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anda has been overruled in effect by *Mosley*. However, the case affirms *Miranda* in name and uses language from *Miranda* to identify the first constitutionally required police procedure for custodial interrogations.

But protecting a procedural right with the Constitution is of little help to the accused if the "constitutional" procedure is defined so vaguely that the police and courts can easily circumvent it. This vagueness, combined with the Court's attitude of expanding the admissibility of custodial confessions and a willingness to read facts to fit the procedural requirement, seems certain to have the effect of freeing the police from the restraint of *truly* honoring the rights of the accused.

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Criminal Procedure—The Right to Proceed Pro Se: Judicial Gymnastics with the Sixth Amendment

Within the past two decades the United States Supreme Court has been zealous in ensuring the right of defendants in state criminal prosecutions to receive the assistance of counsel. The sixth amendment guarantee of assistance of counsel to defendants in federal criminal prosecutions has been extended to state criminal prosecutions under the auspices of the due process clause of the fourteenth amendment.[1] The underlying premise of the "assistance of counsel" cases is that inherent unfairness exists in any criminal proceeding in which the accused has been denied the assistance of counsel to prepare his defense.[2] Arguably, a natural extension of this reasoning might indicate that *any* conviction obtained in a criminal trial absent representation by an attorney for the accused is per se tainted and unfair. However, such an extension clashes with an attempt by a criminal defendant to exercise the right of self representation recognized on either a constitutional or a statutory level by most state and all federal courts. This quandary raises the question whether a state may constitutionally deny a valid request by a

1. Argersinger v. Hamlin, 407 U.S. 25 (1972) (requirement of assistance of counsel before imprisonment for any offense); Gideon v. Wainwright, 372 U.S. 335 (1963) (requirement of assistance of counsel for defendants in state felony prosecutions); *see* Powell v. Alabama, 287 U.S. 45 (1932) (requirement of assistance of counsel for defendants in state capital offense prosecutions).

2. Gideon v. Wainwright, 372 U.S. 335, 344 (1963).

criminal defendant to proceed *pro se* and instead require that the defendant be represented by an attorney, to forestall any subsequent claim of prejudice by the accused based upon the absence of legal guidance. Facing this novel issue in *Faretta v. California*,[3] a divided United States Supreme Court unequivocally held that state criminal defendants have a constitutional right to proceed *pro se* upon a free and knowledgeable waiver of assistance of counsel.[4]

The *Faretta* case arose out of a grand theft charge filed against the defendant, Anthony Faretta, in the Superior Court of Los Angeles, California. The trial judge granted defendant's request to proceed *pro se* but retained flexibility to withdraw the ruling if it should later become evident to the court that Faretta was incapable of effective self-representation.[5] The judge subsequently examined Faretta's ability to represent himself and withdrew Faretta's permission to proceed *pro se* after expressing dissatisfaction with Faretta's responses concerning questions of law.[6] The trial judge appointed a defense counsel[7] and denied Faretta's requests for permission to act as co-counsel, forcing Faretta to present his defense solely through his attorney.[8] After his subsequent

3. 95 S. Ct. 2525 (1975). Mr. Justice Stewart wrote the majority opinion. Mr. Chief Justice Burger, Mr. Justice Blackmun, and Mr. Justice Rehnquist dissented and joined in separate opinions written by Mr. Chief Justice Burger and Mr. Justice Blackmun.

4. *Id.* at 2541.

5. The trial court based this ruling upon an earlier decision of the Supreme Court of California in People v. Sharp, 7 Cal. 3d 448, 499 P.2d 489, 103 Cal. Rptr. 233 (1972). In *Sharp*, the California Supreme Court held that an accused had no constitutional right of federal or state origin to proceed *pro se* in California criminal trials. Consequently, under the *Sharp* rule, permission to proceed *pro se* was a matter of discretion for the trial judge. *Sharp* was decided under CAL. CONST. art. I, § 13 (1879): "In criminal prosecutions, in any court whatever, the party accused shall have the right . . . to appear and defend in person *and with counsel* . . . . (emphasis added)." Before the *Sharp* decision was announced, section 13 was amended to clarify the status of self-representation in California (the amendment was prospective only): "In criminal prosecutions, in any court whatever, the party accused shall have the right . . . to have the assistance of counsel . . . and to be *personally present with counsel. . . . The Legislature shall have power to require the defendant in a felony case to have the assistance of counsel* . . . ." CAL. CONST. art. I, § 13 (emphasis added). In contrast, thirty-six state constitutions explicitly provide criminal defendants with the right to proceed *pro se*. Citations to the state constitutions are found in 95 S. Ct. at 2530 n.10.

Additionally, several state courts have declared that the United States Constitution guarantees the right to proceed *pro se*. *E.g.*, State v. Mems, 281 N.C. 658, 190 S.E.2d 164 (1972); Zasada v. State, 19 N.J. Super. 589, 89 A.2d 45 (App. Div. 1952).

6. Faretta was a high school graduate who had previously proceeded *pro se* in a criminal prosecution. 95 S. Ct. at 2527. For excerpts from the colloquy between the trial judge and Faretta at the sua sponte hearing, see *id.* at 2528 n.3.

7. Faretta's dissatisfaction with the public defender's office had precipitated his request to proceed *pro se*. *Id.* at 2527.

8. *Id.* at 2529.

conviction and the exhaustion of all avenues of appeal within the California court system,[9] Faretta's petition for certiorari was granted by the United States Supreme Court.[10]

The Supreme Court articulated the *Faretta* issue as "[w]hether the Constitution forbids a State from forcing a lawyer upon a defendant . . . ."[11] The Court held that no state can constitutionally require a criminal defendant to be represented by an attorney over the defendant's protestations. Support for this conclusion came from three distinct sources. First, the Supreme Court surveyed the unwavering protection that the federal courts have afforded the right to proceed *pro se* in federal criminal trials.[12] Then, the Court analyzed the evolution of the right to proceed *pro se* from the perspectives of the English common law, colonial judicial practices, and the historical evolution of the sixth amendment.[13] Finally, the Court examined the tension between individual autonomy and the potential unfairness of a criminal trial in which the defendant represents himself.[14]

The right to proceed *pro se* in the federal court system is unquestioned since it has been expressly guaranteed to federal criminal defendants under the Judiciary Act of 1789[15] and its successors.[16] Yet, historically the federal courts have taken a broader position with regard to the right of self-representation than mere statutory fiat. In *Adams v. United States ex rel. McCann*[17] the trial judge allowed a criminal defendant to proceed *pro se* and to waive trial by jury. The subsequent trial court conviction was reversed by the court of appeals on the ground that waiver of trial by jury is only effective when made with assistance of counsel.[18] However, the Supreme Court affirmed the trial court conviction, holding that a defendant may waive his constitutional rights to trial

9. Faretta's contentions concerning a constitutional right to proceed *pro se* were summarily dismissed by the California appellate courts pursuant to the *Sharp* ruling. *Id.*

10. 415 U.S. 975 (1974).

11. 95 S. Ct. at 2531.

12. *Id.* at 2530-32.

13. *Id.* at 2532-40.

14. *Id.* at 2540-41.

15. Judiciary Act of 1789, § 35, 1 Stat. 92.

16. 28 U.S.C. § 1654 (1970) currently provides that: "In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein." The right to proceed *pro se* also is granted to criminal defendants under FED. R. CRIM. P. 44(a).

17. 317 U.S. 269 (1942).

18. United States *ex rel.* McCann v. Adams, 126 F.2d 774 (2d Cir. 1942). Learned Hand delivered the opinion of the court of appeals.

by jury and to assistance of counsel provided that the waivers are knowingly and freely made.[19]

The main issue in *Adams* was the validity of a waiver of an affirmative constitutional right, *e.g.*, trial by jury, in the absence of assistance of counsel to advise the defendant of the consequences of such a waiver. But the Supreme Court nevertheless outlined its views on the right to proceed *pro se* via dictum:

> The right to assistance of counsel and the correlative right to dispense with a lawyer's help are not legal formalisms. They rest on considerations that go to the substance of an accused's position before the law. The public conscience must be satisfied that fairness dominates the administration of justice. An accused must have the means of presenting his best defense. He must have time and facilities for investigation and for the production of evidence. But evidence and truth are of no avail unless they can be adequately presented. Essential fairness is lacking if an accused cannot put his case effectively in court. *But the Constitution does not force a lawyer upon a defendant.* He may waive his Constitutional right to assistance of counsel if he knows what he is doing and his choice is made with eyes open . . . .[20]

Subsequently, in *Carter v. Illinois*[21] the Supreme Court reinforced the *Adams* dictum by declaring that "[n]either the historic conception of Due Process nor the vitality it derives from progressive standards of justice denies a person the right to defend himself . . . ."[22] But the Court retreated from interference into state criminal procedure concerning the waiver of constitutional rights by stating:

> But the Due Process Clause has never been perverted so as to force upon the forty-eight States a uniform code of criminal procedure. . . . *The Constitution commands the States to assure fair judgment.* Procedural details for securing fairness it leaves to the States.[23]

Thus, in *Carter* the focus of the Court centered upon achieving a fair outcome in a criminal proceeding rather than providing the defendant with an opportunity to proceed *pro se*. Although the actual holding is expansive with regard to the latitude given a criminal defendant to waive the affirmative constitutional right of trial by jury without assistance of

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19. 317 U.S. at 275.

20. *Id.* at 279 (citations omitted and emphasis added).

21. 329 U.S. 173 (1946). In *Carter*, the Supreme Court upheld the conviction of petitioner who had pleaded guilty to murder without the assistance of counsel. The Court refused to carry its scrutiny past the common law record of the case to determine the validity of the waiver.

22. *Id.* at 174.

23. *Id.* at 175 (emphasis added).

counsel, the fairness concerns expressed by the Court put the decision into a different perspective, casting shadows on the reach of the *Adams* dictum.

The courts of appeals have directly held in several cases that the right to proceed *pro se* is constitutionally protected by the sixth amendment and the due process clause of the fourteenth amendment.[24] The first analytically significant case espousing the right of self-representation as an affirmative constitutional right is *United States v. Plattner*.[25] In *Plattner*, the Second Circuit Court of Appeals elevated the right to proceed *pro se* to the level of the constitutional safeguards expressly enumerated in the sixth amendment and further stated that the right of self-representation could not be construed as merely statutory in origin.[26] The court of appeals then declared that denial of self-representation was prejudicial per se[27] and required automatic reversal when a defendant had been denied the right to proceed *pro se* without any attempt by the trial court to ascertain the adequacy of the accused to waive his constitutional right to assistance of counsel.[28]

Although the majority in *Faretta* was quite comfortable with the prevailing court of appeals viewpoint, the dissenters were reluctant to embrace a court of appeals doctrine founded, at least in part, upon the sketchy *Adams* and *Carter* dicta. Mr. Chief Justice Burger pointed out in his dissent that *Adams* and *Carter* dealt specifically with the consequences of a waiver of trial by jury and a guilty plea, repsectively, made without the assistance of counsel. Hence, the issue was not whether the accused had an affirmative right to proceed *pro se* but whether uncounseled *waivers* of fundamental constitutional rights were per se defec-

24. *E.g.*, United States v. Warner, 428 F.2d 730 (8th Cir.), *cert. denied*, 400 U.S. 930 (1970); Lowe v. United States, 418 F.2d 100 (7th Cir. 1969), *cert. denied*, 397 U.S. 1048 (1970); United States v. Sternman, 415 F.2d 1165 (6th Cir. 1969), *cert. denied*, 397 U.S. 907 (1970); Arnold v. United States, 414 F.2d 1056 (9th Cir. 1969), *cert. denied*, 396 U.S. 1021 (1970); United States *ex rel.* Maldonaldo v. Denno, 348 F.2d 12 (2d Cir. 1965), *cert. denied*, 384 U.S. 1007 (1966); United States v. Plattner, 330 F.2d 271 (2d Cir. 1964). *Contra*, Van Natton v. United States, 357 F.2d 161 (10th Cir. 1966) (right of self-representation solely statutory right).

25. 330 F.2d 271 (2d Cir. 1964). The case involved the use of assigned counsel to argue a petition for a writ of error *coram nobis* filed by defendant after his conviction for interstate transportation of a stolen motor vehicle. Defendant had prepared the petition himself, and he appealed from the district court order dismissing the petition on the ground that the district court erred in refusing to allow him to represent himself at the hearing.

26. *Id.* at 273.

27. *Id.*

28. *Id.* at 276.

tive.[29] Since the Supreme Court affirmed the convictions in both *Adams* and *Carter*, the obvious answer is that a defendant may *waive* his constitutional rights in some circumstances. However, in *Singer v. United States*[30] the Supreme Court declared that "[t]he ability to waive a constitutional right [*e.g.*, trial by jury] does not ordinarily carry with it the right to insist upon the opposite of that right."[31] The Court in *Singer* found that no prejudice could result from a refusal to permit waiver of a constitutional safeguard because the defendant then receives exactly what the Constitution requires for his protection.[32] This logic could arguably be extended to the issue of self-representation in that denial of the right to proceed *pro se* may be viewed as resulting merely in the exercise of the constitutional right of assistance of counsel. In any event, the judicial background on the right of self-representation, standing alone, is somewhat less than conclusive in forming a constitutional basis for an affirmative right to proceed *pro se*.

As a supplement to the judicial viewpoint, the majority finds support for its position in parallel developments in the English common law, colonial trial practices, and the legislative context of the sixth amendment itself. Presently, an individual has an affirmative right of self-representation under the English common law.[33] But this is hardly surprising or probative in that common-law defendants were historically forced to proceed *pro se*.[34] Indeed, it was not until 1836 that the last vestiges of compulsory self-representation in felony prosecutions were removed by statute.[35] Similarly, colonial trial procedures regularly afforded the defendant the opportunity to represent himself,[36] but whether this practice arose from respect for individual liberties or whether the practice was fostered by common law traditions derived from the dearth of trained counsel in the colonies is not readily ascertainable.

The majority also cited the legislative history of the sixth amendment as indicative of an affirmative constitutional right to proceed *pro*

29. 95 S. Ct. at 2544.

30. 380 U.S. 24 (1965). In *Singer*, defendant was convicted of federal mail fraud charges in a jury trial despite repeated demands by him for trial by the judge alone. The Supreme Court affirmed the conviction. *Id.* at 25, 36.

31. *Id.* at 34-35.

32. *Id.* at 36.

33. R. v. Woodward, [1944] K.B. 118.

34. 1 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 211 (2d ed. 1923).

35. 6 & 7 Will. 4, c. 114, § 1 (1836).

36. 95 S. Ct. at 2537.

se. Congress passed the Judiciary Act of 1789,[37] guaranteeing the right of self-representation in the federal courts, just one day prior to the submission of the sixth amendment to Congress for its approval.[38] In the subsequent congressional debate on the sixth amendment, reference to the right to proceed *pro se* was conspicuously absent.[39] The majority propounded that this was indicative that the right to self-representation was deemed by all to be so pervasive and fundamental that it was a non-issue.[40] However, this logic raised the inevitable question of why Congress affirmatively granted the right to proceed *pro se* in a federal statute if such a right was considered inherent and patently obvious. The dissenters found the Court's argument unpersuasive in that the statutory grant of the right to proceed *pro se* and the corresponding omission in the sixth amendment, which had been drafted by essentially the same persons, lent credence to the inference that the exclusion was purposeful.[41] Neither viewpoint could legitimately be termed persuasive.

The final and most compelling argument of the majority was the necessity of protecting individual autonomy.[42] The Court made no effort to side-step the central premise in *Gideon v. Wainwright*[43] and *Argersinger v. Hamlin*[44] that fundamental fairness requires that an accused be represented by counsel.[45] Rather, the Court conceded that the average criminal defendant who proceeds *pro se* will indeed diminish the likelihood of a successful defense in his case.[46] However, the

37. Judiciary Act of 1789, § 35, 1 Stat. 92.
38. 95 S. Ct. at 2539.
39. *Id.*
40. *Id.*
41. *Id.* at 2546.
42. *See generally* Grano, *The Right to Counsel: Collateral Issues Affecting Due Process*, 54 MINN. L. REV. 1175 (1970); Comment, *Self-Representation in Criminal Trials: The Dilemma of the Pro Se Defendant*, 59 CALIF. L. REV. 1479 (1971); Note, *Constitutional Law—Right to Counsel—Self-Representation Not Guaranteed by Sixth Amendment*, 18 N.Y.L.F. 990 (1973).
43. 372 U.S. 335 (1963).
44. 407 U.S. 25 (1972).
45. *See* text accompanying note 1 *supra*.
46. 95 S. Ct. at 2540. Mr. Justice Sutherland in Powell v. Alabama, 287 U.S. 45, 68-69 (1932), presented the classic critique of the *pro se* defense:

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he had a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it,

Court refused to entwine personal liberties with statistical probabilities and stated that respect for individual freedom, even if exercised in an apparently self-destructive manner, demands an affirmative right for an individual to conduct his own defense.[47] At no other time are individual liberties more precious to a citizen than when a state subjects that citizen to the rigors of its criminal justice process.[48] Accordingly, in the very hour of need, a defendant should be afforded the widest possible latitude to prove his innocence to give the constitutional safeguards of the sixth amendment their fullest meaning.

The dissenting opinions did not belittle the value of individual autonomy and free choice within the criminal justice system. But the dissenters found a preeminent government interest in insuring a just result through compulsory assistance of counsel.[49] In the criminal courts the prosecution and the trial judge must insure that true justice is realized to maintain public confidence in the efficacy of the criminal justice process.[50] Objective standards of impartiality require that court systems appoint attorneys for defendants without counsel since the majority of the populace feels that representation by counsel is a neces-

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though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.

47. 95 S. Ct. at 2540.

48. *See* United States v. Dougherty, 473 F.2d 1113 (D.C. Cir. 1972) (reversal of conviction of "D.C. Nine" who had vandalized the Dow Chemical Corporation's District of Columbia offices). Although the trial judge had granted defendants latitude with respect to addressing the trial court, he had denied defendants' petition to proceed *pro se*. In reversing the conviction, the court of appeals expounded on the nature of the right to proceed *pro se*:

> It [the right of self-representation] is designed to safeguard the dignity and autonomy of those whose circumstances or activities have thrust them involuntarily into the criminal process. An accused has a fundamental right to confront his accusers and his "country," to present himself and his position to the jury not merely as a witness or through a "mouthpiece," but as a man on trial who elects to plead his own cause. He is not obliged to seek what counsel would record as a victory but what he sees as tantamount to condemnation or doubt rather than vindication. A defendant has the moral right to stand alone in his hour of trial. The denial of that right is not to be redeemed through the prior estimate of someone else that the practical position of the defendant will be enhanced through representation by another, or the subsequent conclusion that defendant's practical position has not been disadvantaged.

Id. at 1128.

49. 95 S. Ct. at 2543, 2548.

50. Grano, *supra* note 42, at 1196. The Supreme Court articulated this view in Berger v. United States, 295 U.S. 78 (1935) (conviction of petitioner for conspiracy to utter counterfeit notes). In reversing the conviction because of improper prosecutorial conduct, the Supreme Court declared: "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Id.* at 88. Similar language may be found in Brady v. Maryland, 373 U.S. 83, 87 (1963).

sary precondition to a fair trial.[51] Continued public support for the judicial process is dependent upon widespread popular sentiment that no arm of the state or federal governments will strip a citizen of his rights except through meticulous adherence to procedures deemed most likely to produce just results.[52] Mr. Justice Blackmun concluded that the criminal justice system could not assuage the damage to society inherent in unjust outcomes by pointing to the vindication of an individual's right to proceed *pro se*. Conversely, Mr. Justice Blackmun reasoned that any damage to individual freedom resulting from denial of the *pro se* privilege would be mitigated by the greater fairness of a trial with assistance of counsel. Complaints about the fairness of criminal proceedings from a convicted defendant who received the full benefit of the express constitutional right to assistance of counsel ring hollow despite the abridgement of individual autonomy.[53]

Despite the skepticism of the dissenters, there are rational reasons for a criminal defendant to seek to proceed *pro se*.[54] The glaring flaw in the dissenters' position is their assumption that appointed counsel will provide effective representation for indigent defendants. Patently, the empirical norm for appointed counsel does not approach total effectiveness. Blatant incompetence has appropriate remedies both in the trial court and at the appellate level. But marginally inadequate representation presents an insidious dilemma for the indigent defendant under the minority view. Faretta's request to proceed *pro se* was rooted in his belief that the public defender could not devote the time that Faretta felt was necessary for a successful defense.[55] Under California law, the sole basis for reversal for ineffective representation is a showing by the accused that the errors of defense counsel reduced the trial to a "sham and a farce."[56] Clearly, a defense limited by the time and budgetary constraints of the public defender's office might be "inadequate" in certain circumstances and yet not constitute a "sham and a farce." If the appointed counsel proves ineffective, the accused must either sit mute and sustain the consequences or he must waive his fifth amend-

51. Grano, *supra* note 42, at 1195-96.
52. *Id.*
53. 95 S. Ct. at 2548.
54. Possible rational reasons for seeking to proceed *pro se* are: (1) distrust of appointed counsel and/or the legal process as a whole; (2) political motivations; (3) faith in the ultimate vindication of an innocent defendant by the judicial system; and (4) the tactical desire to gain empathy with the jury. Note, 18 N.Y.L.F., *supra* note 42, at 996.
55. 95 S. Ct. at 2527.
56. People v. Ibarra, 60 Cal. 2d 460, 386 P.2d 487, 34 Cal. Rptr. 863 (1963).

ment right to silence and testify in his own behalf. This situation is constitutionally untenable as the accused is, in fact, forced to waive his right to remain silent to present a viable defense. To forestall this dilemma, qualitative guarantees of effective representation must accompany any denial of the right to proceed *pro se*. Without such guarantees, the dissenters' position is constitutionally defective.

The majority opinion is praiseworthy at the very least for its concern with freedom of individual choice. With the present awesome concentration of power in governmental bodies, any minor victory for individual autonomy is meritorious on its face. However, society's interest in achieving a fair and impartial judicial process must predominate over the autonomy interest. Public doubt concerning the fairness of criminal proceedings strikes at the very core of government. While paying lip service to this ideal, the minority's position fails to insure the essence of a fair trial, *i.e. effective* assistance of counsel. Until the Supreme Court deals decisively with the spectre of inadequate representation for indigent defendants that haunts many criminal proceedings, the right of self-representation must remain unfettered. Hopefully, if the Supreme Court does promulgate guidelines to guarantee effective representation for indigent defendants, the Court will re-examine the *Faretta* decision in the context of the preeminent public interest in ensuring justice in the trial courts.

MICHAEL S. IVES

Federal Income Tax—Use of Installment Sale Reporting for Sales Between Related Taxpayers: The Separate v. Single Economic Entity Argument

Nye v. United States,[1] a case of first impression,[2] presented the issue whether a purported installment sale by a wife to her husband, followed by an outright disposition of the property by the husband to a

1. No. C-374-D-73 (M.D.N.C., May 16, 1975) [hereinafter cited as The District Court Opinion]. The case was decided on a stipulation of facts and cross motions for summary judgment. The United States initially appealed the case to the Court of Appeals for the Fourth Circuit (Court of Appeals No. 75-1905) but subsequently withdrew the appeal. Counsel for plaintiffs in *Nye* reports that he has received correspondence from attorneys in a number of other jurisdictions who are currently involved with factually similar cases. Interview with R. Roy Mitchell Jr., attorney for plaintiffs, in Durham, North Carolina, Jan. 20, 1976. Apparently the Internal Revenue Service has decided to