. 431 F.2d 135 (4th Cir. 1970).

185. 451 F.2d 138 (4th Cir. 1970), *aff'd*, 402 U.S. 1 (1971).

186. In 1965 Craven served as Federal District Judge for the Western District of North Carolina. At that time he heard an earlier version of Swann v. Charlotte-Mecklenburg Bd. of Educ., 243 F. Supp. 667 (W.D.N.C. 1965), *aff'd*, 369 F.2d 29 (4th Cir. 1966). The questions before Craven at that time included: (1) The validity of a freedom of choice option combined with a zoning plan; and (2) whether certain school districts had been gerrymandered to prevent desegregation. Judge Craven concluded that the plan submitted by the Board complied with the mandates of *Brown*. *Id.* at 671-72.

187. 28 U.S.C. § 47 (1970) provides that "[n]o judge shall hear or determine an appeal from the decision of a case or issue tried by him." In his order of disqualification, Judge Craven quoted from an address given by Walter B. Hill to the American Bar Assocation in 1899: " 'Such an appeal is not from Phillip drunk to Phillip sober, but from Phillip sober to Phillip intoxicated with the vanity of a matured opinion and doubtless also a published decision.' " 431 F.2d at 137.

188. Swann v. Charlotte-Mecklenburg Bd. of Educ., 312 F. Supp. 503 (W.D.N.C. 1970), *aff'd sub nom.* North Carolina State Bd. of Educ. v. Swann, 402 U.S. 43 (1971).

189. N.C. GEN. STAT. § 115-176.1 (1975) reads in part:

> Where administrative units have divided the geographic area into attendance districts or zones, pupils shall be assigned to schools within such attendance districts; provided, however, that the board of education of an administrative unit may assign any pupil to a school outside of such attendance district or zone in order that such pupil may attend a school of a specialized kind including but not limited to a vocational school or school operated for, or operating programs for, pupils mentally or physically handicapped, or for any other reason which the board of education in its sole discretion deems sufficient. No student shall be assigned or compelled to attend any school on account of race, creed, color or national origin, or for the purpose of creating a balance or ratio of race, religion or national origins. Involuntary bussing of students in contravention of this Article is prohibited and public funds shall not be used for any such bussing.

190. 312 F. Supp. at 509-10; *see* Green v. County School Board, 391 U.S. 430 (1968); Northcross v. Board of Educ., 397 U.S. 232, 236 (1970) (per curiam) (Burger, C.J., concurring). *See also Vocabulary*, *supra* note 1, at 1-3. Judge Craven viewed this affirmative constitutional duty as a change in traditional constitutional doctrine:

> The major difficulty with school cases arises out of the thought necessity of making the Constitution speak affirmatively rather than with its traditional negative

prohibit school boards from assigning or involuntarily busing students because of race or in order to racially balance the school system.[191] Craven concluded that such an effect was violative of the equal protection guarantees afforded under *Brown*:

> The Constitution is not color blind with respect to the affirmative duty to establish and operate a unitary school system. To say that it is would make the constitutional principle of *Brown I* and *II* an abstract principle instead of an operative one. A flat prohibition against assignment by race would, as a practical matter, prevent school boards from altering existing dual systems. . . . To say that bussing shall not be resorted to unless unavoidable is a valid expression of state policy, but to flatly prohibit it regardless of cost, extent and all other factors—including willingness of a school board to experiment—contravenes, we think, the implicit mandate of *Green* that all reasonable methods be available to implement a unitary system.[192]

Once again, Craven was vitally concerned with the right of the local school board to experiment in their sensitive task of desegregation. To the extent that the statute here contravened those rights in that busing could never be used as a remedy to achieve a unitary system, he held it unconstitutional.[193]

The Supreme Court agreed with Craven's findings and reiterated the necessity for permitting the school board to make use of such methods as busing in providing an adequate remedy.[194] Chief Justice Burger, writing for the Court, noted in accordance with *Swann v. Charlotte-Mecklenburg Board of Education*[195] that "the Constitution does not compel any particular degree of racial balancing or mixing, but when past and continuing constitu-

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> voice. Until recently the Constitution has been more like the Ten Commandments than the Sermon on the Mount. Constitutional dogma has ordinarily been framed in terms of "Thou shalt not."

Id. at 3-4 (footnotes omitted). *See also* Note, *Desegregation of Public Schools: An Affirmative Duty to Eliminate Racial Segregation Root and Branch*, 20 SYRACUSE L. REV. 53 (1968).

191. *See* Evans v. Buchanan, 379 F. Supp. 1218, 1226 (D. Del. 1974).

192. 312 F. Supp. at 509-10. Judge Craven also declared that a school board must always engage in some degree of racial balancing if it desires to take affirmative steps to dismantle a segregated system.

193. A year after the United States Supreme Court's decision in *Swann*, Judge Craven wrote:

> In the long run a rule of law or its implementation that does not have the support of a majority of the American people will not survive. . . . In my opinion, *Brown* has that support and is here to stay. Massive, long-distance bussing does not have that support and, in my opinion, is a temporary expedient. . . . There is also in *Swann* the intimation that such extreme remedies may become inappropriate whenever a system becomes "unitary."

Paean to Pragmatism, *supra* note 1, at 991 (footnote omitted).

194. North Carolina State Bd. of Educ. v. Swann, 402 U.S. at 46.

195. 402 U.S. 1 (1971).

tional violations are found, some ratios are likely to be useful starting points in shaping a remedy."[196]

The process of dismantling school systems with a history of racial segregation included the right afforded by *Swann* to local school boards to require bus transportation if necessary as a tool to seek the necessary objective of desegregation. In the school redistricting cases[197] the Fourth Circuit addressed a narrow but crucial question left unaddressed in *Swann*—may a federal court enjoin state and local officials from establishing new school districts when the existing district is in the process of desegregation?[198]

The first of these cases was *Wright v. Council of Emporia*.[199] Prior to 1967 Emporia was an incorporated town and part of Greensville County, Virginia. In 1967 the town severed its connection with the county,[200] requiring that it provide free schooling for the children within its borders.[201] In 1968 Emporia entered into a contract with the county whereby the county would continue to provide education for the city students if the city would pay for a portion of the school system's total cost.[202] In 1969 the district court ordered the desegregation of the existing school facilities[203] under a

196. North Carolina State Bd. of Educ. v. Swann, 402 U.S. at 46. Burger concluded that race could be used in establishing a remedy for dual systems:

> Just as the race of students must be considered in determining whether a constitutional violation has occurred, so also must race be considered in formulating a remedy. To forbid, at this stage, all assignments made on the basis of race would deprive school authorities of the one tool absolutely essential to fulfillment of their constitutional obligation to eliminate existing dual school systems. . . .
>
> . . . [A]n absolute prohibition against transportation students assigned on the basis of race, "or for the purpose of creating a balance or ratio," will similarly hamper the ability of local authorities to effectively remedy constitutional violations.

Id.

197. Wright v. Council of Emporia, 442 F.2d 570 (4th Cir. 1971), *rev'd*, 407 U.S. 451 (1972); United States v. Scotland Neck City Bd. of Educ., 442 F.2d 575 (4th Cir. 1971), *rev'd*, 407 U.S. 484 (1972); Turner v. Littleton-Lake Gaston School Dist., 442 F.2d 584 (4th Cir. 1971).

198. Several other circuits had dealt with a similar problem, but the resolution of the question was far from final. Lee v. Macon County Bd. of Educ., 448 F.2d 746 (5th Cir. 1971); Stout v. United States, 448 F.2d 403 (5th Cir. 1971); *see* Haney v. Board of Educ., 410 F.2d 920 (8th Cir. 1969).

199. 442 F.2d 570 (4th Cir. 1971), *rev'd*, 407 U.S. 451 (1972), *rev'g* Wright v. County School Bd., 309 F. Supp. 671 (E.D. Va. 1970).

200. *Id.* at 572.

201. VA. CODE § 22-93 (1973). The record indicated that Emporia was prompted to adopt its independent status because of dissatisfaction with the county's method of revenue allocation from a newly enacted state sales tax. 442 F.2d at 572.

202. 442 F.2d at 573. Emporia had considered operating its schools independently of the county but concluded that such an operation might prove impractical.

203. Attempts to desegregate Greensville County Schools began in 1966 when the *Wright* petitioners brought suit to compel the dismantling of the existing system. At that time, the district court approved the school board's freedom of choice plan. Wright v. County School Bd., 252 F. Supp. 378 (E.D. Va. 1966).

"pairing plan."[204] Two weeks after the district judge's order was issued, Emporia declared its desire to establish an independent school system for the city. Plaintiffs claimed that such a separation would frustrate the pairing plan and its purpose to desegregate the schools.[205] The district court agreed and refused to amend its previous order against the city.[206] The two factors that influenced the district court in reaching its decision were the shift in racial balance between the systems as proposed by the city[207] and the decision by the city to leave the county system, thus placing the county's efforts to establish a unitary system in jeopardy from a financial standpoint.[208]

The Fourth Circuit, with Judge Craven writing the majority opinion,[209] concluded that the district court erred and held that unless the dominant purpose of the city was "to retain as much of separation of the races as possible," the federal district court should not interfere with the formation of the new school district.[210] Craven concluded that the intent of the separation was not to avoid desegregation, but rather, the evidence suggested, to embark on an aggressive campaign to increase expenditures for the new city school, as the county officials were unwilling to provide the necessary funds for the county schools.[211] Once again, Judge Craven was

204. 442 F.2d at 573. Pairing plans involve assigning all children in the system enrolled in a particular grade to the same school. Ordinarily, the school board is required to match all-white schools with all-black schools. *See The Supreme Court, 1971 Term*, 86 HARV. L. REV. 1, 63 (1972).

205. Wright v. County School Bd., 309 F. Supp. at 675.

206. *Id.* at 680.

207. *Id.* at 678. At the time of this announcement 66% of the students enrolled in the Greensville County system were black and 34% white. The record indicates that under the Emporia plan all of the city students would enroll in one high school or one grade school. A white majority would exist at the high school, 52% white to 48% black. In the grade school, however, the percentages would be slightly reversed, 54% black to 46% white. The students in the county system would be 72% black and 28% white if the separation of schools were allowed. *Id.* The percentage shift in the county schools would therefore be approximately 6%. 442 F.2d at 573.

208. 442 F.2d at 674; *cf.* 309 F. Supp. at 679 (accepting *arguendo* the financial threat).

209. Judge Winter dissented, Judge Butzner disqualified himself and Judge Sobeloff did not participate.

210. 442 F.2d at 572. Judge Craven stated the dominant purpose test to be the following:

> If the creation of a new school district is designed to further the aim of providing quality education and is attended secondarily by a modification of the racial balance, short of resegregation, the federal courts should not interfere. If, however, the primary purpose for creating a new school district is to retain as much of separation of the races as possible, the state has violated its affirmative constitutional duty to end state supported school segregation. The test is much easier to state than it is to apply.

Id.

211. *Id.* at 574. Both the district judge and Judge Craven agreed that Emporia's proposed system would be educationally superior to the county system due to its lower student-teacher ratios, increased expenditures for each student, health services and adult educational programs as well as a kindergarten program. *Id.* Craven went on to point out that the district judge found that there was no evidence of discriminatory purpose and that "the city would, if permitted, operate its own system on a unitary basis." *Id.*

relying upon the legacy of *Brown* as representing not an unswerving concern for racial balancing, but rather as affording opportunities for pragmatic alternatives in fashioning an adequate remedy in the district court.[212]

In a five-to-four vote the Supreme Court rejected Craven's articulation of the dominant purpose test.[213] Justice Stewart, for the majority, indicated that such a test would be virtually impossible to apply in practice.[214] The primary motive in the redistricting was irrelevant according to Stewart, who stated that in the future the courts must focus "upon the effect—not the purpose or motivation—of a school board's action in determining whether it is a permissible method of dismantling a dual system."[215] Stewart concluded that "[t]he existence of a permissible purpose cannot sustain an action that has an impermissible effect."[216] *Wright* did not embrace the notion that racial balance alone warranted a rejection of the districting plan.[217] Rather, three other factors were considered more significant in preventing the separate systems plan: (1) the fear of white flight from the county schools;[218] (2) the prospect that the city school system would be

212. "In his commendable concern to prevent resegregation—under whatever guise—the district judge momentarily overlooked, we think, his broad discretion in approving equitable remedies and the practical flexibility recommended by *Brown II* in reconciling public and private needs."*Id.* Judge Winter dissented from Craven's dominant purpose test on the basis that each of the redistricting cases differed only slightly from *Green*. The *Green* principles place a burden of heavy persuasion upon the city officials to establish a unitary system and only when that system comes to fruition can "greater latitude in redefinition of school districts . . . then be permitted." *Id.* at 589 (Winter, J., dissenting). In *Wright*, Winter based his dissent upon three considerations: (1) *Green* requires immediate steps; (2) the critical change in the racial balance is not the 6% black change but the significant white increase of 27.8% to 48.3% in the city school; and (3) the subdivision itself will work "adverse psychological effects on the black students in the county which will be occasioned by the secession of a large portion of the more affluent white population from the county schools." *Id.* at 590.

213. 407 U.S. 451 (1972). Justices Stewart, Brennan, White, Douglas and Marshall formed the majority; Chief Justice Burger and Justices Blackmun, Powell and Rehnquist made up the dissent.

214. *Id.* at 461-62. Stewart indicated that such a test "finds no precedent in our decisions. . . . [A]n inquiry into the 'dominant' motivation of school authorities is as irrelevant as it is fruitless. The mandate of *Brown II* was to desegregate schools, and we have said that " '[t]he measure of any desegregation plan is its effectiveness.' " *Id.* at 461, 462 (quoting Davis v. School Comm'rs, 402 U.S. 33, 37 (1971)).

215. *Id.* at 462.

216. *Id.* Stewart did indicate that discriminatory purpose by the school authorities "may be taken into consideration in determining the weight to be given to the proffered justification" by the board in the creation of new districts. *Id.* at 461.

217. *Id.* at 464. It has been suggested that the Court's hesitation to include racial balancing as an element in their refusal to recognize the separate systems arose from the prohibitions against the establishment of certain balances expressed in *Swann*. *The Supreme Court, 1971 Term*, *supra* note 204, at 65. The *Swann* Court was unwilling to adopt the notion that schools in each district must reflect the racial composition of the same district. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. at 24.

218. 407 U.S. at 464-65. The Court's concern with white flight in the event of redistricting varied from the conclusions of several lower courts that had refused to consider such a threat to be relevant in assessing the school board's justifications in efforts to desegregate. *E.g.*,

much better equipped and financed as opposed to its county counterpart;[219] and (3) the timing of the city's decision to operate independently of the county system.[220] The Court declared that in view of these factors the city failed to meet the heavy burden under *Green* in justifying its withdrawal from the county system.[221]

United States v. Scotland Neck City Board of Education,[222] a companion case to *Wright*, originated in a bill (Chapter 31) introduced in the North Carolina General Assembly providing for the creation of a new school district out of the existing Halifax County system.[223] Prior to 1969, the Halifax County schools were entirely segregated.[224] The United States Department of Justice notified the County Board that steps must be taken to establish a unitary system in compliance with *Green*.[225] The County Board and the Justice Department agreed upon an interim plan that called for the transfer of two grades between two formerly segregated schools,[226] but the County Board refused to adopt a later plan that included an interim period of geographic attendance zones and pairing as well as plans for the construction of two consolidated high schools.[227] Upon the Board's refusal to adopt the proposed plans, the Justice Department filed suit. The district court had ruled that Chapter 31 would unconstitutionally interfere with ongoing desegregation efforts.[228] The district judge had also found that the Scotland Neck residents had three primary goals in the establishment of the separate district:[229] (1) local control over schools; (2) financing the schools through

Calhoun v. Cook, 332 F. Supp. 804, 806 (N.D. Ga.), *vacated in part*, 451 F.2d 583 (5th Cir. 1971).

219. 407 U.S. at 465.

220. *Id.* at 465-66; *see* 442 F.2d at 590-91 (Winter, J., dissenting).

221. 407 U.S. at 467. The Court rejected Emporia's argument that the separation would provide better educational services, pointing out that no steps had been taken by the city to assume the operation of the schools. *Id.* at 468. The Court also noted that an increased quality in the city schools would work an adverse effect upon the county schools. *Id.* Whether this adverse "quality" test should even be considered is questionable. Such a burden would be virtually impossible to meet if local authorities must conclusively avoid adverse financial and qualitative consequences as well as discriminatory effects in all redistricting decisions. The Court chose not to list this factor as paramount but decided "only that a new school district may not be created where its effect would be to impede the process of dismantling a dual system." *Id.* at 470. *But see The Supreme Court, 1971 Term*, *supra* note 204, at 69 n.40.

222. 442 F.2d 575 (4th Cir.), *rev'd*, 407 U.S. 484 (1971), *rev'g* United States v. Halifax County Bd. of Educ., 314 F. Supp. 65 (E.D.N.C. 1970).

223. Law of Mar. 3, 1969, ch. 31, 1969 N.C. Sess. Laws 18. The bill conditioned the new district upon the approval of a majority of the voters in Scotland Neck. The district was created on April 8, 1969 by a vote of 813 to 332. 442 F.2d at 575.

224. Halifax County adopted a freedom of choice plan in 1965 but only token integration resulted. 442 F.2d at 579.

225. *Id.*

226. *Id.* at 579-80.

227. *Id.* at 580.

228. 314 F. Supp. 65 (E.D.N.C. 1970).

229. *Id.* at 72.

supplementary property taxes;[230] and (3) prevention of the threat of a mass exodus of white students from the public schools.

On appeal, Craven was careful to point out that five years prior to *Green* and two years before the adoption of a freedom of choice plan by Halifax County, residents of Scotland Neck were attempting to form a separate school district.[231] He conceded that "the threat of white flight will not justify the continuing operation of a dual school system,"[232] but went on to suggest that a school board is not prohibited from considering measures in order to halt white flight from a unitary system:

> Indeed it seems obvious that such a purpose is entirely consistent with and may help implement the *Brown* principle. It is not the purpose of preventing white flight which is the subject of judicial concern but rather the price of achievement. If the effect of Chapter 31 is to continue a dual school system in Halifax County, or establish one in Scotland Neck, the laudable desire to stem an impending flow of white students from the public schools will not save it from constitutional infirmity. But if Chapter 31 does not have that effect, the desire of its proponents to halt white flight will not make an otherwise constitutional statute unconstitutional.[233]

In examining the effect of Chapter 31, Craven pointed out that the change in racial balance resulting from redistricting would be an insubstantial three percent[234] and that no particular racial balance of schools has ever been constitutionally required.[235]

A transfer plan adopted by the Scotland Neck Board, unlike Chapter 31, did not pass constitutional muster according to Craven. This plan called for a transfer of students between the Scotland Neck and Halifax County systems. Each transferee into the city was to pay a certain amount in order to enroll in the Scotland Neck system. The ratio resulting from the proposed plan would be a seventy-four per cent white majority and twenty-four per

230. In Judge Craven's opinion the Scotland Neck history in upgrading educational quality was one of frustration; only one bond issue had passed since 1936. He also pointed out that despite the "political albatross" of voting on increased property taxes along with the creation of a new district, the referendum was passed by the residents. 442 F.2d at 580.

231. *Id.* The residents were unsuccessful in presenting a similar bill before the 1963 session of the legislature and in 1965 the bill itself was defeated by the Assembly. The group reintroduced the bill in 1969 and it was passed on March 30, 1969.

232. *Id.* at 581.

233. *Id.* Craven reasoned that the board's transfer plan must be considered separately from the effect of Chapter 31 in light of the fact that the origins of the plan could be found in the Scotland Neck Board alone. *Id.*

234. The Halifax County schools had a ratio of 77% black, 22% white and 1% Indian during the 1968-1969 school year. If the Scotland Neck students were to leave the county system the resulting ratio would have been 80% black, 19% white and 1% Indian. *Id.* at 582. Craven further pointed out that Chapter 31 would not create a "white refuge" since the racial makeup in the new city district would be 57.3% white and 42.6% black. *Id.*

235. *Id.* at 583 (citing Northcross v. Board of Educ., 397 U.S. 232 (1970) (per curiam)).

cent black minority in the city system.[236] Craven concluded that "these transfers would have tended toward establishment of a resegregated system" and that the fourteenth amendment prohibited such a plan.[237]

He was again reversed by the Supreme Court,[238] which agreed with the district court and the dissent of Judge Winter[239] that the separation of the districts had " 'the effect of creating a refuge for white students of the Halifax County School system.' "[240]

The third redistricting case, *Turner v. Littleton-Lake Gaston School District*,[241] involved a similar question of carving out new school districts by legislative action.[242] As in *Scotland Neck*, the legislature passed several bills creating new districts in the county,[243] and the citizens of these districts supported the creation of the new districts by referendum.[244] The district court found the separate systems to be invalid and granted an injunction against the operation of the new districts.[245] Craven recognized the similarity among *Scotland Neck*, *Wright* and *Turner*,[246] but saw important differences that prompted him to view the legislation establishing the new districts in *Turner* as an attempt to create a white haven: (1) the legislation, as planned, would have substantially altered the percentage of whites in what remained of the original county system from twenty-seven percent to seven percent;[247] (2) in both *Scotland Neck* and *Wright* the lower courts found

236. *Id.*

237. *Id.*

238. 407 U.S. 484 (1972). Justice Stewart wrote the majority opinion with which Justices Douglas, Brennan, White and Marshall joined; Chief Justice Burger concurred in the result with the support of Justices Blackmun, Powell and Rehnquist.

239. The three Justices who had joined Chief Justice Burger's *Wright* dissent also supported his conclusion in *Scotland Neck* that significant differences were present between the two plans. The substantial white majority in the city schools as well as the special legislation indicated that the action of Scotland Neck was not "the fulfillment of its destiny as an independent governmental entity" but rather an impediment to the principles of *Brown*. *Id.* at 491-92 (Burger, C.J., concurring). Judge Winter's dissent pointed out that the history of the city district paralleled attempts by the Halifax County schools to avoid desegregation. 442 F.2d at 591. In Winter's opinion, Craven's rejection of the "white haven" argument did not appear plausible in light of the significant increase in the percentage of white students resulting from the proposed redistricting. *Id.*

240. 407 U.S. at 489 (quoting 314 F. Supp. at 78).

241. 442 F.2d 584 (4th Cir. 1971).

242. The history of the attempts to desegregate Warren County schools followed a familiar course: (1) entirely segregated schools; (2) an ineffective freedom of choice plan; and (3) a final plan that was to provide for geographic attendance areas. It was to this geographic attendance plan that the Board expressed strong reservations and that eventually prompted the introduction of the legislation. *Id.* at 585.

243. Law of May 26, 1969, ch. 628, 1969 N.C. Sess. Laws 586 (setting up Littleton-Lake Gaston School District); Law of May 23, 1969, ch. 578, 1969 N.C. Sess. Laws 520 (setting up Warrenton City Administrative Unit).

244. 442 F.2d at 585.

245. *Id.*

246. *Id.* at 586.

247. *Id.* at 587.

that there were noninvidious purposes in the proposed separation, while in *Turner* there was no such finding;[248] and (3) no attempt was made by residents of the Littleton area to obtain the new school district prior to the time that "effective integration was imminent."[249] Thus, the "dominant purpose" in *Turner* was the avoidance of racial integration.

The dominant purpose test arose from Craven's genuine desire to allow a significant amount of freedom to both local governments and the district courts to implement the practical alternatives of *Brown*. When, however, the record did not support a finding of a history of attempts by citizens to improve schools and the quality of education by the creation of a new school district or when there was no evidence of noninvidious purpose in the district's actions, he did not hesitate to strike down the reorganization scheme as an attempt to carve out a white "refuge." As noted earlier, the test was short-lived, for the Supreme Court found it and its application impracticable,[250] as scrutiny of the school board's purpose in each case would be difficult if not impossible.

In *Bradley v. School Board*,[251] the Fourth Circuit was presented with the sensitive question whether a state may be compelled to revise its county structure so as to achieve racial balance in pupil assignments. The district court concluded that such a requirement would not be unconstitutional and ordered that the Richmond public system consolidate with the public school systems in two other counties, Chesterfield and Henrico.[252]

The district judge adopted, as did Craven in *Brunson*, the "viable racial mix" theory[253] in attempting to resolve the consolidation question.[254] The court found that in the Richmond area segregative patterns developed because of both private and state action and that consequently the residential school districts were born in an atmosphere of de jure segregation.[255] The

248. *Id.* at 586.

249. *Id.* at 586-87.

250. Wright v. Council of Emporia, 407 U.S. at 461-62; *see* notes 209-13 and accompanying text *supra*. The district judge in *Scotland Neck* perceived the puzzling nature of such a test and concluded that "[i]n ascertaining such a subjective factor as motivation and intent, it is of course impossible for this Court to accurately state what proportion each of the above reasons played in the minds of the proponents of the bill, the legislators or the voters of Scotland Neck . . . ." 314 F. Supp. at 72.

251. 462 F.2d 1058 (4th Cir. 1972), *aff'd per curiam by an equally divided Court sub nom.* Bradley v. Virginia Bd. of Educ., 412 U.S. 92 (1973), *rev'g* 338 F. Supp. 67 (E.D. Va. 1972).

252. 338 F. Supp. 67 (E.D. Va. 1972).

253. *Id.* at 194. In *Bradley* Craven recognized the appealing aspects of the Pettigrew thesis of viable racial mix but admitted that its appeal faded in the light of the *Brunson* concurring opinion by Judges Winter and Sobeloff. *See* note 179 *supra*.

254. The district court adopted a lottery plan in order to effectuate the racial mix. 338 F. Supp. at 187.

255. *Id.* at 84. The district judge concluded that this background of segregation restricted educational and job opportunities and thus restricted blacks to low-cost housing in the city. *Id.*

district judge concluded that affirmative action was required in order to dismantle the segregated system[256] and, more significantly, that the powers of the district court to fashion appropriate remedies should not be circumscribed within the boundaries of Richmond's school district.[257] The remedy ordered by the judge consisted of a consolidation plan[258] that provided for one school board with representatives from each county to administer the new district, a district containing six subdivisions of relatively equal numbers of students, and implementation of the plan by busing students across subdivision lines although most would attend schools within their own subdivisions.[259]

Judge Craven, writing for the majority on appeal, disagreed with the district court and held that, as there was no evidence of concerted action by the districts to foster segregated schools, the tenth amendment limited any denial of equal protection[260] to the boundaries of each district.[261]

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at 85. Blacks were consequently forced to attend black schools because of their residence. In order to sustain this finding, the district court judge cited recent census figures that indicated the heavy black concentration within the city itself. The black percentage in the city was approximately 85% whereas the black percentage for the entire metropolitan area including Henrico and Chesterfield counties was 25.3%. The counties alone had a black percentage of 6.5% and 11.2% respectively. *See Fourth Circuit Review—School District Consolidation: The Constitutional Unit of Equality*, 30 WASH. & LEE L. REV. 369, 373 (1973) (citing U.S. BUREAU OF CENSUS, CENSUS OF POPULATION, VIRGINIA 117-20 table 34 (1971)). In 1970, the black student ratio in the Richmond city schools was 64.2%, whereas in the same period the public schools in Chesterfield had a white percentage of 90.5 and those in Henrico had a white majority of 98.9%. 338 F. Supp. at 185.

256. 338 F. Supp. at 81-82.

257. *Id.* at 79-80. The district judge rejected the notion that political boundaries should be adhered to in *Bradley*:

> It is essentially a state-created system of local government of schools which is offered up as a justification for maintenance of separate attendance areas. The asserted fixed policy of retaining political subdivisions as units of assignment does not exist, upon examination. The interests served by the policy favoring local control time and again have been sacrificed to other educational ends. . . . [T]he reality of the defendants' objections fades when one considers that urban government experts have studied the area extensively, noted the intensity of the prevailing segregation, and recommended a cooperative solution.

Id. at 113.

258. Authority to consolidate was vested by statute in both the local school boards and the Virginia State Board of Education. VA. CODE § 22-100.1 (1973). See also *id.* § 22-30 which bars consolidation without local consent. *See Fourth Circuit Review*, *supra* note 255, at 376.

259. 462 F.2d at 1072-73 (Winter, J., dissenting).

260. The tenth amendment provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

Craven pointed out in *Bradley* that when the tenth amendment conflicts with the fourteenth amendment "it is settled that the latter will prevail." 462 F.2d at 1069. But in *Bradley* there was no evidence presented that "any federally protected right" had been infringed since under *Swann* one has only the right to attend a unitary school system.

261. 462 F.2d at 1070-71. Craven concluded that the

> last vestiges of state-imposed segregation have been wiped out in the public schools of the City of Richmond and the Counties of Henrico and Chesterfield and unitary school systems achieved, and because it is not established that the racial composition of the

In *Bradley* Judge Craven was attempting to define the limitations upon the duties of a lower court judge to fashion practical remedies arising under *Brown I* and *II*:

> But we think the adoption of the Richmond Metropolitan Plan in toto by the district court, viewed in the light of the stated reasons for its adoption, is the equivalent, despite disclaimer, of the imposition of a fixed racial quota. The Constitution imposes no such requirement, and imposition as a matter of substantive constitutional right of any particular degree of racial balance is beyond the power of a district court.[262]

Absent invidious state action in establishing the three districts, Judge Craven was unwilling to allow the district judge to take the extra step of disregarding school district boundaries solely because of high black concentration in Richmond:

> We think that the root causes of the concentration of blacks in the inner cities of America are simply not known and that the district court could not realistically place on the counties the responsibility for the effect that inner city decay has had on the public schools of Richmond. . . . Whatever the basic causes, it has not been school assignments, and school assignments cannot reverse the trend. That there has been housing discrimination in all three units is deplorable, but a school case, like a vehicle, can carry only a limited amount of baggage.[263]

Judge Craven's approach in the major desegregation decisions was marked by a serious concern for the implementation of the *Brown* principles, yet he retained deep respect for the traditional powers and duties of the local governing bodies in their efforts to create and effectuate adequate remedies. Craven's exercise of self-restraint is consistent with his view that the federal judiciary should recognize that its powers are circumscribed by traditional notions of federalism and by the powers of local governing bodies to determine their course in desegregation within the confines of the

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> schools in the City of Richmond and the counties is the result of invidious state action, we conclude there is no constitutional violation and that, therefore, the district judge exceeded his power of intervention.

Id. at 1070.

262. *Id.* at 1064. Craven relied upon *Swann* in suggesting that " '[r]emedial judicial authority does not put judges automatically in the shoes of school authorities whose powers are plenary. Judicial authority enters when local authority defaults.' " *Id.* at 1069 (quoting 402 U.S. at 16).

263. *Id.* at 1066. Winter dissented from the majority opinion and reasoned that "[t]o decree a single system and interchange of students, notwithstanding historical political subdivision boundaries, represents no abuse of discretion under existing law." *Id.* at 1076 (Winter, J., dissenting). The mandates of *Brown*, according to Winter, should not be blunted by artificial political boundaries nor should state action be so narrowly defined under the fourteenth amendment so as to preclude its application in *Bradley*. *Id.*

fourteenth amendment. The power of the state to preserve its political divisions as in *Bradley* or the right of a local system to form its own district for educational purposes as in the redistricting cases were examples of the exercise of legitimate state or local power with which Craven would not willingly interfere.

This self-restraint is not inconsistent with Craven's result orientation. Result orientation for Judge Craven did not necessarily mean that the "right" result was to be reached regardless of the traditional powers of the state. His belief in the duty of the federal judiciary to defer to the power of the state and local governments can be readily observed in his strong support of the abstention doctrine. Those branches of either the federal or state judiciary that were competent forums should not falter in providing adequate relief. This did not mean, however, that the federal judiciary, when ill-equipped to decide such matters, should shed their traditional authority and assume the ill-fitting wardrobes of their state counterparts.[264] The creation and implementation of the desegregation plans were duties to be borne by

264. In the labor law area, Judge Craven exhibited a similar respect for the unique remedial powers of arbitration when it was called for in collective bargaining agreements. In Monongahela Power Co. v. Local 2332, 484 F.2d 1209 (4th Cir. 1973), plaintiff, a public utility company, filed to enjoin a work stoppage by its employees, but the district court denied injunctive relief under the Norris-La Guardia Act, 29 U.S.C. §§ 101 to 115 (1970). 484 F.2d at 1210-11. Craven, writing for the Fourth Circuit, declared that the wording of the arbitration agreement was so broad and encompassing in nature that the work stoppage was clearly subject to mandatory arbitration. *Id.* at 1213-14. In construing the labor agreement, he indicated that the court should "resolve all doubt in favor of arbitration, and order arbitration 'unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.'" *Id.* at 1213 (quoting United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582-83 (1960)). Craven ordered the case to be remanded for the issuance of the injunction since the local's no-strike agreement fell within the definition of an arbitrable dispute. *Id.* at 1213-15. *See also* Windsor Power House Coal Co. v. District 6, UMW, 530 F.2d 312 (4th Cir.), *cert. denied*, 429 U.S. 876 (1976), in which Craven adhered to *Monongahela* in concluding that the refusal of union members to cross a "stranger" picket line fell within the terms of the mandatory arbitration clause and was therefore subject to federal injunction. *But see* Consolidation Coal Co. v. International Union, UMW, 537 F.2d 1226 (4th Cir. 1976).

In Local No. 358, Bakery & Confectionary Workers Union v. Nolde Brothers, 530 F.2d 548 (4th Cir. 1975), *aff'd*, 430 U.S. 243 (1977), *rev'g* 382 F. Supp. 1354 (E.D. Va. 1974), the Fourth Circuit was presented once again with an important arbitration question: whether a severance pay dispute under a collective bargaining agreement should be settled according to the agreement's arbitration clause even though the severance pay dispute arose after termination of the contract. Nolde Brothers entered into a collective bargaining agreement with the company's bakery workers that contained both a clause providing that "any grievance" between the parties was subject to arbitration and a provision that afforded severance pay for each employee for at least three years in the event the bakery closed. *Id.* at 549 n.1. Faced with a union strike over proposed changes in a later contract, the company closed the bakery and paid wages through the termination date, but refused to provide severance pay or to agree to arbitrate the issue. The union brought an action under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185 (1970), but the district court granted summary judgment for defendants on the grounds that the right to severance pay expired with the union's termination of the agreement. 382 F. Supp. 1354 (E.D. Va. 1974). The court concluded that there was no issue as

that governing body, the local school board, which by its nature was best able to suggest a practical remedy. When that remedy served only to veil the continued existence of segregation, Craven did not hesitate to reject the proposal, but that rejection did not reflect the usurpation of the local board's unique authority to create an adequate desegregation plan.

The slow and tedious desegregation of the dual system in compliance with *Brown I* was accompanied by resulting discriminatory practices in hiring and rehiring procedures for teachers affected by the dismantling of segregated schools. In *Wall v. Stanly County Board of Education*[265] plaintiff, a black teacher of " 'unchallenged professional and educational qualifications,' "[266] was not reemployed because of a decrease in the allocation of faculty spaces for black schools[267] resulting from the court-ordered adoption of a freedom of choice plan.[268] After the transfer occurred, the need for teachers at the black school diminished and plaintiff lost her position. Judge Craven declared that such a policy on the part of the School Board was "repugnant" to the fourteenth amendment:

> The premise of such a proposition is that Mrs. Wall was not employed as a teacher in the Stanly County School system but was employed *as a Negro teacher in a Negro school.* Such a premise is unlawful. It is repugnant to the Fourteenth Amendment, which

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to severance pay to arbitrate, and if there were an issue, "[I]t had died with the contract that created it." 530 F.2d at 550.

The court of appeals reversed the district court and remanded the matter for arbitration. Writing for the court, Craven held that the question to be addressed by the district court was whether the employer had a duty under the agreement to arbitrate the severance pay dispute after the agreement was terminated. *Id.* Craven concluded that the employees' rights to severance pay did survive the contract's expiration and that "a dispute that turns on whether parties intended certain accruable rights to be enjoyable," should be arbitrated in this case "even if the contingency giving rise to the dispute itself transpired after expiration of the contract." *Id.* at 552. Craven pointed out that the initial issue of arbitrability should be a matter to be determined by the court but that the merits of the dispute should be decided by the arbitrator:

> The company's obligation for severance pay depends upon the parties' intent behind the contract provision for severance pay. A court . . . is not the proper forum in which to inquire into that intent. If the expiration of the contract were held to strip the arbitrator of power, the best means of determining the true content of the parties' original agreement would not be available—which would increase the possibility of the parties' resorting to economic warfare in support of their respective interpretations. But this is precisely the kind of industrial unrest that collective bargaining, coupled with arbitration of difference over contract terms, is intended to avert.

Id. at 553. The Supreme Court affirmed Craven's treatment of the arbitrability issue, reasoning that the "parties clearly expressed their preference for an arbitral, rather than a judicial, interpretation of their obligations . . . ." 430 U.S. at 253.

265. 378 F.2d 275 (4th Cir. 1967).

266. *Id.* at 276 (quoting Wall v. Stanly County Bd. of Educ., 259 F. Supp. 238, 243 (M.D.N.C. 1966)). Plaintiff had 13 years of teaching experience generally in Stanly County. She held A.B. and M.S. degrees and was recommended for reemployment for the upcoming 1965-1966 school term. *Id.*

267. *Id.* at 277.

268. *Id.*

"forbids discrimination on account of race by a public school system with respect to employment of teachers."[269]

In other discrimination cases Craven was willing to strike down discriminatory conduct, but he remained reluctant to mete out what he viewed as "punishment" in the form of double costs and counsel fees.[270] In *Newman v. Piggie Park Enterprises, Inc.*,[271] for example, Judge Craven, writing for the majority, declared that the Civil Rights Act of 1964 applied to all facilities engaged in selling food for consumption on the premises.[272] Defendant operated several barbeque drive-ins where blacks were denied service.[273] Craven concluded that the consumption of fifty percent of the

269. *Id.* (quoting Franklin v. County School Bd., 360 F.2d 325, 327 (4th Cir. 1966)). In North Carolina Teachers Ass'n v. Asheboro Bd. of Educ., 393 F.2d 736 (4th Cir. 1968), the Fourth Circuit held that black teachers who had lost their jobs teaching black pupils and were forced to reapply in the position of new applicants suffered a denial of due process and equal protection. Craven concurred as to the reemployment of those teachers who were unfairly and discriminatorily displaced, yet he dissented as to the two plaintiffs who were compared with other teachers engaged in the same certification area and found lacking. The majority held that both of these plaintiffs "are entitled to an order directing defendant to offer them reemployment in any vacancy within the scope of their certifications without requiring a comparison of their qualifications with those of new applicants . . . ." *Id.* at 746. Craven concluded that the court's mistake was in its

> refusal to recognize that non-invidious displacement can and does create a teacher classification that is not unreasonable and that does not collide with the fourteenth amendment.
>
> That there *is* such a classification—whether or not recognized by the court—is apparent from the unique status conferred on Miss Peterson and Mrs. Segers by the court's decision. They are accorded something to be envied by other North Carolina teachers who sadly lack it: tenure of office. . . . Since this is true for no other teachers—white or Negro—in North Carolina, I am unable to agree that the Equal Protection Clause of the Fourteenth Amendment commands it. Nor does it seem to me very equal.

Id. at 753 (Craven, J., dissenting in part). *But see id.* at 748 (Sobeloff, J., concurring in part and dissenting in part).

270. *See* text accompanying notes 154-74 *supra*.

271. 377 F.2d 433 (4th Cir. 1967), *modified per curiam*, 390 U.S. 400 (1968).

272. 42 U.S.C. § 2000a (a)-(c) (1970). The relevant provisions of the Act are as follows:

> (a) Equal access.
>
> All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accomodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.
>
> (b) . . . Each of the following establishments which serves the public is a place of public accommodation within the meaning of this subchapter if its operations affect commerce, or if discrimination or segregation by it is supported by State action:
>
> . . . .
>
> (2) any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises, including, but not limited to, any such facility located on the premises of any retail establishment; or any gasoline station;
>
> . . . .
>
> (c) . . . The operations of an establishment affect commerce within the meaning of this subchapter if . . . (2) in the case of an establishment described in paragraph (2) of subsection (b) of this section, it serves or offers to serve interstate travelers or a substantial portion of the food which it serves, or gasoline or other products which it sells, [which] has moved in commerce . . . .

273. 377 F.2d at 434.

food off the premises was irrelevant for the purposes of the Civil Rights Act as "Congress did not intend coverage of the Act to depend upon a head count of how many people eat on the premises or a computation of poundage or volume of food eaten."[274] He declined, however, to award attorneys' fees to plaintiffs under Title II of the Civil Rights Act[275] and, in justifying that conclusion, suggested that the allowance of attorneys' fees in such a case hinged upon the good faith of the defendant:

> In exercising its discretion, the district court may properly consider whether any of the numerous defenses interposed by defendants were presented for purposes of delay and not in good faith. But the test should be a subjective one, for no litigant ought to be punished under the guise of an award of counsel fees (or in any other manner) from taking a position in court in which he honestly believes—however lacking in merit that position may be.[276]

The Supreme Court disagreed with his interpretation of the attorneys' fees provision in the Civil Rights Act:[277]

> When the Civil Rights Act of 1964 was passed, it was evident that enforcement would prove difficult and that the Nation would have to rely in part upon private litigation as a means of securing broad compliance with the law. A Title II suit is thus private in form only. When a plaintiff brings an action under that Title, he cannot recover damages. If he obtains an injunction, he does so not for himself alone but also as a "private attorney general," vindicating a policy that Congress considered of the highest priority.[278]

Judge Craven refused, therefore, to award "punitive" measures when a plaintiff alleged and successfully proved a constitutional violation by a defendant if the defendant litigated the case in good faith. Such an approach is consistent with his reluctance to penalize defendants absent evidence of bad faith on their part in conducting the litigation. It is tempting to characterize this concern as naive in light of the excessively burdensome tactics employed by some defendants in civil rights litigation. Such a characteriza-

274. *Id.* at 435.

275. *Id.* at 437. 42 U.S.C. § 2000a-3(a) (1970) permits the Attorney General to appoint counsel, intervene and initiate suits without cost to the victim of the discriminatory conduct. Section 2000a-3(b) allows the court to authorize payment of reasonable attorneys' fees to the prevailing party, other than the United States, within its discretion. *Id.* § 2000a-3(a), (b).

276. 377 F.2d at 437. Judge Winter, in a special concurring opinion, disagreed with Craven on this point and reasoned that "[t]o immunize defendants from an award of counsel fees, honest beliefs should bear some reasonable relation to reality; never should frivolity go unrecognized." *Id.* (Winter, J., specially concurring). He pointed out that the defendant had raised various spurious defenses such as "the Civil Rights Act was invalid because it 'contravenes the will of God' and interferes with the 'free exercise of defendant's religion.' " *Id.* at 438.

277. 390 U.S. at 401.

278. *Id.* at 401-02.

tion might be unfair, however, for Craven recognized that such harassment was not uncommon and that a "litigant who increases the burden upon opposing counsel by such tactics ought ordinarily to bear the cost of unnecessary preparation."[279] Judge Craven was not only sensitive to the needs of individual plaintiffs in overcoming evasive tactics employed by defendants in civil rights litigation, but he was also concerned with the possible obstacles facing victims of employment discrimination in their attempts to pursue adequate remedies.

In *Johnson v. Seaboard Airline Railroad*[280] the Fourth Circuit was faced with the question whether an attempt to conciliate by the Equal Employment Opportunity Commission under Title VII of the Civil Rights Act of 1964[281] is a jurisdictional prerequisite for the filing of a civil suit by an individual plaintiff.[282] Plaintiff was dismissed from his job by Seaboard[283] and brought a complaint before the Commission on January 14, 1966, alleging employment discrimination.[284] The Commission found for plaintiff but notified him by mail that due to its heavy workload it would be "impossible to undertake or to conclude conciliation efforts."[285] The Commission informed him that he could bring a civil suit within thirty days of receipt of the letter.[286] Plaintiff's suit, however, was dismissed on the ground that the EEOC did not engage in conciliation prior to the commencement of the suit.[287]

Judge Craven concluded that a discharged employee need not wait for the EEOC to engage in conciliation once he had received adequate notice of his right to bring an action.[288] To Craven, the legislative purpose behind the provision was unclear,[289] but

> the policies and purposes of the Act [were] clearly discernable. There can be no doubt that Congress intended to attack the prob-

279. Newman v. Piggie Park Enterprises, Inc., 377 F.2d at 437.

280. 405 F.2d 645 (4th Cir. 1968), *cert. denied*, 394 U.S. 918 (1969).

281. 42 U.S.C.A. §§ 2000e to 2000e-17 (West 1974 & Cum. Supp. 1977).

282. 405 F.2d at 647.

283. *Id.* Plaintiff had worked 25 years as a porter for defendant. He was dismissed for a misdemeanor committed while off-duty. *Id.*

284. *Id.*

285. *Id.*

286. *Id.*

287. Civil Rights Act of 1964, Pub. L. No. 88-352, Title VII, § 706(a), 78 Stat. 259 (formerly codified at 42 U.S.C. § 2000e-5(a) (1970)) provided in part:

> Whenever it is charged in writing under oath by a person claiming to be aggrieved, . . . that an employer, employment agency, or labor organization has engaged in an unlawful employment practice, the Commission . . . shall . . . make an investigation of such charge. . . . If the Commission shall determine, after such investigation, that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion.

288. 405 F.2d at 647.

289. *Id.* at 649-51; *accord*, Recent Cases, *Civil Rights—Conciliation by the Equal Employ-*

> lem of discriminatory employment practices by first seeking voluntary compliance by the nation's employers. But neither can there be any doubt that Congress intended the remedies provided to be timely and effective.[290]

In *Johnson* Judge Craven resisted the temptation to adhere rigidly to the statute and thus to foreclose plaintiff's right to pursue his claim. He reasoned rather that when the agency itself is ineffective in aiding individuals in the unfair discrimination area, the complainant should not also be denied the right of private vindication.[291] This emphasis upon the right of the individual to obtain an adequate remedy did not, according to Judge Craven, work unfairly against the defendant and he concluded that "[a]ll that defendants ask is not to be sued before being persuaded to comply with the law."[292] Craven was not to be tempted, however, to ignore the policies of the Act in favor of strict statutory construction. He refused to construct "an edifice of logic and precedent upon which justice may be sacrificed [so] [t]hat the result in terms of the people involved would make an Apache cry . . . ."[293]

In *Moody v. Albemarle Paper Co.*[294] the Fourth Circuit addressed two significant questions also arising under Title VII: (1) what test should be followed in awarding back pay when an employer has unlawfully discriminated against an employee and the employee has thereby been precluded from the opportunity to earn wages; and (2) what must the employer show to prove that a preemployment test is sufficiently job related when such tests are discriminatory in effect. Plaintiffs brought a class action under

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ment Opportunity Commission of a Complaint Arising Under Title VII of the Civil Rights Act of 1964 Is Not a Jurisdictional Prerequisite for the Filing of a Civil Suit, 38 CINN. L. REV. 365, 367-69 (1969).

290. 405 F.2d at 651. Judge Boreman dissented and reasoned that private litigation should be the last resort in such claims and that "unable" to conciliate means that the attempts to resolve the claim were fruitless. *See id.* at 654 (Boreman, J., dissenting).

291. 42 U.S.C. § 2000e was amended in 1972 to include in part: "If within thirty days after a charge is filed with the Commission . . . , the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action . . . ." 42 U.S.C. § 2000e-5(f)(1) (Supp. V 1975).

The EEOC's new powers to bring civil actions have caused some courts to hold the agency to a higher standard of compliance with the Act. *See* EEOC v. Westvaco Corp., 372 F. Supp. 985, 991 (D. Md. 1974); EEOC v. Bartenders Int'l Union, Local No. 41, 369 F. Supp. 827 (N.D. Cal. 1973).

292. 405 F.2d at 653.

293. *Paean to Pragmatism*, *supra* note 1, at 979-80. Craven declared that he "never had the misfortune to be closely associated with a truly conservative judge. I do not mean 'conservative' in the ordinary sense. A more apt word is, perhaps, 'sterile.' " *Id.* at 979. "On the Fourth Circuit over the decade I have known it as a participant . . . there has not been a sterile judge—whether or not any one of us may have been labelled as liberal or conservative." *Id.* at 979 n.10.

294. 474 F.2d 134 (4th Cir. 1973), *vacated and remanded*, 422 U.S. 405 (1975).

Title VII.[295] The district court found that Albemarle had engaged in discriminatory employment practices in both hiring and according seniority rights.[296] The district court refused, however, to order any changes in the preemployment testing procedures or to award plaintiffs back pay.[297]

A divided Fourth Circuit, with Judge Craven writing the majority opinion, reversed the district court on both the testing and back pay findings. Craven concluded that "[b]ecause of the compensatory nature of a back pay award and the strong congressional policy embodied in Title VII, . . . a plaintiff . . . who is successful in obtaining an injunction under Title VII of the Act should ordinarily be awarded back pay unless special circumstances would render such an award unjust."[298] Craven concluded that no such special circumstances existed and that the district court should have awarded back pay.[299]

The Fourth Circuit also reversed the district court's failure to enjoin or limit Albemarle's testing procedures.[300] In the test used by the employer, ninety-six percent of the white applicants and sixty-four percent of the black applicants passed.[301] In *Griggs v. Duke Power Co.*[302] the Supreme Court had held that employers must demonstrate business necessity to justify the use of the testing program.[303] Craven declared that Albemarle failed to meet the "job-related" test articulated in *Griggs* in three primary areas: (1) the company failed to engage in any significant or objective job analysis;[304] (2)

295. 42 U.S.C.A. §§ 2000e to 2000e-17 (West 1974 & Cum. Supp. 1977).

296. 474 F.2d at 137. Albemarle did not contest the district court's order to abolish the job seniority system and to institute a plant-wide system in its place. *Id.*

297. *Id.* The district court concluded that the claim for back pay was filed five years after the action had begun and that the employer did not evidence bad faith in complying with the Act. *Id.* at 140.

298. *Id.* at 142 (footnote omitted).

299. *Id.* Judge Boreman dissented from the authorization of back pay and concluded that the award "unlike the grant of attorney's fees, is an element of affirmative relief which has been entrusted to the more general discretion of the district courts." *Id.* at 143 (footnote omitted) (Boreman, J., dissenting).

300. *Id.* at 140.

301. *Id.* at 138 n.1.

302. 401 U.S. 424 (1971).

303. 474 F.2d at 138. 42 U.S.C. § 2000e-2(h) (1970) provides in part:

> [I]t shall not be an unlawful employment practice for an employer . . . to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin.

304. The test results were measured against the subjective standards of supervisors. 474 F.2d at 139; *see* Cooper & Sobol, *Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion*, 82 HARV. L. REV. 1598 (1969). EEOC guidelines provide in part: "In view of the possibility of bias inherent in subjective evaluation, supervisory rating technique should be carefully developed, and the ratings should be closely examined for evidence of bias." 29 C.F.R. § 1607.5(b)(4) (1976), *quoted in* 474 F.2d at 139.

it failed to carry out a validation study in crucial job areas;[305] and (3) it failed to demonstrate that hiring employees into a pool was necessary for the operation of the business.[306]

Craven's holding in *Moody* was vacated by the Supreme Court,[307] which concluded that back pay should generally be awarded within the limits of Title VII regardless of the employer's "good intent or absence of discriminatory intent"[308] and that the test for back pay should not be conditioned upon Craven's "special circumstances" test. Rather it "should be denied only for reasons which . . . would not frustrate the central statutory purposes of eradicating discrimination . . . and making persons whole for injuries suffered through past discrimination."[309] The Court agreed with Craven that Albemarle's validation study was materially defective, yet Justice Stewart, writing for the Court, pointed out that implicit in the Fourth Circuit's reversal was the notion that an injunction should issue immediately.[310] Stewart concluded that in light of Albemarle's amendment of these procedures the district court should have the discretion to fashion other, appropriate relief.[311]

Craven's approach in racial discrimination cases under Title VII was marked, therefore, by the view that access to the Act's remedies should be broadly afforded plaintiffs injured by discriminatory conduct.[312] In

305. Some testing procedures were approved without a validation study. EEOC guidelines suggest, although they do not require, that "where a test is to be used in different units of a multi-unit organization and no significant differences exist between units, jobs, and applicant populations, evidence obtained in one unit may suffice for the others." 29 C.F.R. § 1607.4(c)(2) (1976), *quoted at* 474 F.2d at 139.

306. 474 F.2d at 140. Judge Bryan dissented as to the invalidation of the testing procedures on the grounds that the tests were sufficiently job related under *Griggs*. *Id.* at 148 (Bryan, J., dissenting).

307. 422 U.S. 405 (1975), *noted in* 54 N.C.L. REV. 197 (1976).

308. *Id.* at 422 (quoting Griggs v. Duke Power Co., 401 U.S. at 432). The question whether the tardiness of the employees' back pay demand prejudiced Albemarle was remanded for further consideration. *Id.* at 423-25.

309. *Id.* at 421.

310. *Id.* at 436.

311. *Id.* Justice Stewart, writing for the majority, found that Craven's *Piggie Park* rationale in the award of back pay under Title II was not directly on point, *id.* at 415, and that the district court's decision to award such payment must be measured instead against the purposes of Title VII, *id.* at 417. Stewart agreed with the Fourth Circuit's findings as to the deficiency of Albemarle's testing procedures, but he suggested that rather than immediately issuing an injunction it would be "the more prudent course . . . to leave to the District Court the precise fashioning of the necessary relief in the first instance." *Id.* at 436.

312. In Barnett v. W.T. Grant Co., 518 F.2d 543 (4th Cir. 1975), Craven noted that the record did not demonstrate that plaintiff was denied a probationary employment period because of his race. Nevertheless, he held that plaintiff's suit was proper as a class action, even though several of defendant's challenged actions were not directed against the plaintiff:

> Viewed broadly, Barnett's suit is an "across the board" attack on all discriminatory actions by defendants on the ground of race . . . . We believe such a characterization is more consonant with the broad remedial purposes of Title VII itself, and that

Johnson, for example, he was unwilling to hold that conciliation by the EEOC was a jurisdictional prerequisite to permitting an individual to bring civil suit—a decision that would have narrowed significantly plaintiffs' opportunities to remedy discriminatory employment practices. Moreover, he thought that the Act's remedies should be afforded swiftly, with good faith on the part of defendants not relieving the court of its duty to ensure "removal of all vestiges of discrimination."[313]

In equal employment cases involving sex discrimination, Judge Craven pursued a similar judicial course of supporting ready access to the federal courts for plaintiffs and implementing broad remedies when discriminatory conduct by the employer could be shown. In *Keyes v. Lenoir Rhyne College*[314] the Fourth Circuit agreed with the trial court's findings that defendant had not discriminated against a college faculty member because of her sex and age.[315] Judge Craven dissented and declared that the statistical evidence in the case supported plaintiff's claim of discrimination between female faculty members and male faculty members for the same work.[316] Judge Craven concluded that the college failed to present "clear and convincing evidence to explain any disparity in salary between males and females, demonstrating that such differentials were based upon legitimate, reasonable and nondiscriminatory factors."[317] He maintained that plaintiff's statistical evidence established at least a prima facie case that should be considered by the jury.[318]

In *Cook v. Arentzen*[319] plaintiff, a woman and a Navy lieutenant, attacked her separation from the Navy under a former regulation requiring all women officers to resign if they became pregnant while in the service.[320]

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the district court's less charitable view, under which Barnett could as a class representative challenge only those *specific* actions taken by the defendants toward him, would undercut those purposes.

Id. at 547-48. In *Barnett* the court also declared that "[s]tatistics can in appropriate cases establish a prima facie case of discrimination, without the necessity of showing specific instances of overt discrimination." *Id.* at 549; *accord*, Roman v. ESB, Inc., 550 F.2d 1343, 1359, 1361-62 (4th Cir. 1976) (Winter, J., joined by Craven, J., dissenting).

313. 518 F.2d at 550.

314. 552 F.2d 579 (4th Cir. 1977).

315. *Id.* at 581. Plaintiff sought injunctive, declaratory and pecuniary relief for herself and other female faculty members under Title VII. *Id.* at 579.

316. *Id.* at 581 (Craven, J., dissenting). Plaintiff, a full, tenured professor, received a salary of $9,450 in 1968-1969, whereas a male professor in the same department, an associate, tenured professor, received a salary of $10,200. The evidence also indicated that in the same year plaintiff received $11,667, another male professor received $12,015.

317. *Id.* at 582 (Craven, J., dissenting).

318. *Id.*

319. No. 76-1359 (4th Cir., filed May 6, 1977).

320. The former regulation stated in part: " 'The commissions or warrants of all women officers of the Regular Navy, and of women officers of the Naval Reserve while in an active

Plaintiff had served over thirteen years in the Navy, but after discovering her pregnancy, she resigned pursuant to Navy policy.[321] After the birth of the child, her commission was not reinstated, and she brought suit for reinstatement, back pay and damages on the grounds that the Navy regulation was a violation of due process and equal protection under the fifth amendment.[322] The district court disagreed with her contention, holding that the policy behind the regulation was " 'to assure a manpower supply continuously available for service worldwide, and to guarantee the efficient performance of services wherever and whenever needed.' "[323]

The Fourth Circuit, with Craven writing the majority opinion, reversed and declared that the "regulation is not rationally related to the objective of assuring the availability and efficiency of the Navy's personnel."[324] Craven dismissed the Navy's argument that pregnancy "leads to the permanent condition of motherhood":[325]

> Such a justification rests on " 'archaic and overbroad' premises which have been rejected as unconstitutional in a host of recent decisions." . . . There is much to be said for old-fashioned motherhood; but, we think, it is better said by women than by government in the form of an inflexible regulation based on a false and irrational premise: that one who has been pregnant cannot be a good officer in the Nurse Corps. . . . It is enough to rhetorically inquire: why is Lt. Cook, USNR, competent to serve and Lt. Comdr. Cook, USN, incompetent?[326]

Some of the more controversial Craven decisions involve the element of state action in claims arising in the civil rights area. Plaintiff in *Bellamy v. Mason's Stores, Inc.*,[327] a member of the Ku Klux Klan, alleged under both Title VII and 42 U.S.C. § 1985(3)[328] that his constitutionally protected rights of association were denied by a private employer. The district court

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duty or training duty status are subject to termination when it is established that the woman . . . is pregnant . . . .' " No. 76-1359, slip op. at 2 (quoting former UNITED STATES NAVY, BUREAU OF PERSONNEL MANUAL art. C-10330). The regulation was rescinded effective August 1, 1975, and presently a service woman can continue to serve unless she requests to resign in such circumstances. *Id.*

321. *Id.* at 3.

322. *See id.* at 4. Plaintiff had exhausted all of the administrative remedies available. *Id.*

323. *Id.* (quoting Civil No. 73-332-N, slip op. at 10 (E.D. Va., filed Jan. 9, 1976)).

324. *Id.* at 6.

325. *Id.*

326. *Id.* at 7 (quoting Crawford v. Cushman, 531 F.2d 1114, 1124 (2d Cir. 1976) (footnote omitted)).

327. 508 F.2d 504 (4th Cir. 1974).

328. 42 U.S.C. § 1985(3) (1970) reads in part:

> If two or more persons in any State or Territory conspire or go in disguise on the highway, or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; . . . in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done,

dismissed plaintiff's complaint.[329] The court of appeals agreed with the district court's holding and affirmed.[330] Craven, writing for the majority, declined to consider plaintiff's claim that the Klan is a religious organization under Title VII.[33] In addressing the section 1985(3) claim, Craven reasoned that "[a]lthough it is clear that state action is not necessarily an essential ingredient under this statute, nevertheless we think that some state involvement is necessary in this particular application of the statute in order to maintain a cause of action."[332] Craven viewed state action as vital in *Bellamy*; to hold that the first amendment right of association applies not only to states but to private persons as well would require

> an innovation that must come from the Congress or the Supreme Court.
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> . . . .
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> . . . [W]e are unable to make the several jumps—without further guidance from the Supreme Court—from statutory language tracking the fourteenth amendment to the amendment itself to incorporation of the first amendment to application of that amendment to private persons, and while on our way jettison state involvement.[333]

Bellamy has been cited[334] as narrowing the broad interpretation generally afforded civil rights statutes under *Griffin v. Breckenridge*,[335] which held that section 1985(3) suits did not require state action in cases involving racial discrimination. The *Griffin* court recognized that although "it [is] understandably difficult to conceive of what might constitute a deprivation of the equal protection of the laws by private persons . . . there is nothing inherent in the phrase that requires the action working the deprivation to

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any act in furtherance of the conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

329. 368 F. Supp. 1025 (E.D. Va. 1973).

330. 508 F.2d 504 (4th Cir. 1974).

331. Plaintiff had alleged in the trial court that the Klan was a patriotic organization and at the same time declared that the Klan was a religion since its meetings were highlighted by "religious pomp and ceremony." *Id.* at 505.

332. *Id.* at 506. *But see* Griffin v. Breckenridge, 403 U.S. 88 (1971).

333. 508 F.2d at 507. *But see* Action v. Gannon, 480 F.2d 1227 (8th Cir. 1971); Richardson v. Miller, 446 F.2d 1247 (3d Cir. 1971). In Doski v. M. Goldseker Co., 539 F.2d 1326 (4th Cir. 1976), Craven reaffirmed *Bellamy* in a sex discrimination case and declared "that totally private employment discrimination on the basis of sex does not state a cause of action under 42 U.S.C. § 1985(3) for violation of rights following directly and exclusively from the fourteenth amendment." *Id.* at 1333-34 (footnote omitted).

334. *See* Note, *Civil Rights—State Action is a Requirement for the Application of Section 1985(3) to First Amendment Rights*, 54 N.C.L. REV. 677, 685 (1976).

335. 403 U.S. 88 (1971).

come from the state."[336] Craven declined to extend the principles of *Griffin* to private persons in view of the first amendment claim involved.

In an earlier case of significance, *Joy v. Daniels*,[337] Craven relied upon the state action theory in deciding that a landlord's use of state eviction procedures against a tenant in a federally funded low-income project included the requisite state involvement in order to invoke 42 U.S.C. § 1983.[338] Plaintiff leased an apartment from defendant.[339] Approximately one year later, defendant gave plaintiff thirty days' notice to leave the premises, without indicating the cause for eviction.[340] Plaintiff brought a section 1983 action alleging that her threatened eviction should be enjoined under the fifth and fourteenth amendments. Craven found state action to support a claim, premising it upon the following factors: (1) Defendant was a recipient of mortgage benefits and rent supplements from the Federal Housing Authority (FHA);[341] (2) state eviction procedures were used by defendant;[342] and (3) state approval was necessary to allow federal participation in these quasi-public housing projects.[343]

Judge Craven then turned to the substantive fourteenth amendment rights of which plaintiff was allegedly deprived by the eviction. In concluding that plaintiff was in fact entitled to a good cause notice prior to eviction, Craven declared that the weight of legislative and constitutional background afforded such rights:

> In view of the congressional policies of providing a decent home (with stability and security) for every American family, and of prohibiting arbitrary and discriminatory action, bolstered by the FHA regulations and custom, we find in the scheme of the National Housing Act and the Housing and Urban Development Act of 1965 a property right or entitlement to continue occupancy until there exists a cause to evict other than the mere expiration of the lease.[344]

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336. *Id.* at 97 (citation omitted).

337. 479 F.2d 1236 (4th Cir. 1973).

338. *Id.* at 1239; *see* 42 U.S.C. § 1983 (1970). Federal jurisdiction in *Joy* was based upon 28 *id.* § 1343(3) which grants jurisdiction over actions "[t]o redress the deprivation, under color of any state law" of a constitutional right.

339. The lease itself provided in part:

> At the end of one year, lease is automatically renewed from month to month, rent to be payable in advance without demand on first day of each month. Either party may terminate lease at end of term or any successive term by giving 30 days' notice in advance to other party.

479 F.2d at 1238.

340. Defendant in its answer declared that plaintiff " 'maintained a slovenly and ill-kept apartment;' had destroyed window screens; failed to pay rent on time; and, used excessive electricity." *Id.* at 1238 n.2.

341. *Id.* at 1238-39.

342. *Id.*

343. *Id.* at 1239.

344. *Id.* at 1241. Craven pointed out in conclusion that as the South Carolina judicial

In *Joy* Craven revealed his strong support for extending fourteenth amendment rights to aggrieved plaintiffs when state action was present. When, however, no state action existed upon which plaintiffs could hang a constitutional claim, Craven was reluctant, as in *Bellamy*, to extend the reach of section 1985(3) to private persons.

CRIMINAL LAW

Judges on the United States Courts of Appeals have relatively limited opportunities to interpret substantive criminal law, and many of their decisions in this area are of less importance than their decisions in other areas. Of Judge Craven's decisions, two groups stand out. They may not be of overriding legal significance, but they reveal a striking contrast in his interpretations of various statutes. The first of these groups of cases involves issues that arose out of the war in Vietnam.

Political questions do not surface with great frequency in criminal cases. Judge Craven, on the court of appeals during the height of the war in Vietnam, was well known for his opposition to that war.[345] Yet, in all of the opinions that he wrote dealing with the selective service laws, his personal beliefs were mentioned only once, in *Lawton v. Tarr*,[346] when the United States Attorney moved to recuse on the basis of Craven's public expression of his opposition to the war.[347] His other decisions in this area bear no hint of his personal beliefs.

During the draft era, many cases arose that dealt with various aspects of the selective service laws. In *United States v. Davis*,[348] for example, the registrant had been convicted for refusing induction.[349] He had not appealed his 1-A classification and had refused to step forward for induction. At trial, the district court declined to examine the registrant's file to consider the propriety of his classification.[350] When the local draft board notified the registrant of his classification, it had failed to follow new procedures that required that the registrant be informed of his right to appeal his classification.[351] Writing for the court, Judge Craven held that the local board's error

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eviction procedure was constitutionally adequate, a prior administrative hearing was not necessary when the tenant was afforded procedural due process by the state courts. *Id.* at 1243.

345. *See* Lawton v. Tarr, 327 F. Supp. 670 (E.D.N.C. 1971).

346. *Id.*

347. See text accompanying notes 22-35 *supra* for a discussion of *Lawton*.

348. 413 F.2d 148 (4th Cir. 1969).

349. Act of June 30, 1967, Pub. L. No. 90-40, 81 Stat. 105 (current version at 50 U.S.C. § 462 (Supp. V 1975)).

350. 413 F.2d at 150.

351. Local Board Memorandum No. 82 (Mar. 6, 1967) provided that the local draft board would notify registrant of his right to appeal and give him the name of his appeal agent at the time his Notice of Classification was mailed. 413 F.2d at 149 n.1.

excused the registrant's failure to appeal his classification.[352] Thus, it was error for the trial court to refuse to examine the classification,[353] for the registrant's failure to exhaust administrative remedies could be excused by the board's action.[354]

The "misleading information" defense arose again in *United States v. Ramey*,[355] in which one of defendant's convictions was for failure to report for an armed forces physical examination. Defendant had registered with a board in North Carolina, but he was in California when he received his order to report to North Carolina for a physical examination. Having no money to return to North Carolina, he reported to a local board in California, but a board employee erroneously told him that he would have to obtain his physical in North Carolina. Judge Craven, again writing for the court, held that having misled the defendant, the Government could not try to hold him liable for failing to obey the order to report for the physical.[356] *Davis* and *Ramey* are consistent with a theme that seems to run through many of Craven's opinions: convictions should not result from the mistakes or misconduct of the government.[357]

In *United States ex rel. Tobias v. Laird*,[358] Judge Craven refused to allow the government to err at the expense of a conscientious objector. In *Tobias* petitioner sought relief on the ground that he had been wrongfully denied conscientious objector status by the Army. Despite the unanimous recommendation of the three officers required to determine the validity of petitioner's claim, the commanding officer, who had not talked to petitioner, recommended denial of the application because he thought that the prospect of going to Vietnam caused petitioner to make the request. Petitioner's request for discharge or assignment to noncombatant duties was routinely denied, even though a finding was made by the Adjutant General of the Army that the evidence supported a claim for noncombatant classification. Finding that the Army had violated its own regulations,[359] Judge Craven held that the policy of fairness underlying the regulations required that petitioner be granted conscientious objector status even though his

352. 413 F.2d at 150.

353. *Id.*

354. *Id.*; *see* McKart v. United States, 395 U.S. 185 (1969) (special circumstances may justify a failure to exhaust administrative remedies).

355. 503 F.2d 705 (4th Cir. 1974).

356. *Id.* at 709.

357. *See, e.g.*, text accompanying notes 478-94 *infra*. A different view, however, seems to apply to cases that involve fourth amendment claims. *See* text accompanying notes 528-47 *infra*.

358. 413 F.2d 936 (4th Cir. 1969).

359. Craven noted that a Department of Defense Directive seemed to permit either the discharge or the assignment to noncombatant duties of a conscientious objector. *Id.* at 940.

objections did not crystallize until he faced the prospect of going to Vietnam.[360]

Judge Craven's opinion in *Tobias* was relied upon and extended by the Fourth Circuit in *United States ex rel. Lehman v. Laird*,[361] in which the court discharged a serviceman who had been denied conscientious objector status. Citing *Tobias*, the court stated, "This court has recognized that the prospect of Vietnam duty may act as a catalyst for requesting discharge as a conscientious objector but does not by itself constitute a basis in fact for denial of discharge."[362] The Supreme Court, in reversing the conviction of Muhammad Ali (then Cassius Clay) for refusing induction,[363] approved the rulings of *Tobias* and *Lehman*.[364] As in these cases, the Court held that conscientious objector status should not be withheld "simply because of the circumstances and timing of the petitioner's claim."[365]

Coleman v. Tolson[366] also involved a claim for discharge from the Army. Petitioner had been granted a student deferment upon his enrollment in college. The college's administrative regulations required a number of students, including petitioner, to take a reduced number of credit hours. This reduction would not, however, have prevented petitioner from graduating in the usual four-year period. Nevertheless, upon hearing that the petitioner was seven hours short of the credit necessary to be classified as a third-year student, the local board reclassified him as 1-A and he was inducted into the Army. Although the Selective Service regulation based deferment on credits being earned at a pro rata rate throughout the four years of college, Judge Craven noted the injustice of denying deferment to a student who would graduate in four years but who temporarily lacked the proper number of credits due to no fault of his own. If the regulation were followed precisely, half of the freshman at Morgan State College would have lost their deferments. Considering such circumstances, Craven held that if the college certifies that the registrant will graduate on time and if it is reasonably likely that he will do so, he is entitled to his deferment. Then, finding no basis in fact for petitioner's 1-A classification, Craven ordered him discharged from the Army.[367]

Judge Craven's opinion in *Coleman* reflects the common sense approach that characterizes many of his opinions. This approach is also at the

360. *Id.*
361. 430 F.2d 96 (4th Cir. 1970).
362. *Id.* at 99.
363. Clay v. United States, 403 U.S. 698 (1971) (per curiam).
364. *Id.* at 703.
365. *Id.*
366. 435 F.2d 1062 (4th Cir. 1970).
367. *Id.* at 1064-65.

base of his opinion in *United States v. Snider*,[368] in which the court reversed convictions for supplying false or fraudulent information on income tax withholding exemption certificates and for criminal contempt of court.[369] Defendant was a Quaker who, pursuant to his opposition to war, decided that he could not continue voluntarily to pay taxes. He therefore claimed three billion dependents (the world's population) on the Employee's Withholding Allowance Certificate that he gave to his employer. He also sent a letter to the Internal Revenue Service with this form explaining his claim. His employer continued to withhold money from his pay for several months, but, receiving no reply from the Internal Revenue Service, returned the withheld amounts. Later that year, Snider was convicted of wilfully supplying his employer with false or fraudulent information.[370]

It is apparent that Judge Craven saw Snider's claim of three billion dependents as exaggeration for the purpose of symbolic protest.[371] The statute was an obstacle to reversing the conviction, however, for its language required only that the information be "false or fraudulent."[372] Although the usual meaning of "false" is "not true,"[373] the court noted that the word is often given other meanings in statutes. After examining these other meanings in a number of statutes,[374] Judge Craven stated:

> [I]n order for a taxpayer to be convicted of supplying "false or fraudulent" information contrary to section 7205 the information must either be (1) supplied with an intent to deceive, or (2) false in the sense of deceptive—of such a nature that it could reasonably affect withholding to the detriment of the government.[375]

Because a jury could not find that a claim of three billion dependents was

368. 502 F.2d 645 (4th Cir. 1974).

369. See text accompanying notes 49-66 *supra* for a discussion of a criminal contempt issue in the same case.

370. 502 F.2d at 649. I.R.C. § 7205 provides: "Any individual required to supply information to his employer . . . who willfully supplies false or fraudulent information . . . shall . . . upon conviction thereof, be fined not more than $500, or imprisoned not more than one year, or both."

371. 502 F.2d at 646. Judge Widener, in a vehement dissent, saw the majority opinion in a different light:

> Although the reversal of the tax conviction is thinly veiled in the guise of an improper definition of "false or fraudulent," it is in fact nothing more nor less than a ruling that a Vietnam War protestor may not be required to be punished for a willful refusal to pay withholding taxes on account of a political belief. The real extent of the ruling is revealed by the dismissal of the indictment, rather than ordering a new trial under proper instructions . . . .

Id. at 661 (Widener, J., dissenting).

372. *See* note 370 *supra*.

373. 502 F.2d at 651 n.10. (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1961)).

374. *E.g.*, 11 U.S.C. § 32(c)(2) (1970); 18 *id.* § 1001; *see* 502 F.2d at 651-52.

375. 502 F.2d at 655.

"false or fraudulent" under this definition, the court reversed the conviction and ordered that the indictment be dismissed.[376]

Snider may be viewed as a case in which statutory interpretation imposed a greater burden on the prosecution, enabling Judge Craven to avoid convicting a person for an act that could be reasonably viewed only as symbolic protest. In another area of criminal law, however, Craven's statutory interpretation affirmed a broad reading of federal jurisdiction in order to uphold the convictions of persons who were clearly engaged in criminal activity lacking any element of political expression. It seems that he was quite willing to find that the statute applied to their conduct. The statute in question was 18 U.S.C. § 1952, which forbids the use of a facility in interstate commerce to promote, establish or carry on any unlawful activity.[377] In *United States v. Wechsler*,[378] defendants had been convicted of violating and conspiring to violate section 1952 in bribing county officials.

Jurisdiction under the statute was established by Judge Craven's finding that depositing a check used to pay a bribe in a bank for collection was the use of a facility in interstate commerce.[379] The check had been drawn on

376. *Id.* at 656. In deciding *Snider*, Craven distinguished and declined to follow two cases from other circuits that had taken a more literal view of the meaning of "false." United States v. Smith, 487 F.2d 329 (9th Cir. 1973); United States v. Malinkowski, 472 F.2d 850 (3d Cir.), *cert. denied*, 411 U.S. 970 (1973). The result, however, does not seem to have "undermine[d] statutory law required for the administration of a voluntary tax system," as feared by Judge Widener in his dissent. 502 F.2d at 660 (Widener, J., dissenting). In Shea v. United States, 506 F.2d 1226 (4th Cir. 1974), the Fourth Circuit affirmed the petitioner's conviction for supplying false or fraudulent information. About a month before filing his withholding certificate claiming 20 dependents (instead of the 6 previously claimed), petitioner had written a letter to the Internal Revenue Service expressing his general intent to resist paying taxes. *Id.* at 1227. The court held that the information that petitioner had supplied could have deceived the government, *id.* at 1227-28, and this fact required a decision different from that in *Snider*.

377. 18 U.S.C. § 1952 (1970) provides in part:

> **Interstate and foreign travel or transportation in aid of racketeering enterprises**
> (a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—
> (1) distribute the proceeds of any unlawful activity; or
> (2) commit any crime of violence to further any unlawful activity; or
> (3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity, and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

378. 392 F.2d 344 (4th Cir.), *cert. denied*, 392 U.S. 932 (1968). One question on appeal was the ex post facto application of the law. Before the statute was enacted in 1961, defendants had committed acts that would have supported indictments for bribery under Virginia law because they had passed money to county officials. *Id.* at 346-47. It was after the statute was enacted, however, that a check was deposited and the officials voted as they had promised. The statute was therefore applicable, according to Judge Craven, and the ban on ex post facto laws was not violated. *Id.* at 347.

379. *Id.* at 347 & n.3. Craven noted, "Banks have often been held to be involved in interstate commerce for other purposes. *E.g.*, N.L.R.B. v. Bank of America, 130 F.2d 624 (9th

a Virginia bank and endorsed by a Washington, D.C. bank. Craven found this action to be a sufficient connection between the unlawful activity and the use of a facility in interstate commerce, as required by the statute.[380]

Defendant in *United States v. LeFaivre*[381] was convicted of violating section 1952 as a result of his gambling operations. These operations were wholly within Maryland and predominantly in Baltimore; nevertheless, they involved approximately half a million dollars annually. At trial, fourteen out-of-state negotiable instruments were introduced to establish defendant's use of facilities in interstate commerce. Because of this minimal connection (considering the extent of defendant's operation), defendant questioned whether Congress ought to regulate criminal activity that is local in nature through Congress' power over commerce. Judge Craven, writing for the court, declined to restrict the application of the statute, stating that the courts cannot restrain Congress when its actions are within the limits of its powers.[382]

Defendant in *LeFaivre* also contended that under the Supreme Court's decision in *Rewis v. United States*[383] and under the cases interpreting *Rewis*[384] prosecution was no longer permissible under section 1952 just because a few checks drawn on out-of-state banks were involved in a purely local operation. *Rewis* held that section 1952 could not be used either to prosecute people who crossed state lines to go to a local gambling establishment or to prosecute the operators of such an establishment because some customers crossed state lines.[385] Judge Craven, however, stated that the

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Cir. 1942) (National Labor Relations Act); Lorenzetti v. American Trust Co., 45 F. Supp. 128 (N.D. Cal. 1942) (Fair Labor Standards Act)." *Id.* at 347 n.3.

380. *Id.* at 347 n.3. The Fourth Circuit relied on *Wechsler* in United States v. Salsbury, 430 F.2d 1045 (4th Cir. 1970), a case in which § 1952 was invoked to convict a defendant who financed a large gambling enterprise. Defendant often received payment by check, which he cashed at a local store. The store, in turn, deposited the checks in a bank. Because some of the checks were drawn on out-of-state banks, defendant was prosecuted under § 1952. Citing *Wechsler*, the court upheld the conviction, stating that a gambler cannot use interstate facilities to clear checks from illegal activities. *Id.* at 1048.

Craven also wrote the opinion in United States v. Parzow, 391 F.2d 240 (4th Cir.), *cert. denied*, 393 U.S. 823 (1968), decided the same day as *Wechsler*. Like *Wechsler*, *Parzow* involved the bribery of a county official in Virginia. Payment for the bribery was accomplished by mail. As in *Wechsler*, Craven found that such use of facilities in interstate commerce was sufficiently related to the unlawful activity to constitute a violation of § 1952. *Id.* at 241.

381. 507 F.2d 1288 (4th Cir. 1974), *cert. denied*, 420 U.S. 1004 (1975).

382. *Id.* at 1290. Defendant did not challenge the constitutionality of the statute.

383. 401 U.S. 808 (1971).

384. United States v. Archer, 486 F.2d 670 (2d Cir. 1973); United States v. McCormick, 442 F.2d 316 (7th Cir. 1971); United States v. Altobello, 442 F.2d 310 (7th Cir. 1971). Judge Craven's opinion sought to distinguish all of these cases. 507 F.2d at 1293-94. Even if the cases were not distinguishable, he declined to follow them, rejecting "any narrowly restrictive reading of [§ 1952]." *Id.* at 1294.

385. 401 U.S. at 811-12.

purpose of *Rewis* was to prevent the extension of section 1952 beyond its literal language.[386] Hence, because the activity in *LeFaivre* was clearly covered by the statute, Craven declined to investigate the legislative history of section 1952 to see whether Congress truly intended such coverage.[387] The scope of federal jurisdiction in criminal prosecutions can be controlled by prosecutorial discretion, Craven suggested, adding that he refused to read section 1952 to require that interstate travel or the use of facilities in interstate commerce be a "substantial" or "integral" part of the crime.[388] Such travel or use of facilities "need only facilitate the promotion, management, establishment, or carrying on of the illegal . . . business."[389]

Judge Craven's statutory interpretation in the draft cases and in *Snider* provides an interesting contrast when compared with the statutory interpretation in the section 1952 cases. The draft cases and *Snider* involve defendants who might be considered less culpable morally than the defendants in the section 1952 cases. Although Craven's opposition to the war in Vietnam may have contributed to this view of those defendants, improper actions by the government (as in *Davis*, *Ramey* and *Tobias*) may have also influenced his attitudes. Whatever the cause, it is clear that the interpretations of the statutes in cases such as *Coleman* and *Tolson*, which strictly construe the meaning of the draft statutes, differ quite strikingly from the broad, literal interpretation of section 1952.

CRIMINAL PROCEDURE

Judge Craven wrote numerous opinions dealing with criminal procedure, most of which fall into two broad areas that reveal different facets of his judicial personality. In cases that concerned defendants' right to a fair trial, Craven was scrupulous in his insistence on safeguarding the interests of defendants. But when the essential fairness of the trial was not an issue—as when the seizure and introduction of evidence of guilt were in question—his focus seemed to shift to the practical necessities of law enforcement.

Judge Craven recognized that the determination of venue is more than a mere technicality and that proper venue is required for a fair trial. In *United*

386. 507 F.2d at 1294.

387. *Id.* at 1295.

388. *Id.* at 1296-97.

389. *Id.* at 1297 (quoting the trial judge's jury charge). Judge Craven further held that nothing in the statute requires a knowing use of facilities in interstate commerce; therefore, it was immaterial whether defendant knew that cashing out-of-state checks involved the use of facilities in interstate commerce. *Id.* In addition, because federal law makes aiders and abettors principals, women who received bets over the telephone, with no knowledge of the out-of-state checks, were also liable for violation of § 1952. *Id.* at 1298.

States v. Walden,[390] defendants were charged with violations of federal bank robbery laws. The conspiratorial and transportation acts were alleged to have taken place in South Carolina, but the banks that defendants were charged with entering in order to commit robbery were not in South Carolina. Nevertheless, defendants were tried in South Carolina on all charges. On appeal, they claimed that venue for the unlawful bank entry charges was improperly laid in the South Carolina district. Judge Craven's opinion for the court pointed out that the sixth amendment provides that trials shall take place in the state where the crime was committed.[391] Furthermore, such provisions are for the benefit of the defendant, and doubts as to venue should be resolved in his favor.[392] Craven held that entry into the bank to commit robbery is the act proscribed by the statute, and that such entry could take place only in the state where the bank was located.[393] He refused to approve venue in South Carolina based on the presence of an accessory in that state.[394] Recognizing that a prosecution for conspiracy has some advantage to the government, he declined to enlarge this advantage by allowing forum shopping for the substantive offenses: "The right to a trial before a jury of the vicinage is fundamental and such a trial ought to be held at the place of commission of the substantive offense. The Sixth Amendment may not be ignored . . . ."[395]

Judge Craven viewed jurisdictional matters in the same light as questions of venue. In *Long v. Robinson*,[396] a federal district court had ruled that the Maryland laws that lowered the juvenile age limit from eighteen to sixteen in Baltimore alone were unconstitutional. By a petition for a writ of habeas corpus, petitioner in *Woodall v. Pettibone*[397] raised the question whether *Long* would be applied retroactively. Craven held that a hearing for the waiver of juvenile jurisdiction was a critical stage in the criminal process,[398] because it was the juvenile's only chance to raise the defense of

390. 464 F.2d 1015 (4th Cir.), *cert. denied*, 409 U.S. 867, 410 U.S. 969 (1972).

391. *Id.* at 1017. The sixth amendment states: "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 . . . ." U.S. CONST. amend. VI.

392. 464 F.2d at 1017.

393. *Id.* at 1018.

394. *Id.* at 1019-20.

395. *Id.* at 1020.

396. 316 F. Supp. 22 (D. Md. 1970), *aff'd*, 436 F.2d 1116 (4th Cir. 1971). Under the laws invalidated in *Long*, 16 and 17 year old juveniles arrested for crimes in Baltimore were tried as adults, but persons of equal age tried outside of Baltimore were initially subject to the jurisdiction of the juvenile courts.

397. 465 F.2d 49 (4th Cir. 1972), *cert. denied*, 413 U.S. 922 (1973).

398. Judge Craven considered the result controlled by an earlier decision, Kemplen v. Maryland, 428 F.2d 169 (4th Cir. 1970). For a discussion of *Kemplen*, see text accompanying notes 434-55 *infra*.

diminished responsibility as a juvenile:[399] "To deny juveniles in Baltimore the opportunity of such a defense and to allow it to all other juveniles in Maryland seems to us so fundamentally unfair as to impeach the validity of the 'adult' proceedings and render unreliable the guilty verdicts obtained in these proceedings."[400] The doubt thus cast on the adult convictions led Craven to approve the retroactive application of *Long*.[401]

The *Woodall* court recognized possible difficulties in implementing its decision, and therefore ordered expunction of the improper convictions from the records of affected persons who raised the issue.[402] The determination of whether expunction was required was ordered to be done on a case-by-case basis,[403] with an important consideration being "whether or not waiver to the adult criminal courts would likely have been granted."[404] Information supplied by petitioner's counsel revealed that 122 persons would be affected by the court's decision, and Judge Craven held that these persons could benefit from the *Woodall* decision.[405] He suggested that these persons' convictions would be prima facie null and void, but that the state would have the opportunity to show that the juvenile court would have waived jurisdiction to an adult court.[406]

Walden and *Woodall* show Judge Craven's great concern for the elements that contribute to the inherent fairness of a trial. He recognized that pretrial matters such as venue and jurisdiction play important roles in the protection of the rights of an accused. As a complement to this concern for the integrity of the trial, several of Craven's opinions revealed a preference for disposing of charges by trial rather than by dismissal on threshold grounds such as double jeopardy or denial of a speedy trial. In *United States v. Smith*,[407] petitioner claimed that the double jeopardy provision of the fifth

399. 465 F.2d at 52.

400. *Id.*

401. *Id.*

402. *Id.* This solution allowed the state to avoid the task of discovering each improper conviction. *Id.*

403. *Id.*

404. *Id.* at 53.

405. *Id.* These 122 people were either imprisoned, institutionalized, on probation or on parole. *Id.*

406. *Id.* In deciding *Woodall*, Craven failed to anticipate one of its possible applications. Petitioner in Douglas v. Warden, Md. Penitentiary, 399 F. Supp. 1 (D. Md. 1975), presented the question of whether pre-*Long* convictions could be used for impeachment purposes in a trial held before *Long* was decided. The district court, believing that Judge Craven had not considered this question when he stated in *Woodall* that the effect of the Maryland laws was to impeach the validity of the adult convictions, declined to extend *Woodall* to this situation. *Id.* at 9. The court was unwilling to increase the state's burden by applying *Long* to more than the 122 persons named in *Woodall*. *Id.* at 11. Furthermore, the court thought that in cases such as petitioner's, imprisonment did not result solely from improper pre-*Long* convictions, but from a fair trial. *Id.* at 11-12.

407. 390 F.2d 420 (4th Cir. 1968).

amendment[408] barred his retrial after the reversal of his conviction. At the first trial of petitioner and his co-conspirators, the court had declared a mistrial because several jurors had read a prejudicial newspaper article. Petitioner, being tried by the judge alone, did not join in the motion for a mistrial, but neither did he object to it. He was convicted at a second trial, but the conviction was reversed and he raised the fifth amendment issue.

Taking note of the very heavy caseload in the district courts, Craven's majority opinion pointed out that completion of petitioner's trial would have resulted in separate trials for petitioner and some of his co-conspirators, with the possibility of several undesirable consequences.[409] These considerations and the fact that there was no unfair purpose behind the declaration of the mistrial led Craven to approve a third trial for all defendants.[410]

The sixth amendment's guarantee of a speedy trial[411] was at issue in *United States v. MacDonald*.[412] Unlike *Smith*, in which Judge Craven approved a retrial over a colleague's dissent, the *MacDonald* court, with Craven dissenting, held that defendant's right to a speedy trial had been denied. These cases involved difficult issues of fact, and in each case, Craven called for a trial on the merits. This inclination to have disputes resolved by trial evinces a deep-seated belief in the value of courts as fact

408. The fifth amendment provides in part: "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . . ." U.S. CONST. amend. V.

409. 390 F.2d at 424. Because the trial was for conspiracy, Craven felt that separate jury and non-jury trials might have removed "the sometimes helpful influence of the jury verdict on the trial judge's findings on close, difficult questions of credibility, and the likelihood of contradictory verdicts would have been enhanced." *Id.*

410. *Id.* Another case in which a petitioner sought to have his charge dismissed was United States v. Davis, 369 F.2d 775 (4th Cir. 1966), *cert. denied*, 386 U.S. 909 (1967). The jury had acquitted petitioner of four counts of violating federal liquor laws, but it could not reach a verdict on a fifth count, so a mistrial was declared. Petitioner asserted that collateral estoppel should have prevented his retrial on the fifth count. The basis of this assertion was petitioner's claim that the acquittals showed that the jury found as a fact that he was not present at the illegal distillery and thus could not be guilty of the fifth count. The court, through Judge Craven, recognized the possible validity of such an interpretation, but went on to show that other valid interpretations were equally likely; he explained that the acquittals could have been based on the jury's finding that petitioner had been present but had not committed the acts charged in the other four counts. *Id.* at 778-80. Because the issue of petitioner's presence was not necessarily the basis of the favorable verdicts, Craven refused to foreclose consideration of this issue by dismissing the fifth charge. *Id.* at 780.

411. *See* note 391 *supra*.

412. 531 F.2d 196 (4th Cir. 1976), *cert. granted*, 97 S. Ct. 2948 (1977) (No. 75-1892). MacDonald, a former Army doctor, was indicted for murder four and a half years after he had been accused and detained by the Army for the same offenses. The Army dismissed the charges against him, but investigations by the Army's Criminal Investigation Division and the FBI continued sporadically. During this time, MacDonald sought to have the case resolved and did nothing to contribute to the delay. The court found that the sixth amendment's guarantee of a speedy trial applied to MacDonald. *Id.* at 208. In his dissent, Judge Craven disagreed at length with the application of the sixth amendment's guarantee of a speedy trial to the military proceedings to which MacDonald had been subjected. *See id.* at 209-14 (Craven, J., dissenting).

finders. Craven's confidence in the system's ability to reach a just decision[413] was likely a strong factor in his view of threshold challenges to criminal proceedings.

Other pre-trial matters such as the composition and impartiality of the jury were also subjects that seemed to be of great concern to Judge Craven. In *Witcher v. Peyton*,[414] petitioner sought a writ of habeas corpus, alleging that blacks were unlawfully excluded from the grand jury that indicted him and from the venire from which his jury was selected. Although petitioner's county had a population that was approximately one-quarter non-white, no grand jury in the five years prior to his conviction had included more than one black. About eight percent of the people on the jury list from which the venire for his jury was chosen were black, and the fact that these people were black was designated on the list. The seven people on the grand jury that indicted petitioner included one black, and the venire of thirty-five included three blacks, none of whom were selected to serve on the jury.[415] County officials testified that they did not select grand jurors or jurors at random because they wanted to find the best qualified people. In addition, they testified to the effect that race was indicated on the lists to avoid discriminating against blacks.

In an earlier hearing, the court of appeals had held that petitioner's pleadings stated a prima facie case of unlawful exclusion of blacks from service on grand and petit juries.[416] On remand, the district court denied relief, stating that petitioner had failed to establish deliberate and purposeful discrimination.[417] Judge Craven concluded that blacks were substantially underrepresented on petitioner's grand jury and on the venire from which his jury was selected.[418] Moreover, Craven found that this "[d]isproportionate representation was recurrent, systematic and relatively uniform in degree."[419] In light of these findings, he held that the county officials' denials of intentional discrimination did not negate petitioner's prima facie case.[420] He proceeded to highlight the importance of a truly representative jury: " 'Tendencies, no matter how slight, toward the selection of jurors by any

413. *See Paean to Pragmatism*, *supra* note 1, at 980.

414. 405 F.2d 725 (4th Cir. 1969).

415. Virginia law required that a grand jury consist of five to seven persons, VA. CODE § 19.2-195 (1975), with four votes necessary for an indictment, *id.* § 19.2-202. Thus, by limiting the number of blacks on a grand jury, an indictment could be returned without the concurrence of a black. 405 F.2d at 728. Similarly, the number of blacks on the venire was always less than the number that could be peremptorily challenged. *Id.* at 728-29.

416. Witcher v. Peyton, 382 F.2d 707 (4th Cir. 1967).

417. 405 F.2d at 726.

418. *Id.* at 728.

419. *Id.*

420. *Id.* at 729.

method other than a process which will insure a trial by a representative group are undermining processes weakening the institution of jury trial, and should be sturdily resisted.' "[421]

As shown by *Witcher*, Judge Craven felt that a representative jury was essential to the integrity of trial by jury. Absence of prejudicial bias was another element that he considered to be essential to the fairness of a jury trial. Appellant in *United States v. Johnson*[422] was black, and he requested that his conviction be reversed because of the trial judge's failure to question potential jurors about racial prejudice. In *Ham v. South Carolina*,[423] the Supreme Court had held that under the facts presented to the Court,[424] due process required that a defendant be allowed to have the jurors questioned about racial bias. Judge Craven, writing for the court in *Johnson*, agreed with the Second Circuit[425] that *Ham* did not establish a per se rule that would call for reversal without regard to actual prejudice to the defendant.[426] In reversing Johnson's conviction, however, Craven predicted "that only in the extremely unusual case will the prosecutor be able to sustain his heavy burden of showing that the error [of failing to ask about racial prejudice] was harmless."[427] Furthermore, although the judge must ask the question, not every question suggested must be asked, and "[a] general query whether any juror is unable to judge the case fairly because of race, creed or color of the defendant should suffice."[428]

Johnson can be seen as an extension of the concern for the integrity of the jury that Judge Craven expressed in *Witcher*. *United States v. Hankish*[429] showed that this concern extended beyond the time when the jury is impaneled. On the second day of Hankish's trial, a local newspaper printed

421. *Id.* at 728 (quoting Glasser v. United States, 315 U.S. 60, 86 (1942)). In a case that did not involve a jury trial, the Fourth Circuit, per Judge Craven, held that defendant's intelligent and voluntary guilty plea was valid despite the systematic exclusion of blacks from the grand jury that indicted him. Parker v. Ross, 470 F.2d 1092 (4th Cir. 1972).

422. 527 F.2d 1104 (4th Cir. 1975).

423. 409 U.S. 524 (1973).

424. These facts from *Ham* are set out in *Johnson*: defendant "was a bearded black and a well-known civil rights worker charged with the possession of marijuana . . . ." 527 F.2d at 1106. The court of appeals also noted that the racial composition of the jury and prosecution witnesses was not mentioned. *Id.*

425. United States v. Grant, 494 F.2d 121 (2d Cir.), *cert. denied*, 419 U.S. 849 (1974).

426. 527 F.2d at 1106.

427. *Id.* at 1106-07.

428. *Id.* at 1107. Pursuant to this instruction about appropriate questions, a federal district court upheld a state court judge who asked whether any member of the jury "would have any problem rendering a fair and impartial verdict with the accused being a black man and the alleged victim [of rape] being a white woman." Johnson v. Maryland, 425 F. Supp. 538, 540-41 (D. Md. 1976). The court held that such questioning "more than met the suggestion of the Fourth Circuit in *United States v. Johnson*." *Id.* at 541.

429. 502 F.2d 71 (4th Cir. 1974).

an article that described Hankish as a racketeer who directed a large theft ring. The trial judge denied defense counsel's request for the judge to question the jurors to see whether any of them had read or discussed the article. On appeal, Hankish and a codefendant claimed that this refusal was error, and Judge Craven agreed: "To put into the jury box an impression that Hankish was a racketeer and director of a multistate theft ring, and the implication that Matthews [the codefendant] was a participant, is highly prejudicial."[430]

Adopting the practice of the Seventh Circuit,[431] Judge Craven set out for the first time the procedure to be followed in the Fourth Circuit when there is a possibility that the jury has received prejudicial information: "[W]hen highly prejudicial information may have been exposed to the jury, the court must ascertain the extent and effect of the infection, and thereafter, in its sound discretion, take appropriate measures to assure a fair trial."[432] In recognition of the fact that not all newspaper articles that appear during trial are prejudicial to the defendant, Craven held that this procedure need be followed only when "there is substantial reason to fear prejudice."[433]

As in the cases that dealt with venue and jurisdiction, the cases that bolstered defendant's jury trial rights demonstrated Judge Craven's insistence upon maintaining the integrity of the trial. These decisions attest to his strong desire to afford the criminal defendant a fair trial. Probably the most effective way of safeguarding the rights of defendants is to provide assistance of counsel, and in *Kemplen v Maryland*[434] Craven contributed to the expansion of the right to counsel. *Kemplen* involved the rights of a juvenile at the hearing in which the juvenile court could waive jurisdiction and allow the juvenile to be tried as an adult. At the hearing, petitioner was not told of his right to counsel, nor did the court appoint counsel for him. Petitioner's hearing was held prior to the decision in *In re Gault*,[435] which held that due process rights, including notice and counsel, are required at proceedings that determine delinquency. The district court denied Kemplen's petition for a writ of habeas corpus on the ground that *Gault*, if applicable to waiver hearings, should not be applied retroactively.[436] Judge Craven's opinion for

430. *Id.* at 76.

431. *See* Margoles v. United States, 407 F.2d 727 (7th Cir.), *cert. denied*, 396 U.S. 833 (1969).

432. 502 F.2d at 77 (citations omitted).

433. *Id.* (citations omitted). Several Fourth Circuit cases have followed the rule adopted in *Hankish*. *See* United States v. Jones, 542 F.2d 186 (4th Cir. 1976); Martin v. United States, 528 F.2d 1157 (4th Cir. 1975); United States v. Pomponio, 517 F.2d 460 (4th Cir.), *cert. denied*, 423 U.S. 1015 (1975).

434. 428 F.2d 169 (4th Cir. 1970).

435. 387 U.S. 1 (1967).

436. Kemplen v. Maryland, 295 F. Supp. 8, 11 (D. Md. 1969).

the court of appeals reversed this decision and held that the requirements of *Gault* were applicable to waiver hearings and that *Gault* was to be applied retroactively.[437]

In analyzing whether *Gault* would apply to waiver hearings, Judge Craven started from the position that *Gault* demands full due process at any juvenile court proceeding that can affect the juvenile's substantial rights.[438] Because the waiver hearing can determine the extent of punishment that a juvenile can receive upon conviction,[439] Craven found the hearing to be a critical stage in the process of determining guilt: "[I]t seems to us nothing can be more critical to the accused than determining *whether there will be a guilt determining process in an adult-type criminal trial*."[440] Craven also equated counsel's role at sentencing to the role counsel could play at a waiver hearing, providing favorable information to the court in order to suggest possible methods of rehabilitation.[441] Moreover, counsel could assist the juvenile in the assertion of the defense of diminished responsibility because of juvenile status.[442] In view of these considerations, the court held that the right to counsel, either appointed or retained, was applicable to waiver hearings.[443] To ensure the full value of this right, Craven also held that due process requires that the juvenile, parents and counsel be given adequate notice of the proceeding.[444]

Turning to the issue of the retroactivity of *Gault*,[445] Judge Craven looked to the Supreme Court's decision in *Stovall v. Denno*[446] for the criteria used in such decisions: " '(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards.' "[447] Craven declared that the purpose of the new rule was to maintain the fundamental fairness of the waiver proceeding.[448] The retroactive application of the Supreme Court's right to counsel cases[449] heavily influenced a decision in favor of retroactivi-

437. 428 F.2d at 175-77.
438. *Id.* at 173.
439. *Id.* at 174 (citing Law of April 27, 1945, ch. 797, sec. 1, § 48K, 1945 Md. Laws 967 (formerly codified at MD. ANN. CODE art. XXVI, § 61 (1957) (repealed 1969)).
440. *Id.*
441. *Id.* at 174-75.
442. *Id.* at 175.
443. *Id.*
444. *Id.*
445. Craven noted that other courts had split on this issue. *Id.* at 175 n.15.
446. 388 U.S. 293 (1967).
447. 428 F.2d at 176 (quoting Stovall v. Denno, 388 U.S. at 297).
448. *Id.*
449. *See, e.g.*, Arsenault v. Massachusetts, 393 U.S. 5 (1968); McConnell v. Rhay, 393 U.S. 2 (1968); Douglas v. California, 372 U.S. 353 (1963); Gideon v. Wainwright, 372 U.S. 335 (1963); Hamilton v. Alabama, 368 U.S. 52 (1961).

ty under the first criterion.[450] As to the second factor, reliance, Craven stated: "Longstanding reliance is clearly not enough to overbalance the individual's right to counsel at a critical point in a criminal action against him."[451] Similarly, in considering the third criterion, Craven felt that any disruption would not be severe enough to justify ignoring people who had been imprisoned because they were not represented by counsel at juvenile waiver hearings.[452] On the basis of this analysis, Craven held for the court that the requirements of counsel and notice at waiver hearings would be applied retroactively.[453]

Kemplen was a significant extension of the right to counsel under the rule established by *Mempa v. Rhay*,[454] in which the Supreme Court held that "appointment of counsel for an indigent is required at every stage of a criminal proceeding where substantial rights of a criminal accused may be affected."[455] In contrast to the broad reading of *Mempa* adopted in *Kemplen*, Judge Craven's opinion in *Bearden v. South Carolina*[456] rests on an extremely narrow[457] interpretation of *Mempa*.

Bearden presented the question whether states are required to appoint counsel for indigents faced with possible parole revocation. Judge Craven began his analysis by construing *Mempa* to apply only to the right to counsel at sentencing deferred subject to probation.[458] His opinion recognized, as in *Kemplen*, that *Mempa* summarized the Supreme Court's right to counsel cases as requiring counsel " 'at every stage of a criminal proceeding where substantial rights of a criminal accused may be affected.' "[459] Despite this recognition, Craven expressed his belief that the result in *Mempa* was based on an assumption that appointed trial counsel would not

450. 428 F.2d at 176-77.

451. *Id.* at 177.

452. *Id.*

453. *Id.* Craven went on to suggest a remedy for petitioners who asserted claims under the decision in *Kemplen*. Under his suggested procedure, either a state court or a federal district court would reconstruct the circumstances at the waiver hearing and determine whether the judge would have waived juvenile jurisdiction if he could have considered all of the information that competent counsel might reasonably have put before him at the time. *Id.* at 178. If the reviewing court should find that waiver was inappropriate, the subsequent conviction would be vacated. *Id.* The conviction would stand, however, if the court should find that waiver was appropriate. *Id.*

454. 389 U.S. 128 (1967).

455. *Id.* at 134. This decision guaranteed the right to counsel at probation revocation hearings.

456. 443 F.2d 1090 (4th Cir.), *cert. granted*, 405 U.S. 916, *cert. dismissed*, 405 U.S. 972 (1972).

457. Craven's interpretation was termed "niggardly" in the dissenting opinion of Judges Winter, Sobeloff and Butzner. *Id.* at 1096 (Winter, J., dissenting).

458. *Id.* at 1091.

459. *Id.* (quoting Mempa, 389 U.S. at 134).

be overly burdened by continuing representation at deferred sentencing proceedings and on the fact that certain rights might be waived if not asserted at these proceedings.[460] By not interpreting *Mempa* as a decision based on an accused's right to continued liberty, as the dissent did,[461] Craven's opinion was able to avoid requiring counsel at all parole revocation hearings because of the burden such a requirement would impose on the original trial counsel.[462]

In holding that the sixth amendment and the due process clause of the fourteenth amendment do not require states to provide counsel to indigent parolees at revocation hearings,[463] Judge Craven acknowledged that the appointment of counsel may be required in certain situations.[464] To decide when counsel would be required, he adopted a case-by-case approach,[465] suggesting two situations that might necessitate the appointment of counsel: (1) instances in which the parolee denies violating the conditions of parole, and (2) cases in which "the fairness of the proceeding would be impaired by counsel's absence."[466] Craven also indicated that the assistance of a parole or probation officer might be sufficient to meet the requirements of fundamental fairness and due process.[467]

Bearden thus applies a quite limited right to counsel to suspected parole violators. Judge Craven gave assurances[468] that *Bearden* was not a rejection of the Fourth Circuit's decision in *Hewett v. North Carolina*,[469] which relied heavily on *Mempa* to extend the right to counsel to probation revocation proceedings. Although it is true that *Bearden* does not detract from *Hewett*, *Bearden* does seem to deviate from the intent shown in *Hewett* and *Kemplen* to follow *Mempa* by applying the right to counsel to all criminal proceedings.

Although *Bearden* showed that Judge Craven was unwilling to apply the sixth amendment right to the assistance of counsel to all possible situations, he did believe that the right should not be diminished by attempts

460. *Id.* at 1092.
461. *Id.* at 1097 (Winter, J., dissenting).
462. *Id.* at 1092-93. The court also mentioned the administrative nature of a parole revocation proceeding and the parens patriae relationship between a parole board and a parolee. *Id.* at 1093.
463. *Id.* at 1093.
464. *Id.* at 1094-95.
465. *Id.* at 1095.
466. *Id.* at 1094-95. These two situations were noted in *Jones v. Rivers* in the concurring opinions of Judges Sobeloff, 338 F.2d 862, 878 (4th Cir. 1964) (violating conditions of parole) (Sobeloff, J., concurring), and Haynsworth, *id.* at 879 (fairness of the proceeding) (Haynsworth, J., concurring).
467. 443 F.2d at 1095.
468. *Id.* at 1094.
469. 415 F.2d 1316 (4th Cir. 1969).

to prevent defendants from consulting with their attorneys. In *Geders v. United States*, [470] the Supreme Court held that a trial judge who ordered a defendant not to consult with his attorney during an overnight recess denied that defendant his right under the sixth amendment. *Geders* expressly reserved the question whether this right would be denied by such an order during a short recess during the trial day.[471] This question arose first in the Fourth Circuit in *United States v. Allen*.[472] During defendant's testimony, the court took two short recesses, and the judge directed defendant not to talk to anyone during the recesses.

Judge Craven's approach to the issue began with an examination of the nature of the sixth amendment right to counsel. In his view, "It is so fundamental that there should never occur any interference with it for any length of time, however brief, absent some compelling reason."[473] The reason asserted to justify the prohibition was fear that the defense attorney would improperly coach the defendant in order to shape his testimony.[474] Craven was unimpressed by this reason, pointing out that the probability of such occurrences was low, that improper coaching during a short recess was unlikely to be effective, that the prosecutor could cross-examine a defendant about any coaching and then impeach his credibility, and that any plan to testify falsely was likely to be completed before trial.[475] He therefore held unconstitutional restrictions on a defendant's right to talk to counsel during short recesses.[476] This extension of *Geders*, in addition to protecting defendants' sixth amendment rights, avoids burdening the courts with claims of prejudice resulting from prohibiting a defendant to talk to his lawyer.[477]

Through his decisions in *Kemplen* and *Allen*, Judge Craven helped broaden the sixth amendment's guarantee of the right to the assistance of counsel. Even the assistance of an attorney may not suffice to protect the rights of the defendant, however, in cases that involve misconduct by the prosecution. In such instances, only the later review of an appellate court may be able to negate the prejudicial effects of such actions. Judge Craven authored several opinions in cases of this sort and, like the draft cases involving the misleading information defense,[478] these opinions demand "fair play" in criminal trials.

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470. 425 U.S. 80 (1976).
471. *Id.* at 89 n.2.
472. 542 F.2d 630 (4th Cir. 1976), *cert. denied*, 430 U.S. 908 (1977).
473. *Id.* at 633.
474. *Id.*
475. *Id.*
476. *Id.* at 634. The court applied the new rule prospectively, holding it applicable only to trials held after its decision. *Id.*
477. *Id.* at 633.
478. *See* text accompanying notes 348-57 *supra*.

Petitioner in *Ganger v. Peyton*[479] was convicted of assaulting his wife. At the time of trial, the prosecuting attorney was also representing Ganger's wife in a pending divorce action. The district judge found that the prosecutor had offered to drop the assault charge if Ganger would agree to a property settlement in the divorce action. Affirming the lower court's decision to vacate Ganger's conviction, Judge Craven held that the "conflict of interest clearly denied Ganger the possibility of fair minded exercise of the prosecutor's discretion"[480] in such matters as whether to prosecute, whether to reduce the charge, and whether to make a sentencing recommendation.[481] In light of these circumstances, even though Ganger received only a six month sentence upon conviction of a lesser assault, Craven felt that the court could not assume that the prosecutor's improper conduct had been harmless.[482]

The misconduct of the prosecutor in *Ganger* was rather blatant. In *Boone v. Paderick*,[483] the misconduct was more subtle, but Judge Craven found it to be no less prejudicial. Prior to trial, a detective promised a prosecution witness leniency in return for cooperation. At the habeas corpus proceeding, the prosecutor did not deny knowledge of this promise, although his closing argument at trial had pictured the witness as testifying against his penal interest because of his conscience and civic duty. The witness had also denied any promise of leniency.[484]

The Supreme Court in *Giglio v. United States*[485] found a denial of due process in the prosecution's failure to inform the jury of an agreement not to prosecute a government witness when knowledge of the agreement would have been reasonably likely to change the verdict. In a two-step analysis, Judge Craven first determined that *Giglio* applied to the situation in *Boone* because "the jury may have been falsely led to believe that [the witness] was motivated solely by conscience and altruism and that there was no deal when in truth he responded to [the detective's] promises."[486] The basis of this determination was a finding that the witness' denial of a promise, when joined with the prosecutor's inaccurate description of the witness' motivation for testifying, amounted to "false evidence of which the prosecutor knew or should have known."[487]

479. 379 F.2d 709 (4th Cir. 1967).
480. *Id.* at 712.
481. *Id.* at 713.
482. *Id.* at 714.
483. 541 F.2d 447 (4th Cir. 1976), *cert. denied*, 430 U.S. 959 (1977).
484. *Id.* at 449-50.
485. 405 U.S. 150 (1972).
486. 541 F.2d at 450 (citation omitted).
487. *Id.* (citation omitted).

The second step of the analysis, which would control the grant of a new trial, involved a determination of whether the false testimony could have been reasonably likely to affect the judgment of the jury.[488] Judge Craven found that the witness' testimony was the most incriminating evidence that the prosecution had.[489] Moreover, he believed that with the evidence of the promise and without the prosecutor's inaccurate claims during his closing argument supporting the witness' credibility, a reasonable likelihood existed that the jury's verdict would have been different.[490] Craven held that the withheld evidence was sufficiently material to warrant a new trial.[491]

United States v. Sutton[492] involved a claim similar to the one raised in *Boone*. The petitioner alleged that an FBI agent had threatened a witness with prosecution in order to convince him to testify against petitioner. The prosecutor did not know of the threat, and he told the jury that the witness had not been threatened. Judge Craven held for the court that what the agent knew was imputed to the prosecutor.[493] As in *Boone*, the witness' testimony was crucial to conviction. Craven concluded that the jury's decision might have changed if the jury had been aware of the witness' fear of prosecution, for this fear detracted from his credibility.[494]

Ganger, *Boone* and *Sutton* involved prosecutorial misconduct during trial. It is common knowledge that in most jurisdictions, the majority of defendants plead guilty and never go to trial. Many of these pleas are the result of plea bargaining, a process that seems to work best when all promises are fully disclosed and recorded. Failure to do so can lead to a later challenge of the plea, which necessitates further adjudication. Judge Craven recognized the utility of plea bargaining, and he was a strong advocate of its proper implementation. In one of his opinions, he made the following remarks:

> We think that plea bargaining serves a useful purpose both for society and the prisoner and is a permanent part of the criminal courtroom scene, but we think that it ought to be brought out into the open. We do not suggest that defense counsel and the prosecutor actually conduct their negotiations in open court, but we do urge that in this circuit a full and complete disclosure of such negotiations be announced to the court and made a part of the record. The matter is, after all, public business, and we deplore the

488. *Id.* at 451 (quoting Giglio, 405 U.S. at 154).
489. *Id.* at 453.
490. *Id.* at 451-53.
491. *See id.*
492. 542 F.2d 1239 (4th Cir. 1976).
493. *Id.* at 1241 n.2.
494. *Id.* at 1243.

> hypocrisy of silent pretense that it has not occurred. . . . [D]isclosure would enable the trial judge to exercise a proper controlling influence and to reject any such arrangement he deemed unfair either to the defendant or to the public.[495]

Being only advice, these urgings were not always followed. In *Walters v. Harris*,[496] Craven ordered the expansion of the district courts' rule 11[497] inquiry in an attempt to ensure the disclosure of any plea bargain.

Petitioner in *Walters* asserted that he pleaded guilty in exchange for a ten-year sentence. He claimed that five witnesses, including his attorney, heard an Assistant United States Attorney confirm the bargain. When he pleaded guilty, petitioner said that no promises had been made to him and that he understood that the judge had complete control over the length of his sentence. Judge Craven held that it was error for the district court to dismiss the petition solely because Walters had denied that his plea was induced by any promises.[498] Craven observed that compliance with rule 11 procedure cannot always justify summary dismissal of attacks on guilty pleas:

> Examination of the defendant alone will not always bring out into the open a promise that has induced his guilty plea. It is well known that a defendant will sometimes deny the existence of a bargain that has in fact occurred . . . out of fear that a truthful response would jeopardize the bargain. . . . The danger that a Rule 11 inquiry will not uncover a plea bargain is sufficient that the defendant's responses alone to a general Rule 11 inquiry cannot be considered conclusive evidence that no bargaining has occurred.[499]

To remedy this lack of certainty, Judge Craven's opinion ordered district court judges to expand their rule 11 inquiries.[500] The judges were instructed to ask the prosecutor, the defendant and the defense counsel whether plea bargaining had taken place.[501] Then, before receiving a response, the judge should advise the parties that the Supreme Court has approved plea bargaining and that any bargain should be revealed without fear of the court's disapproval.[502] In Craven's view, "[A] negative response

495. United States v. Williams, 407 F.2d 940, 948-49 (4th Cir. 1969) (dictum) (footnotes and citations omitted).

496. 460 F.2d 988 (4th Cir. 1972), *cert. denied*, 409 U.S. 1129 (1973).

497. FED. R. CRIM. P. 11(d). Pursuant to rule 11, the trial judge must find that the guilty plea was made intelligently and voluntarily. To do so, the judge must: (1) speak to the defendant to inform him of and to determine his understanding of the nature of the charged offense and the consequence of pleading guilty to it; and (2) address the defendant personally to determine that the plea is voluntary and not coerced in any manner.

498. 460 F.2d at 992-93.

499. *Id.* at 993 (citations omitted).

500. *Id.*

501. *Id.*

502. *Id.*

to such an inquiry would finally conclude the subject matter and prevent subsequent litigation."[503]

Several cases have extended the ideas that Judge Craven propounded in *Walters*.[504] This line of cases, which ends with the Supreme Court's decision in *Allison v. Blackledge*,[505] firmly established the proposition that a defendant's answers to the inquiries that seek to document the knowing and voluntary nature of his guilty plea are not conclusive under all circumstances.

Convictions obtained through guilty pleas obviate much of the need to present evidence. In a full trial, however, the presentation of evidence and the evidentiary rulings of the court can be of the utmost importance. With respect to testimony about the identification of defendants, two of Judge Craven's opinions meshed with decisions of the District of Columbia Circuit to formulate jury instructions to be used with such testimony. In the first of Craven's decisions, *United States v. Levi*,[506] the court of appeals found that the evidence, which included eyewitness identification testimony by one witness, was sufficient for conviction. Because of the frequency of appeals disputing the sufficiency of such identification testimony, Craven adopted a rule that required trial judges, on request, to give a special instruction to the jury when the defendant has raised the issue of his identification.[507] This rule, designed by the District of Columbia Circuit, instructed the judge to tell the jury

> (1) "that the evidence raises the question of whether the defendant was in fact the criminal actor and necessitates the juror's resolving any conflict in testimony upon this issue," and (2) "that the burden of proof is upon the prosecution with reference to every element of the crime charged and this burden includes the burden of proving beyond a reasonable doubt the identity of the defendant as the perpetrator of the crime charged."[508]

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503. *Id.*

504. In Crawford v. United States, 519 F.2d 347 (4th Cir. 1975), the court adopted the following rule: "[T]he accuracy and truth of an accused's statements at a Rule 11 proceeding in which his guilty plea is accepted are 'conclusively' established by that proceeding unless and until he makes some reasonable allegation why this should not be so." *Id.* at 350 (citation omitted). Edwards v. Garrison, 529 F.2d 1374 (4th Cir. 1975), *cert. denied*, 424 U.S. 950 (1976), involved the claims of two petitioners. As to the state petitioner, the court held that because the trial judge had not asked specifically about the existence of a plea bargain, the petitioner would be allowed a chance to show that his plea was involuntarily induced by his attorney's promise of a certain sentence. *Id.* at 1377. The court held that the second petitioner, a federal prisoner, could challenge his answers at his guilty plea proceeding if the answers were not true but merely intended to assure the acceptance of the plea. *Id.* at 1380. The court extended this aspect of *Edwards* to state prisoners in Allison v. Blackledge, 553 F.2d 894 (4th Cir. 1976), which was affirmed by the Supreme Court. 431 U.S. 63 (1977).

505. 431 U.S. 63 (1977).

506. 405 F.2d 380 (4th Cir. 1968).

507. *Id.* at 382.

508. *Id.* at 382-83 (quoting Jones v. United States, 361 F.2d 537, 542 (D.C. Cir. 1966)).

Craven also decreed that a district court should not allow a criminal case to go to the jury when the prosecution relied on the identification testimony of a single eyewitness unless the judge "is himself persuaded by the demeanor, appearance and degree of apparent certainty of the witness, and by other factors affecting the integrity of the identification, that in all probability it is correct."[509]

The District of Columbia Circuit's opinion in *United States v. Telfaire*[510] viewed the decision in *Levi* as "the correct approach,"[511] and extended the reasoning of *Levi* by requiring, in effect, that the *Levi* instruction to the trial judge be used by the judge to instruct the jury. For this purpose, the court adopted a flexible model instruction. Judge Craven's next opinion on this topic in *United States v. Holley*[512] "agree[d] that to guard against misidentification and the conviction of the innocent it is not enough that the trial judge himself be specifically alerted to the detailed factors that enter into the totality of the circumstances, but that the jury should also be so charged."[513] To achieve this result, Craven approved the *Telfaire* rule and held that the substantial equivalent of the model instruction, with appropriate modifications to reflect differing circumstances, should be given any time the identity of the defendant is at issue.[514]

In *Levi* and *Holley*, Judge Craven sought to protect the defendants from the risk of conviction based on uncertain eyewitness identification testimony. He contemplated the trial judge providing this protection through suitable instructions to the jury. In cases of this sort, when the main issue was the credibility of the identification testimony, Craven sought to afford defendants substantial protection in order to reduce the likelihood that an innocent person would be convicted. This approach was similar to his approach in cases in which the issue was whether the identification tes-

509. *Id.* at 383. Craven expanded on this notion:

> In deciding whether to permit a criminal case to go to the jury, where identification rests upon the testimony of one witness, the district judge ought to consider with respect to identification testimony the lapse of time between the occurrence of the crime and the first confrontation, the opportunity during the crime to identify as compared with the opportunity of other witnesses who may be unable to do so, the reasons, if any, for failure to conduct a line-up or use similar techniques short of line-up, and the district judge's own appraisal of the capacity of the identifying witness to observe and remember facial and other features. In short, the district judge should concern himself as to whether the totality of the circumstances "give[s] rise to a very substantial likelihood of irreparable misidentification."

Id. (quoting Simmons v. United States, 390 U.S. 377, 384 (1968) (citations and footnotes omitted)).

510. 469 F.2d 552 (D.C. Cir. 1972).

511. *Id.* at 555 n.5.

512. 502 F.2d 273 (4th Cir. 1974).

513. *Id.* at 275.

514. *Id.*

timony should be excluded because it arose out of impermissibly suggestive circumstances. Craven was not a great proponent of the exclusionary rules of evidence. Although he was sometimes forced by precedent of the Supreme Court to "vote to let the criminal go free because the constable blundered,"[515] the opinions that he authored rarely did so. Nevertheless, these opinions do not reflect any less concern for avoiding the conviction of innocent defendants than do his decisions about the credibility of identification testimony.

In *Patler v. Slayton*,[516] two women had seen a person near the scene of the crime for which Patler stood trial. They each viewed Patler at improper show-ups, but the trial judge allowed them to testify only to what they saw at the scene of the crime and how it compared to Patler's appearance. Consequently, neither was subsequently able to identify him positively at trial. One testified that the person she saw "looked something like" petitioner, and the other said "only that the appearance of Patler was not 'in conflict' with the person she had seen."[517] Because of the trial judge's actions and the lack of positive identification testimony, Judge Craven declined to apply the *Wade-Gilbert*[518] exclusionary rule.[519] Even though the police had committed flagrant violations of the show-up standards, Craven held that the deterrent purpose of the exclusionary rule was served by the trial judge's refusal to allow any testimony from the show-ups.[520]

A judge sitting without a jury convicted petitioner in *Smith v. Paderick*.[521] Judge Craven felt that the identification testimony was the result of a confrontation that was " 'unnecessarily suggestive and conducive to irreparable mistaken identification.' "[522] Although such evidence should have been excluded if the trial had been to a jury, Craven held that a different standard applied to a trial before a judge.[523] He pointed out that a purpose of the exclusionary rule is to reduce

> the very appreciable danger of convicting the innocent. Positive identification testimony is the most dangerous evidence known to

515. *Paean to Pragamatism*, *supra* note 1, at 978.
516. 503 F.2d 472 (4th Cir. 1974).
517. *Id.* at 477.
518. Gilbert v. California, 388 U.S. 263 (1967); United States v. Wade, 388 U.S. 218 (1967). Under the *Wade-Gilbert* rule, positive identification testimony would have been excluded because it was obtained through an identification procedure at which Patler was denied the informed presence of counsel.
519. 503 F.2d at 476.
520. *Id.* at 477.
521. 519 F.2d 70 (4th Cir.), *cert. denied*, 423 U.S. 935 (1975).
522. *Id.* at 74 (quoting Stovall v. Denno, 388 U.S. at 302) (footnote omitted). The witness had been unable to identify petitioner until petitioner was seen with three codefendants previously identified by the witness.
523. *Id.* at 75.

> the law. That is true because it is easier to deceive ourselves than others: . . . a potential witness may be readily receptive to subtle, even circumstantial, insinuation that the person viewed is the culprit. . . . [S]uch a witness . . . is usually totally unaware of all the influences that result in his say[ing], "That is the man." And that enables him to speak with conviction and utter honesty—further enhancing the danger.[524]

Because experienced trial judges are aware of this danger and put such evidence in a proper light, Craven thought that they could hear evidence that would be excluded at a jury trial.[525] Craven's decision in *Smith* was reinforced by the fact that the trial judge had indicated that the verdict was based on the evidence as a whole, with little reliance on the identification testimony.[526] Thus, as in *Patler*, Craven saw little probability that the identification testimony caused the conviction of an innocent man.[527]

An exclusionary rule is also applicable to cases that involve defendants' rights under the fourth amendment. Judge Craven's written decisions in cases involving defendants' fourth amendment rights seem to show an even greater reluctance to apply the exclusionary rule than do his identification cases.[528] In *Anglin v. Director, Patuxent Institution*,[529] the police presented petitioner's wife with a search warrant describing twenty-seven items stolen in a burglary. She misunderstood the scope of the warrant and helped the police identify over seven hundred pieces of stolen property, which the police seized. As a result, Anglin was convicted of theft offenses in addition to the one that was under investigation when the police obtained the search warrant.

In his petition for a writ of habeas corpus, Anglin claimed that his home had been subjected to a general exploratory search and seizure of property not particularly described in the search warrant. In analyzing this contention, Judge Craven stated that the seizure must be judged "on the basis of whether it was an unreasonable extension of the valid power contained in the search warrant."[530] Because the warrant authorized entry into the home, Craven felt that the large seizure did not exceed the limits of

524. *Id.* (footnote omitted).
525. *Id.*
526. *Id.* at 75-76.
527. *Id.* at 76.
528. It should be recognized that in those cases in which Judge Craven wrote opinions upholding the introduction of various types of evidence, he was not ignoring any clear-cut mandates of the Supreme Court. If such mandates were applicable to a case, he voted in accordance with them. *See Paean to Pragmatism*, *supra* note 1, at 978. Nevertheless, it is possible to detect patterns in his decisions that were not dictated by binding precedent.
529. 439 F.2d 1342 (4th Cir.), *cert. denied*, 404 U.S. 946 (1971).
530. *Id.* at 1346.

the warrant.[531] In reaching this conclusion, he treated as "almost dictum"[532] the following language in the Supreme Court's decision in *Marron v. United States*:[533] "The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant."[534] In addition to this extremely narrow reading of *Marron*, Craven also pointed to other decisions that have created exceptions to this broad ban.[535] Under the rationale of the plain view doctrine,[536] for example, he reasoned that the search warrant gave the officers a "right to be in the position" to see the seized items; thus there should be no need to obtain another warrant to seize what was found in the course of the lawful search.[537]

Judge Craven thought that excluding evidence obtained in a lawful search because the items were not described in the warrant would "tempt the police to proceed without a warrant, for even now searches incident to arrest are not so confined. . . . To hold otherwise will again put a premium on search incident to arrest at the expense of the warrant procedure contemplated by the amendment itself."[538]

A warrantless search was the subject of *United States v. Epperson*,[539] in which defendant appealed his conviction for attempting to board an

531. *Id.*

532. *Id.* at 1347.

533. 275 U.S. 192 (1927).

534. *Id.* at 196.

535. 439 F.2d at 1347 (citing Aron v. United States, 382 F.2d 965 (8th Cir. 1967); Seymour v. United States, 369 F.2d 825 (10th Cir. 1966); Porter v. United States, 335 F.2d 602 (9th Cir. 1964); United States v. Garris, 262 F. Supp. 175 (D.D.C. 1966)).

536. *See* Harris v. United States, 390 U.S. 234 (1968).

537. 439 F.2d at 1347.

538. *Id.* at 1347-48. In United States v. Fuller, 441 F.2d 755 (4th Cir.), *cert. denied*, 404 U.S. 830 (1971), Judge Craven was again faced with a contention that a seizure of evidence was beyond the scope of the search warrant. Appellants were convicted of federal gambling charges. Included in the evidence introduced at trial was testimony about telephone conversations that FBI agents had with people who called the residence of one of the defendants during an authorized search of the residence. The warrant contained a generalized description of items relating to bookmaking operations; appellants contended that the seizure of the telephone conversations was outside the authorization of the warrant under *Marron*.

Writing for the court, Judge Craven distinguished *Marron* on the grounds that the warrant involved there was very specific and that the items seized were too unrelated to the specified articles. *Id.* at 760. On the other hand, in *Fuller*, "[T]he description is necessarily general and clearly contemplates that material relating to gambling activity but not precisely described might be seized." *Id.* Because the telephone calls were part of the gambling operation, Craven held that they were within the scope of the warrant. *Id.*

539. 454 F.2d 769 (4th Cir.), *cert. denied*, 406 U.S. 947 (1972).

aircraft engaged in interstate commerce while carrying a concealed dangerous weapon. Defendant was going towards his flight when he passed a United States Marshal who was operating a magnetometer, an instrument used to detect metal. The magnetometer indicated a very high reading, and the marshal asked defendant if he had a large amount of metal. Epperson displayed some metal objects, but the reading remained high. The marshal then searched the jacket that Epperson was carrying and discovered a loaded pistol. On appeal, Epperson contended that the use of the magnetometer was an illegal warrantless search under the fourth amendment.

Judge Craven, writing for the court, agreed that such use of the magnetometer was a search but held that it came within the exception to the warrant requirement[540] established by the Supreme Court in *Terry v. Ohio*.[541] In *Terry*, the Court sustained convictions stemming from a police officer's warrantless frisk of the outer clothing of two men who he thought were about to commit a crime. Craven explained that "[t]he limited scope and purpose of the search plus the element of danger and the necessity for swift action excused getting a warrant in *Terry*."[542] In the case of airport magnetometer searches, the warrant requirement was likewise excused because of the government's compelling interest in preventing the dangers of air piracy and because of the minor nature of the search's intrusion.[543]

Judge Craven also determined that the search was reasonable under the balancing test set out in *Terry*, a balancing of "the governmental interest in searching against the invasion of privacy which the search entails."[544] In meeting this test, Craven found the search to be "justified at its inception"[545] and "limited in scope to the circumstances which justified the interference in the first place."[546]

Judge Craven's decisions in these search and seizure cases seem to give a great deal of consideration to the practical difficulties of law enforcement. At the same time, however, he attempted to maintain the required balance of individual rights. His practical approach is reflected by this quotation from *Anglin*: " 'There is no war between the Constitution and common sense.' "[547]

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540. *Id.* at 770.
541. 392 U.S. 1 (1968).
542. 454 F.2d at 771.
543. *Id.*
544. *Id.*
545. *Id.* at 772.
546. *Id.*
547. 439 F.2d at 1347 (quoting Mapp v. Ohio, 367 U.S. 643, 657 (1961)).

FEDERAL PROTECTIVE LEGISLATION: STATUTORY CONSTRUCTION AND AGENCY DECISIONMAKING

Perhaps in no other area of the law was Judge Craven's compassion and sensitivity to people's problems more pronounced than in his review of administrative and district court decisions denying claimants benefits provided under federal protective legislation.[548] In these cases the plaintiffs characteristically had suffered serious physical injury but had been denied benefits by an agency or district court through an unfavorable construction of the relevant statute.[549] Presented with such a denial of benefits, Judge Craven seemed willing to strain statutory interpretation in order to bring claimants within the coverage of relevant statutes.[550] Judge Craven's aggressive approach in this area at times met with disapproval.

When the internal logic of a statutory scheme threatened a worthy claim that seemed to fall within the policy of the statute, Judge Craven tended to avoid the technically correct result and permit recovery. Implicit in such holdings was the notion that to follow unswervingly the logical implications of statutory language was not expressive of congressional intent. At any rate, Judge Craven was not to be the one to assent to a "technically correct" interpretation that denied a deserving claimant recovery. If, in such instances, there was indeed some substantive policy to be implemented through a technical interpretation of federal protective legislation, he was willing to let the Supreme Court or Congress instruct him.

In *Leftwich v. Gardner*[551] a claimant for social security disability benefits could medically establish that he was permanently disabled within the meaning of the statute.[552] Despite his considerable injuries, he managed to hold down a full-time job as a dishwasher.[553] The court of appeals was

548. *E.g.*, Social Security Act, 42 U.S.C.A. §§ 301-1397f (West 1974, Cum. Supp. 1977 & Supp. Pamphlet Nos. 2, 3).

549. This section will deal only with cases in which claimants were physically injured. For similar cases dealing with economic injury, see Hodgson v. Fairmont Supply Co., 454 F.2d 490 (4th Cir. 1972) (Fair Labor Standards Act); Belton v. Traynor, 381 F.2d 82 (4th Cir. 1967) (Longshoremen's and Harbor Workers' Act); Edwards v. Southern Ry., 376 F.2d 665 (4th Cir. 1967) (Interstate Commerce Act); United States v. Davison Fuel & Dock Co., 371 F.2d 705 (4th Cir. 1967) (Walsh-Healy Act). Claimants in these cases were granted recovery on appeal.

550. Judge Craven was equally vigorous in his review of agency fact findings where claimants had been denied benefits because of failure of proof. *See* Breeden v. Weinberger, 493 F.2d 1002 (4th Cir. 1974); Brandon v. Gardner, 377 F.2d 488 (4th Cir. 1967); Carico v. Gardner, 377 F.2d 259 (4th Cir. 1967).

551. 377 F.2d 287 (4th Cir. 1967).

552. 42 U.S.C. § 423(d)(1)(A) (1970) provides in relevant part: "The term 'disability' means—(A) inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment . . . ."

553. Claimant, a disabled coalminer, had obtained his job at the Pinecrest Sanitarium through political connections; however, his "position was not a 'made' job involving minimal or

asked to decide whether the claimant's ability to hold down a full-time job negated his medical proof that he was "unable to engage in any substantial gainful activity" as required by the statute.[554] To Judge Craven the solution to this problem was clear:

> In this unusual social security case, claimant Leftwich was denied disability benefits at the administrative level largely because he has the admirable motivation to insist upon working for the support of his family despite physical inability to do so. There is more logic than common sense in such a result, and there is irony not intended, we think, by the Congress.[555]

Technically, it would seem that claimant's ability to hold down a job would belie his contention that he was unable to "engage in substantial gainful activity" as required by the statute.[556] Nevertheless, Judge Craven felt that those who would have qualified for benefits, but for their sheer determination to hold down a job, should not be penalized for their admirable perseverance. Thus, he held in *Leftwich* that when a claimant could medically establish the requisite disability he would be deemed to have satisfied the statutory standard despite his ability to work full time:[557] "We think the Congress did not intend to exclude from the benefits of the Act those persons who because of character and a sense of responsibility for their dependents are most deserving."[558]

Congressional response to the decision in *Leftwich* was swift and to the point. It was overruled by 1967 amendments to the Social Security Act that gave the Secretary of Health, Education and Welfare the power to provide by regulation "the criteria for determining when services performed or earnings derived from services demonstrate an individual's ability to engage in substantial gainful activity."[559] Congress intended by these amendments to make clear that "an individual who does substantial gainful work despite an impairment . . . that otherwise might be considered disabling"[560] is not

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trifling tasks which make little or no demand on the individual and are of little or no utility to his employer . . . ." 377 F.2d at 289. The regulations provide that such "made work" "does not demonstrate ability to engage in substantial gainful activity." 20 C.F.R. § 404.1532(d) (1977).

554. 42 U.S.C. § 423(d)(1)(A) (1970).

555. 377 F.2d at 288.

556. 42 U.S.C. § 423(d)(1)(A) (1970).

557. In support of its decision the court relied upon Hanes v. Celebrezze, 337 F.2d 209 (4th Cir. 1964), and Flemming v. Booker, 283 F.2d 321 (5th Cir. 1960). In *Hanes*, however, claimant's position involved very few duties that were often performed by his family. In *Flemming*, the court borrowed the test of disability utilized in insurance policies to support its conclusion that claimant's employment did not rebut substantial medical proof of his disability.

558. 377 F.2d at 291.

559. 42 U.S.C. § 423(d)(4) (1970); *see* Harris v. Richardson, 450 F.2d 1099 (4th Cir. 1971) (discussing effect of 1967 amendments on *Leftwich*).

560. S. REP. NO. 744, 90th Cong., 1st Sess. 49 (1967), *reprinted in* [1967] U.S. CODE CONG. & AD. NEWS 2834, 2883.

disabled within the meaning of the statute.[561]

In *Smith v. Norfolk & Western Railway*,[562] a Federal Employers Liability Act[563] (FELA) case, the court of appeals was asked to consider whether plaintiff Smith sustained his injuries while an " 'employee' of the railroad within the meaning of the Act."[564] At the time he sustained his injuries Smith was not directly employed by the railroad; rather, he was an employee of a firm that unloaded automobiles for Norfolk and Western Railway Company at a place in North Carolina. As he worked on the top tier of an automobile-carrying railroad car, Smith fell to the ground and was injured. The facts in *Smith*, then, posed a difficult question regarding the scope of coverage afforded to injured workers like Smith by the statutory language, which gave a cause of action for negligence against the railroad to those workers who suffered injury "while . . . employed" by the railroad. In effect, the court in *Smith* had to determine what definition of the employment relation would satisfy the "while employed" clause of the FELA[565] in those instances when the injured worker was not directly employed by the railroad.

Judge Craven, speaking for a unanimous panel, adopted a broad definition of "employment" that significantly extended the coverage of the Act. According to Judge Craven, "if the injured worker [was] employed by an agent or adjunct of the railroad he will be treated as an employee of the railroad for purposes of the Act."[566] In support of this proposition Judge Craven cited a line of cases from the Sixth Circuit that, under similar circumstances, had found the plaintiff to be an employee of the railroad for purposes of the Act.[567] Judge Craven read these cases as establishing that "traditional concepts of agency extend the coverage of the Act."[568]

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561. The regulations adopted by the Secretary of Health, Education and Welfare pursuant to his authority under 42 U.S.C. § 423(d)(1)(A) (1970) adhere to congressional intent. *See* 20 C.F.R. §§ 404.1532 to .1534 (1977). *Id.* § 404.1532(a) provides in part:

> If an individual performed work during any period in which he alleges that he was under a disability . . . the work performed may demonstrate that such individual has ability to engage in substantial gainful activity. If the work performed establishes that an individual . . . is able to engage in substantial gainful activity, he is not under a disability.

562. 407 F.2d 501 (4th Cir.), *cert. denied*, 395 U.S. 979 (1969).

563. 45 U.S.C. §§ 51-60 (1970). Section 51 provides in relevant part: "Every common carrier by railroad while engaging in [interstate] commerce . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce." *Id.* § 51.

564. 407 F.2d at 502.

565. 45 U.S.C. § 51 (1970).

566. 407 F.2d at 502.

567. Pennsylvania R.R. v. Barlion, 172 F.2d 710 (6th Cir. 1949); Pennsylvania R.R. v. Roth, 163 F.2d 161 (6th Cir.), *cert. denied*, 332 U.S. 830 (1947); Cimorelli v. New York Cent. R.R., 148 F.2d 575 (6th Cir. 1945).

568. 407 F.2d at 502.

In fact, the use of agency concepts to determine when the coverage of the Act "extends . . . to those injured workers not directly employed by the railroad itself"[569] was a novel interpretation of the Act.[570] Prior case law had analyzed such "three-party relationship[s] between two employers and a worker"[571] strictly in terms of the more restrictive doctrine of master and servant.[572] Modern FELA cases had de-emphasized the narrow, technical tests of traditional master-servant law and instead determined the presence of an employment relationship by reference to all the relevant factors in a given situation.[573] This more flexible analysis of the employment relationship tended to extend the coverage of the Act when three-party relationships were involved; nevertheless, the more restrictive concepts of control and right to control inherent in the master-servant relationship, although interpreted in a pragmatic manner by the cases, were never abandoned.[574] Thus, the Sixth Circuit cases relied upon by Judge Craven were premised on a finding that a master-servant relationship existed between plaintiff and defendant railroad.[575] An FELA plaintiff in the Sixth Circuit, then, still faced the heavier burden of establishing a master-servant relationship between himself and the railroad, while an FELA plaintiff in the Fourth Circuit needed only to establish an agency relationship between his employer and the railroad in order to bring himself within the scope of the Act.

The decision in *Smith*, like that in *Leftwich*, was short-lived. The Supreme Court rejected *Smith* by name in *Kelley v. Southern Pacific Co.*,[576] where, on facts identical to those in *Smith*, it held that no employment relationship existed between the plaintiff and defendant railroad. The Court stressed that in three-party situations "a finding of agency is not tantamount to a finding of a master-servant relationship."[577] A plaintiff could not satisfy the employment test under the holding in *Kelley* by

569. 407 F.2d at 502.

570. *See generally* Kelley v. Southern Pac. Co., 419 U.S. 318, 323 (1974).

571. *Id.* at 324.

572. To establish an agency one need only show that the agent was employed to perform services that are part of the regular business of the principal. Smith v. Norfolk & W. Ry., 407 F.2d at 503. To establish a master-servant relationship one must further show that the employer had control or the right to control the manner in which those services were performed. Kelley v. Southern Pac. Co., 419 U.S. 318, 324 (1974).

573. Ward v. Atlantic Coast Line R.R., 362 U.S. 396 (1960) (per curiam); Baker v. Texas & Pac. Ry., 359 U.S. 227 (1959) (per curiam). Modern cases have referred to the pragmatic definition of the master-servant relationship found in the RESTATEMENT (SECOND) OF AGENCY § 220 (1957) "as a source of principles which provide a basis for the factual decision as to whether an individual is an employee for FELA purposes." Kelley v. Southern Pac. Co., 419 U.S. 318, 337 (1974) (Douglas, J., dissenting).

574. Kelley v. Southern Pac. Co., 419 U.S. 318, 336-37 (1974) (Douglas, J., dissenting).

575. *See* cases cited note 567 *supra*.

576. 419 U.S. 318, 320 (1974).

577. *Id.* at 325.

showing that his employer was an agent of the railroad; rather, the " 'control or right to control' test . . . [could] be met only if it were shown that the role of the second company was that of a conventional common-law servant."[578] Accordingly, the Fourth Circuit test for FELA coverage was found to be "too broad."[579]

Judge Craven's insights could generally be considered as valid extensions of legal doctrine that was either in its formative stages or ready for reexamination.[580] If an area of the law was settled, Judge Craven would typically desist from further exploration, even when the result reached did not satisfy his sense of justice.[581] *Leftwich* and *Smith* illustrate the risks inherent in an activist judicial philosophy. Inevitably the activist judge will be tempted to overreach. Judge Craven readily admitted that he was not immune from such temptations. His frank recognition of this predilection,

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578. *Id.* at 326. The Court laid down the following test:

> Under common law principles there are basically three methods by which a plaintiff can establish his 'employment' with a rail carrier for FELA purposes even while he is nominally employed by another. First, the employer could be serving as the borrowed servant of the railroad at the time of his injury. Second, he could be deemed to be acting for two masters simultaneously. Finally, he could be a subservant of a company that was in turn a servant of the railroad.

Id. at 324 (citation omitted).

579. *Id.* at 326. Other liberal constructions of federal protective legislation by Judge Craven have aroused spirited debate among the circuits. *See* I.T.O. Corp. v. Benefits Review Bd., 529 F.2d 1080, 1089 (4th Cir. 1975) (Craven, J., dissenting), *noted in* 54 N.C.L. REV. 925 (1976), *modified on rehearing en banc*, 542 F.2d 903 (4th Cir. 1976). Judge Craven's dissent in *I.T.O.* adopted a broad interpretation of the coverage provisions contained in the 1972 amendments to the Longshoremen's and Harbor Worker's Compensation Act, 33 U.S.C. §§ 901-950 (1970 & Supp. V 1975). A majority of the circuits that have faced the question are in agreement with Judge Craven's broad interpretation. *See* Pittston Stevedoring Corp. v. Dellaventura, 544 F.2d 35 (2d Cir. 1976) (Friendly, J.); Sea-Land Serv. v. Director, Office of Workers' Compensation Programs, 540 F.2d 629 (3d Cir. 1976); Jacksonville Shipyards, Inc. v. Perdue, 539 F.2d 533 (5th Cir. 1976); Stackman v. John T. Clark & Son, Inc., 539 F.2d 264 (1st Cir. 1976).

In Wallenius Bremen v. United States, 409 F.2d 994 (4th Cir. 1969), *cert. denied*, 398 U.S. 958 (1970), *annotated in* Annot., 12 A.L.R. Fed. 616 (1972), Judge Craven held that the exclusive remedy provision of the Federal Employees' Compensation Act, 5 U.S.C. § 8116(c) (1970), did not bar the claims of a third party for indemnity against the federal government for damages paid an injured government employee. This broad construction of the exclusive remedy provision supplements the compensatory relief available to injured government employees under the act by permitting a third party tortfeasor who has been found liable to the government employee to recover indemnity from the federal government whenever a duty to indemnify exists. Thus, under *Wallenius Bremen* the government employee could conceivably receive both compensatory relief and tort damages in the form of indemnity from the federal government. No other circuit facing this issue has adopted Judge Craven's construction of the exclusive remedy provision. *See* Annot., 12 A.L.R. Fed. 616, 626 (1972 & Supp. 1976).

580. *See, e.g.*, Arlington Coalition on Transp. v. Volpe, 458 F.2d 1323 (4th Cir.), *cert. denied*, 409 U.S. 1000 (1972); Atkins v. Schmutz Mfg. Corp., 401 F.2d 731, 734 (4th Cir. 1968) (Craven, J., dissenting), *rev'd on rehearing en banc*, 435 F.2d 527 (4th Cir. 1970), *cert. denied*, 402 U.S. 932 (1971), *discussed at* text accompanying notes 67-109 *supra*; Turner v. Blackburn, 389 F. Supp. 1250 (W.D.N.C. 1975) (three-judge court). *Turner* is analyzed in Comment, *Real Property—Changes in North Carolina's Foreclosure Law*, 54 N.C.L. REV. 903 (1976).

581. *See, e.g.*, Perkins v. North Carolina, 234 F. Supp. 333 (W.D.N.C. 1964), *discussed at* text accompanying notes 13-21 *supra*.

together with his fine sense of the limits of the judicial power, however, sharply checked his propensity to engage in such judicial "frolics and detours."

A Concluding Note

Actions sounding in tort and contract arising under diversity jurisdiction or under federal acts[582] were quite special to Judge Craven, for the factual questions they presented demanded human understanding as well as legal expertise. His opinions in this area are distinguished by an intense, probing review of the facts.[583]

An excellent example of Judge Craven's method is found in the diversity case of *Webb v. Old Salem, Inc.*[584] The case presented a question of contract interpretation that could be resolved only by reference to the behavior and status of the parties. Webb, an experienced restorer of old buildings, had contracted with Old Salem to restore two rooms in an old house owned by Old Salem. The contract provided that Old Salem was to "*furnish and pay for the scaffolding and one or two painters to assist* [Webb] *in the work as necessary*."[585] Webb was injured when the scaffolding erected by the painters collapsed. He then sought damages alleging that the scaffold had been negligently erected by agents of Old Salem. Webb contended that "under their contract, Old Salem assumed the duty of safely erecting the scaffolds . . . ."[586] The district court held that Smith could not recover for defendant's negligence in assembling the scaffold since he himself had been responsible for supervising that assembly.[587] Implicit in the district court's interpretation of Old Salem's contractual obligation to

582. Generally, the result on appeal would be favorable to plaintiff. *See, e.g.*, Chestnut v. Ford Motor Co., 445 F.2d 967 (4th Cir. 1971) (products liability); United States v. Kirkman, 426 F.2d 747 (4th Cir. 1970) (bail bond practice); Clark v. United States, 402 F.2d 950 (4th Cir. 1968) (Federal Tort Claims Act); Rogers v. United States, 397 F.2d 12 (4th Cir. 1968) (Federal Tort Claims Act); United States v. Glassman Constr. Co., 397 F.2d 8 (4th Cir. 1968) (Miller Act); Harner v. John McShain, Inc., 394 F.2d 480 (4th Cir. 1968) (negligence). *But see, e.g.*, Sacilotto v. National Shipping Corp., 520 F.2d 983 (4th Cir. 1975), *cert. denied*, 423 U.S. 1055 (1976) (admiralty); Joye v. Great Atl. & Pac. Tea Co., 405 F.2d 464 (4th Cir. 1968) (negligence); Langley v. Turner's Express, Inc., 375 F.2d 296 (4th Cir. 1967) (negligence).

583. *See, e.g.*, Norfolk Shipbuilding & Drydock Corp. v. M/V Harry W. Adams, 537 F.2d 1222 (4th Cir. 1976) (admiralty); Johnson v. United States, 528 F.2d 489 (4th Cir. 1975) (Federal Tort Claims Act); Mays v. Pioneer Lumber Corp., 502 F.2d 106 (4th Cir. 1974), *cert. denied*, 420 U.S. 927 (1975) (negligence); Golden v. Oil Screw Frank T. Sherman, 455 F.2d 133, 135 (4th Cir.) (Craven, J., dissenting), *cert. denied*, 408 U.S. 924 (1972) (admiralty); Elkins v. United States, 429 F.2d 297, 301 (4th Cir. 1970) (Federal Tort Claims Act) (Craven, J., dissenting); Rogers v. United States, 397 F.2d 12 (4th Cir. 1968) (Federal Tort Claims Act).

584. 416 F.2d 223 (4th Cir. 1969).

585. *Id.* at 224 (emphasis by court).

586. *Id.* at 225.

587. *Id.*

"furnish and pay for scaffolding"[588] was the assumption that Webb was essentially an ordinary painter. As most commercial painters set up their own scaffolding, it followed that Old Salem's duty under the contract was limited to the furnishing of materials for the scaffolds. On appeal, Judge Craven disagreed with this interpretation of Old Salem's contractual duty. He thought that Webb's distinctive professional skills and his well established working habits were crucial to the meaning of the term "scaffolding" in the contract.[589] Judge Craven's convincing description of Webb's career and method of operation made it clear that Webb was no ordinary painter and that the contractual duty to provide safe scaffolding should therefore rest with Old Salem:

> Beginning when he was 14 years old, and continuing steadily until he was 66, Robert Webb worked at painting and restoration of murals and building interiors. . . . Though sometimes required to use a scaffold to reach his selected work area, never in his long career had Webb erected or moved scaffolding into place. . . .
>
> . . . .
>
> Webb was no ordinary painter working under contract, who might properly be thought willing to assume the more menial burdens of setting up his working environment, such as constructing mechanical contrivances for his own elevation to the work area. Instead, he was a uniquely skilled artisan, sought after for his expertise in restoration and in teaching subordinates and directing their work on restoration projects. . . . The 66-year-old Webb had never erected scaffolding nor moved it into place in his life. We think it plain that he never intended to assume the burden for doing so at this late date in his career. Webb's background and method of operation were well known to Old Salem. It seems to us very unlikely that the company intended to pay handsome remuneration to an artist who would then spend even a part of his time in the occupation of a relatively unskilled carpenter.[590]

Thus Webb, a journeyman painter with little bargaining power in the eyes of the district judge, was found by Judge Craven to be a skilled artist who possessed considerable bargaining power. Craven thus concluded that by "scaffolding" the parties contemplated a "system of scaffolding" that would be set up by Old Salem.

Judge Craven's concern with attaining a detailed understanding of the human problems underlying the litigation was not limited to cases that

588. *Id.* at 224.

589. *Id.* at 225-26. "Scaffolding" could mean "materials for scaffolds" to be furnished by Old Salem and assembled by Webb or "a system of scaffolds" to be erected by Old Salem for Webb. *Id.* (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1961)).

590. *Id.* at 224-26.

turned on "question[s] or opinion with respect to the facts."[591] It was Judge Craven's habit, even in cases dominated by technical questions of law, to keep in sharp perspective the human "stuff" that had given birth to the legal issues being disputed.[592] Such keen involvement with the human dimensions of a case, as has been previously noted,[593] tempted the judge to depart from the legal framework. But to Judge Craven the presence of such tension was absolutely crucial to the proper disposition of a case. The judge, he felt, had to feel the conflicting demands of life and logic for ultimately the "life of the law [was] not logic but experience."[594] Judge Craven found in the following verse of Yeats an appropriate description of this attitude: "God guard me from those thoughts men think In the mind alone; He that sings a lasting song thinks in (the) marrow-bone."[595]

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591. Nuckoles v. F.W. Woolworth Co., 372 F.2d 286, 288 (4th Cir. 1967).

592. *See, e.g., In re* Braverman, 549 F.2d 913 (4th Cir. 1976) (controversial attorney); I.T.O. Corp. v. Benefits Review Bd., 529 F.2d 1080, 1089 (4th Cir. 1975) (Craven, J., dissenting), *modified on rehearing en banc*, 542 F.2d 903 (4th Cir. 1976) (pragmatic definition of "maritime employment"); Evans v. Wright, 505 F.2d 287 (4th Cir. 1974) (power of federal judge to comment on the evidence); United States v. Snider, 502 F.2d 645 (4th Cir. 1974) (tax prosecution of controversial Quaker defendants), *discussed at* text accompanying notes 49-66, 368-76 *supra*; United States v. Kirkman, 426 F.2d 747 (4th Cir. 1970) (bail bond practice—inexperienced sureties); United States *ex rel.* Tobias v. Laird, 413 F.2d 936 (4th Cir. 1967) (habeas corpus—refusal of Army to release enlisted man), *discussed at* text accompanying notes 358-60 *supra*; Brunwasser v. Suave, 400 F.2d 600 (4th Cir.), *cert. denied*, 393 U.S. 1083 (1968) (saga of disputatious attorney).

593. *See* text accompanying notes 582-83 *supra*.

594. *Paean to Pragmatism, supra* note 1, at 980 (citing Holmes' aphorism).

595. *Id.* (quoting from W.B. Yeats, "A Prayer for Old Age") (footnote omitted).