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tained would mitigate in favor of the police considering virtually all arrest records essential. An opportunity for a collateral attack upon the police discretion would be beyond the means of most individuals and, consequently, would not constitute a viable remedy. A procedure similar to that used in issuing search warrants would serve the dual purpose of providing objectivity and alleviating the necessity of the individual taking the initiative in protecting fundamental rights. In addition, a high visibility decision-making process would facilitate judicial establishment of standardized guidelines by which the close cases could be resolved. Admittedly, this procedure is not demanded by the language of the constitution. Nevertheless, the courts have traditionally been willing to require particular procedures when it is apparent they are essential to insure constitutionally protected rights.[52]

Constantly expanding capacity to secure and maintain massive quantities of data on individuals has placed the right to privacy on the cutting edge of the law. *Menard* represents the beginning of more intense judicial involvement in this area. However, a definitive demarcation by appellate courts of the boundaries of police rights in the record retention context is critical.

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Constitutional Law—The North Carolina Public Assistance Lien Law and Current Constitutional Doctrine

"Beneficient provisions for the poor, the unfortunate and orphan [is] one of the first duties of a civilized and Christian state . . . ."[1] Such was the philosophy of "welfare" when the framers wrote the North Carolina Constitution of 1868. By mid-twentieth century, however, the "beneficence" associated with public assistance in North Carolina was sharply curtailed for some groups among the poor. The change came with the enactment of North Carolina's first "welfare lien" laws.[2] For the first time in the state's history, public assistance was conditioned on eventual repayment through statutory liens on real property.[3]

[52] An excellent example of a procedure established by the courts to secure a constitutionally based right is that outlined in Miranda v. Arizona, 384 U.S. 436 (1966).

[1] N.C. CONST. art. XI, § 7 (1868).

[2] N.C. GEN. STAT. §§ 108-29 to -37.1 (Supp. 1969).

[3] As recently as 1969, thirty-three other states had some type of repayment provisions under federal-state funded programs. While such provisions are not required

Though there is a dearth of literature and case law on North Carolina's lien laws,[4] some of the federal constitutional doctrine that has evolved within the last two or three decades is highly relevant to the North Carolina statute and its administration. It is significant that the statute has never been challenged on constitutional grounds and that lien laws throughout the nation have generally escaped such a fate. The poverty of the potential litigants and their lack of adequate representation have made them for the present, at least, part of a silent minority. The important issues confronting North Carolina welfare legislation, however, can be highlighted by a brief examination of developing constitutional doctrine as it has related to other lien laws, welfare legislation generally, and allied fields.

In *Snell v. Wyman*[5] the United States Supreme Court affirmed without opinion a three-judge district court decision rejecting a challenge to the New York repayment law. Under the New York law, a person otherwise eligible for public assistance who owns real or personal property is deemed to have an "implied contract" with the welfare department for the full amount of assistance rendered.[6] Among the four plaintiffs in *Snell* was a nineteen-year-old mother with three children receiving AFDC payments. In 1967 she was involved in an auto accident, and as a condition to her continued receipt of public assistance, she was required to execute an "assignment of proceeds of lawsuit." This document served to assign the proceeds of her personal injury claim to the Department of Social Services.[7] Another plaintiff whose income was eighty-six dollars per week, and who was also receiving AFDC to help support his eight children, suffered personal injuries in the public housing project where he lived and was forced to quit his job. In 1967 this plaintiff received four hundred dollars from the New York City housing authorities as compensation for his injury,

by the states, and while the original Social Security Act was silent on state reimbursement, Congress has acquiesced to those states requiring repayment and now provides that a proportionate amount of money collected shall go to the federal government. HEW, CHARACTERISTICS OF STATE PUBLIC ASSISTANCE PLANS UNDER THE SOCIAL SECURITY ACT, PUBLIC ASSISTANCE REPORT No. 50 (1964 ed.).

[4] See R. Ligon, North Carolina Old Age Assistance Lien Law, March, 1960 (unpublished study located at the Institute of Gov't, Chapel Hill, N.C.).

[5] 393 U.S. 323 (1969) (per curiam), *aff'g*, 281 F. Supp. 853 (S.D.N.Y. 1968).

[6] N.Y. Soc. WELFARE LAW § 104 (McKinney 1966).

[7] 281 F. Supp. at 857. The Attorney General of North Carolina has stated that although proceeds from a wrongful death action are not "assets" of an estate under N.C. GEN. STAT. § 28-173, if the judgment of the court in a criminal prosecution for manslaughter directs that an amount of money be paid an administrator of the deceased-recipient, those funds do become assets of the estate that can be applied to an assistance claim. See R. Ligon, *supra* note 4, at 32.

but these funds were soon exhausted. The Department of Social Services required endorsement over of one of three disability insurance checks and asserted a "notice of lien" in the amount of 420 dollars for assistance furnished after the accident.[8] In addition to the liens on potential or actual recoveries for personal injuries, liens on an interest in real property and on an assignment of the interest of an insured recipient in life insurance policies were also involved.[9]

The plaintiffs argued that the repayment provisions were "arbitrary, oppressive, and irrational," that the state was defeating its own announced objective of seeking to make welfare recipients productive and self-supporting, and that the laws were contrary to the plaintiffs' own desires for human dignity and independence. They also argued that the state's only "conceivable rationale" for these laws was to save money but pointed out that in 1966 of 1,200,000,000 dollars spent for public aid, only 5,000,000 dollars was recovered through liens.[10]

In rejecting the due process arguments, the three-judge court stated that it could hold the statutes unconstitutional only if it were invested with a power under the due process clause to invalidate state laws on the basis that they might be "improvident" or "unwise."[11] Yielding to the Supreme Court's traditional nonintervention policy in cases in which the major impact is "economic," the court said:

> [I]t is not for federal judges to be "liberal" or "conservative" in advancing and ordering measures which undoubtedly related to basic matters of human decency. . . . The constricted test in this forum is one of minimal rationality.[12]

Plaintiffs also argued that they were denied equal protection since the state supplied many benefits for which it did not seek repayment and discriminated between those who had property and those who did not. With equal finesse the court blunted these arguments:

> Like the life of the law generally, the Fourteenth Amendment was not designed as an exercise in logic. It is ancient learning by now that a classification meets the equal protection test "if it is practical, and is not reviewable unless palpably arbitrary."[13]

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[8] 281 F. Supp. at 858.
[9] *Id.* at 860.
[10] *Id.* at 861 n.16.
[11] *Id.* at 862.
[12] *Id.* at 863.
[13] *Id.* at 865. The California Supreme Court has held that the estate of a daughter could not be held liable for the mother's care at a state mental institution. The

Snell is significant because it is patently inconsistent with most of the equal protection standards established by the Supreme Court during the past quarter century, sometimes referred to as the "new" equal protection.[14] Where the impact of legislation has fallen on fundamental social concerns.[15] as opposed to purely economic relations, the Court has demanded a close analysis of several elements, including the legitimacy of the classification established by the law, the relationship between the classification and the purpose that the state is trying to promote, and finally, the validity of the state's purpose itself.[16] Professor Karst has summarized the constitutional effect of the new equal protection:

> What emerges from the new equal protection cases is an extremely flexible sliding scale for measuring the required degree of intensity

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state's attempt to recover was deemed a denial of equal protection in that "the cost of maintaining the state's institution, including the provision of adequate care for its inmates, cannot be arbitrarily charged to one class in society." Department of Mental Hygiene v. Kirchner, 62 Cal. 2d 586, 400 P.2d 321, 43 Cal. Rptr. 329 (1965). For general commentary on welfare lien laws see Graham, *Public Assistance: The Right to Receive; The Obligation to Repay*, 43 N.Y.U.L. REV. 451 (1968); O'Neil, *Unconstitutional Conditions: Welfare Benefits With Strings Attached*, 54 CALIF. L. REV. 443 (1966); Comment, *Snell v. Wyman and the Constitutional Issues Posed by Welfare Payments Provisions*, 55 VA. L. REV. 177 (1969). For a biting attack on various state lien laws, in which the North Carolina statute is criticized, see SOUTH TODAY, July-August, 1970, at 4.

[14] See Horowitz & Neitring, *Equal Protection Aspects of Inequalities in Public Education and Public Assistance Programs from Place to Place Within A State*, 15 U.C.L.A.L. REV. 787 (1968); Karst, *Invidious Discrimination: Justice Douglas and the Return of the "Natural-Law-Due-Process Formula,"* 16 U.C.L.A. L. REV. 716 (1969).

[15] Outside the area of free expression, the Supreme Court has labeled the following as "fundamental" rights: voting, education, procreation, marriage, fairness in the criminal process, and the right to travel. Karst, *supra* note 14.

In Goldberg v. Kelly, 397 U.S. 254, 265 (1970), the Court declared welfare benefits a matter of "statutory entitlement" for those qualified. Justice Brennan, writing for the court, rejected the idea that public assistance was a mere charity, emphasizing that it was a "means to 'promote the general Welfare, and secure the Blessings of Liberty to ourselves and our posterity.'" Judge Frankel, writing for the three-judge court in *Snell* recognized that the "primitive needs of desperate people" is a different matter than purely economic concerns but refused to give such a difference constitutional distinction. The court added that its decision was in no way to be construed that welfare was not a "right" coming within the scope of the fourteenth amendment. 281 F. Supp. at 863 n.19.

[16] In cases in which classifications have been based on race, wealth or some other nonvoluntary status, the Supreme Court has insisted on a tight connection between the challenged legislation and the state's objective. A mere "rational" nexus is clearly insufficient. In such cases involving "fundamental" rights, the court will also weigh the state interests carefully, even if they concededly have validity. *See* Shapiro v. Thompson, 394 U.S. 618 (1969); Harper v. Virginia State Bd. of Elections, 383 U.S. 663 (1966).

> of judicial scrutiny of the legislative classification . . . . The more the victims of legislative classification appear to be disadvantaged, the less need there is for their interests to be basic. . . . The result . . . is not that the claim of constitutional right is absolute, but that it will prevail unless it is outweighed by a strong showing of justification by the state.[17]

The court in *Snell* clearly chose not to conform to the new equal protection formula,[18] though that formula has been adhered to in other cases dealing with welfare issues.[19] The inconsistencies that mark this area of the law, as well as other more stable constitutional doctrines, have important ramifications for the North Carolina welfare lien law.

North Carolina's first welfare lien law was created in 1951, but it applied only to aged persons receiving assistance.[20] In 1963 the General Assembly adopted a similar law applicable to those receiving aid under the permanently and totally disabled category,[21] and in 1969 the lien laws were amended and consolidated without significant change.[22] Assistance to those aged or disabled persons who owned any real property was conditioned on their agreeing to a lien for the amount of assistance which they might receive, while aid under the other federally and locally funded programs remained unconditional.[23] At the termination of the recipient's aid or at his death, the county department of social services determines the amount of real property owned by the recipient including that acquired subsequent to the lien; the department also determines if the recipient owns personal property worth over one hundred dollars. In the event the recipient or his estate satisfies *either* of these requisites, the county department prepares a report, and the county attorney then enforces the lien.[24] Unlike the New

[17] Karst, *supra* note 14, at 744-45.

[18] In another case involving the state's discretion in allocating welfare funds, the Court recognized that public assistance "involves the most basic economic needs of human beings" but followed *Snell* in applying minimum rationality standards. Dandridge v. Williams, 397 U.S. 471, 485 (1970).

[19] Goldberg v. Kelly, 397 U.S. 254 (1970); Shapiro v. Thompson, 394 U.S. 618 (1969).

[20] N.C. GEN. STAT. § 108-30.1 (1966).

[21] N.C. GEN. STAT. § 108-73.12a (1966).

[22] N.C. GEN. STAT. §§ 108-20 to -37.1 (Supp. 1969).

[23] Recipients of Aid for Dependent Children (AFDC), Aid to the Blind (AB), and those receiving "general assistance" money are unaffected by the lien laws.

[24] N.C. GEN. STAT. §§ 108-36, -37 (Supp. 1969). The liens are renewable provided the recipient continues to receive public assistance and an additional statement is filed and properly indexed. Once the assistance terminates the lien is not renewable, and no action may be brought to enforce the lien more than ten years after the last day on which assistance was paid nor more than three years after

York lien statute, which provides for an implied contract between the department of social services and the recipient, the North Carolina law places a "general claim and a lien" on the real property of the person. The state courts have held that when the recipient dies the claim must first be satisfied from personal property in the same manner other claims against the estate are satisfied. When the personal property is insufficient, the real property is sold to satisfy the obligation.[25]

Whether the North Carolina statute as presently administered could withstand the Court's rigorous scrutiny under the "new" equal protection doctrine, or even meet some of the relaxed standards as expressed in *Snell* is open to debate. While the Supreme Court has said that where the state regulates or interferes with fundamental freedoms, " '[p]recision of regulation must be the touchstone,' "[26] the major infirmity of the North Carolina law rests in its lack of precision, both in framing and administration.

It is significant that the majority in *Snell* recognized the need for some precision with regard to the nature of the property that could be subject to the liens. Acknowledging that there are administrative qualifications upon the state's right to recover, the court pointed out that except in cases of fraud, no reimbursement is sought from property acquired by earnings after a recipient has gone off welfare. The fact that such earnings are exempted, in the words of the court, "leave wholly unfettered the desire and search for independence through gainful work."[27] The New York statute was designed to catch primarily "windfall" property, *i.e.*, any property not "gainfully earned."

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the date of the recipient's death. N.C. GEN. STAT. § 108-33 (Supp. 1969). No enforcement is possible as long as the recipient, or after his death his surviving spouse, dependent minor child, or dependent adult child with a mental or physical disability (and incapable of self-support) is occupying the property as a homesite. N.C. GEN. STAT. § 108-34 (Supp. 1969).

[25] Brunswick County v. Vitou, 6 N.C. App. 54, 169 S.E.2d 234 (1969). The Attorney General has given his opinion that the former old age assistance lien did not apply to property held by the entirety, although it does apply to tenancies in common. See Letter from Attorney General to W.E. Bateman, subject: S.M. Woodley, 89-448-1249; Assistance Lien; Tenancy by the Entirety; Tenancy in Common; dated 24 May 1967. (On file at the Institute of Gov't, Chapel Hill, N.C.). N.C. GEN. STAT. § 108-31 (Supp. 1969), makes the filing of the lien "due notice" to the recipient of the obligation against his real property.

[26] Griswold v. Connecticut, 381 U.S. 479, 498 (1965), *quoting* NAACP v. Button, 371 U.S. 415, 438 (1963).

[27] 281 F. Supp. at 862. Judge Kaufman, dissenting in *Snell*, was dissatisfied with the majority's view that the administrative qualifications were adequate, choosing not to discern merely between property "gainfully earned" and other

The North Carolina statute makes *no* distinction between "windfall" and earned property but subjects *all* property, earned or otherwise acquired, to the claim or lien.[28] The only "precision" required by North Carolina is that personal property be exhausted before realty, and that mandate is not even statutory.[29] The rationale for North Carolina's lack of precision in determining which property is susceptible would seem to be that those who are aged or permanently and totally disabled no longer enjoy an "earning capacity" at the time they receive public assistance, and that there is only a minimal chance that such persons will gainfully earn any property after receiving aid. This does not, however, explain the consequences of the liens upon property gainfully earned before the relief is sought.

The administration of the welfare lien in North Carolina is left almost totally in the hands of the counties, and the county attorneys enforce the law at the appropriate time. There is evidence that enforcement throughout the state is not uniform and that in at least one county the lien laws are not enforced at all.[30] An amendment to the law in 1969 gave the Boards of County Commissioners discretionary power to release any lien if, in its opinion, such a release would result in a larger net recovery for the county, state and federal governments.[31] It is clear that unevenness of administration raises constitutional questions even under "traditional" equal protection notions.

The Supreme Court has held that a state, in deciding whether laws shall operate statewide or only in selected territories, has great latitude.[32] Territorial uniformity is not a constitutional requirement, and the legislature is free to determine priorities for its local subdivisions.[33] Such broad discretion applies to welfare payments, and the state may allocate its resources as it sees fit provided there is a rational basis.[34] A state, however, may not "purposefully" discriminate in applying an otherwise uniform law. The constitutional principle was set out in *Snowden v. Hughes*:[35]

property. He suggested that the guide for the welfare officials should not be the "mere *availability of some property* but a genuine *ability to repay* without sacrificing the basic incidents of self-support." *Id.* at 873.

[28] N.C. GEN. STAT. §§ 109-29, -35 (Supp. 1969).

[29] See text preceding note 25 *supra.*

[30] Yancey County has not enforced the lien law since 1958 according to one social services official. "Local politics" was the only explanation given.

[31] N.C. GEN. STAT. § 108-37.1 (Supp. 1969).

[32] Salsburg v. Maryland, 346 U.S. 545 (1954).

[33] *Id.* at 552.

[34] Dandridge v. Williams, 397 U.S. 471, 487 (1970).

[35] 321 U.S. 1 (1944).

> The unlawful administration by state officers of a state statute fair on its face, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination. This may appear on the face of the action taken with respect to a particular class of persons . . . or it may only be shown by extrinsic evidence showing a discriminatory design to favor one individual or class over another not to be inferred from the action itself.[36]

Since *Snowden* the Court has stated that "discrimination-in-fact" is bad even when it "reflects *no* policy, but simply arbitrary and capricious action."[37] This would apparently condemn inefficient or haphazard administrative action, even if not intentionally discriminatory.[38] There has been some suggestion that even purposeful and apparently rational variations within a state may be subject to closer scrutiny if the interests involved are "fundamental":

> Even though . . . territorial variations may not always constitute a denial of equal protection there may be less justification for such a permissive attitude where interests such as education are involved. To be constitutional variations of this kind have to be shown to be essential to some overriding state interest.[39]

An equally important question connected with the "new" equal protection doctrine, and one which involves the North Carolina statute, is the determination of when the judiciary will look behind the "purpose" of the legislation to analyze the "motives" of the legislature. Early constitutional doctrine shunned looking to the "motives" of Congress, as this was deemed a violation of the separation of powers principle.[40] In later years, however, the Supreme Court has at least given a hard look at the underlying purpose if not the motives behind some legislation, namely that serving to maintain school segregation[41] or foster racial discrimination in voting.[42]

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[36] *Id.* at 8, *citing* Yick Wo v. Hopkins, 118 U.S. 356, 373-74 (1886).

[37] Baker v. Carr, 369 U.S. 186, 226 (1962).

[38] J. Skelly Wright, writing for the District Court for the District of Columbia, has denied that deliberate discrimination is essential for a violation of equal protection. "[G]overnment action which without justification imposes unequal burdens or awards unequal benefits is unconstitutional." Hobson v. Hansen, 269 F. Supp. 401, 497 (D.D.C. 1967).

[39] *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1096 (1969).

[40] Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810).

[41] See Griffin v. County School Bd., 377 U.S. 218 (1964); Hall v. St. Helena

The ostensible purpose of the North Carolina lien law is to reimburse county and state treasuries for aid to the aged and disabled, thus allowing more qualified poor persons to receive assistance. However, a brief review of some of the statistics supplied by the Department of Social Services casts doubt on this assumption.[43] For the period beginning July 1, 1970, and ending December 31, 1970, the net collection for all North Carolina counties reporting lien collections was 234,354 dollars. Fifty-two out of one hundred counties collected old age assistance liens, and thirty-eight collected disability liens during this period. From the total, the amount returned to the federal government was 186,167 dollars, or nearly eighty per cent. The state and counties then split the remainder equally—24,093 dollars going to the state treasury and an average of 395 dollars left for each of sixty-one counties, the total number of counties reporting lien collections.[44]

Contrasting the total contributions to the two programs by the state and the counties with the lien reimbursements during the six month period, the latter appears miniscule. According to the Department of Social Services, the total amount expended by the state and counties for the period was 6,655,022 dollars for the two assistance programs.[45] Thus, the total liens collected comprised only 3.5 per cent of the amounts expended by the state and counties for public assistance; but since eighty per cent of that amount collected was returned to the federal treasury, only 0.72 per cent expended by the state and counties was actually recouped by them through the liens.

The conclusion to be drawn from an overview of the statistics is that reimbursement is not the only or perhaps not even the major reason for the continuation of the liens. The federal government and the taxpayers in all fifty states are the benefactors of lien collections in North Carolina.

Parish School Bd., 197 F. Supp. 649 (E.D. La.), *aff'd per curiam*, 368 U.S. 515 (1962).

[42] Davis v. Schnell, 81 F. Supp. 872 (S.D. Ala.), *aff'd per curiam*, 336 U.S. 933 (1949). See generally *Developments in the Law—Equal Protection, supra* note 39, at 1091-1101.

[43] The statistics appearing herein were made available upon request from the Finance and Budget Section of the Department of Social Services, Raleigh, North Carolina.

[44] Nine of the thirty-eight counties reporting collections of disability liens did not collect old age liens. Attorneys' fees for the collection of the liens totaled 37,698 dollars over the six-month period, well over 100 percent of the total amount returned to the counties that enforced the claims.

[45] 3,342,802 dollars were expended on old-age assistance and 3,312,219 dollars on aid to the disabled. The state and counties each contributed fifty percent of the total.

The only fair deduction is that the liens are intended to deter the aged and permanently and totally disabled from seeking public assistance. In view of the fact that welfare assistance is now regarded as a "statutory entitlement"[46] instead of a charitable privilege it is questionable whether such deterrence is constitutionally permissible. Even by rational standards, classifying the aged and the disabled into such a category would hardly stand analysis if deterrence is in fact a purpose behind the laws. It is significant in this regard that those receiving "general assistance" in North Carolina are persons ineligible for one of the federally-supported categorical public assistance programs, and *all* of the funds for general assistance must be raised at the county level at the discretion of the county commissioners.[47] Though the need for reimbursement would seem critical at the local level no lien laws are applicable. Clearly, if North Carolina's primary purpose in enforcing the lien is to provide reimbursement, the present law is wholly unsatisfactory.

A narrow reading of recent judicial decisions would indicate that welfare repayment laws, at least in the short run, will remain immune from attack by the courts. A broader view of recent equal protection doctrine, however, both in the welfare field and in other areas where disadvantaged persons and fundamental rights are concerned, suggests that such immunity may not endure.[48] North Carolina's statute is vulnerable to an attack under the new equal protection doctrine because of the imprecision in its composition, the lack of uniformity in its enforcement and the failure of the state to achieve its purported purpose. An analysis of the statute and its administration lead to the conclusion not only that its provisions raise constitutional questions but that its preservation is due to political expediency rather than fiscal responsibility.

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[46] Goldberg v. Kelly, 397 U.S. 254, 262 (1970).

[47] M. Thomas, Jr., *A Guide To Social Services in North Carolina* 34 (1970). The author cites authority for the fact that North Carolina was forty-first in the nation in 1968 in per capita annual income and that there are many needy people who are ineligible because they do not meet all of the qualifications established. He gives as an example a father earning sixty dollars per week who is living in the home with his wife and six children. His children are ineligible for AFDC because they have not been deprived of parental support. *Id.* at 32.

[48] *But see* Wyman v. James, 39 U.S.L.W. 4085 (U.S. Jan. 12, 1971), in which the court rejected a fourth amendment challenge to a New York regulation which requires home visits as a condition for receiving assistance. This decision may portend a movement away from the "new" equal protection approach in welfare cases. *But cf.* Note, *Poverty Law—Is a Search Warrant Required for Home Visitation by Welfare Officials?* 48 N.C.L. REV. 1010 (1970) (author reached a contrary conclusion in writing on the court of appeals decision).