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Foreword

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FOURTH CIRCUIT REVIEW

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The Fourth Circuit Court of Appeals cases that the Editorial Board of the *Washington and Lee Law Review* selected for the *Fourth Circuit Review* exemplify the contemporary decisional profile of federal appellate courts. Distinctive to the profile are the contours shaped by what I refer to as "new" public law controversies.[1] Early cases involving this type of litigation concerned segregated education and voting rights. Some of these cases continue to arise, but the largest number of public law cases now involve civil rights protection against discrimination in employment and housing, and a host of rights created by legislation protecting consumers and citizens. This type of litigation occupies much of our time and provides considerable public drama.

The contemporary profile of our end product has not been completely changed, however, for the absolute number of traditional law suits has multiplied. Diversity actions, cases in bankruptcy, admiralty, maritime law, antitrust, standard administrative agency review, and criminal law—originating from conventional sources, routed and decided through traditionally structured court systems and procedures—were probably more numerous than the "new" public law controversies.

Litigation of rights modernly designed to remedy old wrongs provides more public drama. It is often for reasons other than the controversial substance of these rights, however, that such cases demand more court time than their numbers indicate, and give rise to more articulated differences among judges on the court. The legislation creating these rights is frequently silent as to the structures and procedures a court should use in litigation involving these rights. If not silent, the acts usually indicate that courts should resolve the "new" rights within the framework of traditional judicial concepts. More often than not, however, problems raised in resolving these modern rights simply do not fit into judicial structures conceptualized centuries ago to solve the then new problems raised in diversity, admiralty, federal reservation criminal cases, and the like. As a consequence, courts today spend much

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[1] I use "public law" as I perceive it is generally used, to refer to the many actions involving the public sector—such as civil rights, consumer protection, environmental law—in contradistinction to the law governing disputes between private parties. I refer to "new" public law controversies as those arising under statutes enacted and cases decided after approximately 1950.

time determining these new rights and judges often differ as to how the traditional concepts apply

The ever-present chore of statutory interpretation, including the unraveling of congressional intent, complicates the process. Ascertaining congressional intent likewise presents a central problem in many cases involving conventional dispute resolution, but unlike public law legislation, these conventional congressional actions are normally progressive amendments, additions, or revisions of long-standing and frequently applied laws. Congressional committees and courts usually have developed ready, short-hand meanings and directions to implement these actions. The precedential or legislative blueprints are often available in fine-honed detail. The legislature frequently has drawn the blueprints in the new areas of public law enacted during the past twenty-five years, however, very broadly Courts must fill in the details. Absent direction to consider these "new" issues under different procedural rules or philosophies, we resort to traditional procedural guides found in cases involving standing, class action, intervention, res judicata, and similar concepts developed within the traditional judicial infrastructures. The cases we decided during the survey reflect this modern American judicial phenomenon.

While the surveyed cases cover a broad range of categories, this introduction discusses only some of the Fourth Circuit's recent cases which illustrate this diverse role of modern federal courts. Roughly, these cases include civil rights, criminal cases, prisoner rights, attorney fees, and administrative law cases.

Actions generally viewed under the comprehensive canopy of "civil rights" continued as a major part of appealed litigation in the Fourth Circuit. These appeals included cases arising from race, sex, and age discrimination in employment, housing, and other areas.

Recent decisions involving alleged discrimination often focused on the methods of judicial decision-making—necessarily involving procedural concepts. The inevitable impetus of such modern decisional technique has incorporated into civil rights decisions some of the rules or even doctrines of the traditional areas of federal jurisprudence. Appeals for judicial restraint notwithstanding, we have thus responded to the duties placed upon us by Congress and prior decisions not only to disc and harrow previously plowed sod, but to plow additional virgin soil.

In *Lovelace v. Sherwin-Williams Co.*,[2] a central issue we addressed concerned the appropriate standard for assessing the sufficiency of the evidence necessary to establish improper motivation in an age discrimination case. Judge Phillips, speaking for the panel majority, ar ticulated the dispositive issue in the case as whether the defendant would have demoted the 55-year-old plaintiff absent the defendant's

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681 F.2d 230 (4th Cir. 1982).

motive to discriminate against the plaintiff because of the plaintiff's age. In the absence of a congressional standard, Judge Phillips looked to Fourth Circuit tort cases for a test of sufficiency. Judge Phillips derived a standard from those tort cases where causation was the dispositive issue, and determined that the proper test of sufficiency in ADEA causation cases turned on whether the inference that the defendant discriminated against the plaintiff was a "reasonable probability" rather than a "mere possibility."

In *Smith v. Town of Clarkton*,[3] we addressed a troublesome problem inherent in housing discrimination litigation. It is well established that a city has no constitutional duty to provide housing, equal or otherwise.[4] It is equally clear that constitutional rights are implicated once a city constructs public housing—the fourteenth amendment guarantees citizens equal access to it.[5] Do these rights attach only after the city completes construction? After partial construction? When the city planners or legislators first conceive the plan for housing?

The dispute in *Smith* arose when Clarkton city officials, as a result of public pressure, withdrew from a low-income public housing project which would have served black residents of the area. At the time of the town's withdrawal, which terminated the project, the local housing authority had purchased a building site, engaged an architect, and accepted rental applications. We concluded that the town's actions were racially motivated and violated both the fourteenth amendment and Title VIII.

The decision is noteworthy for two reasons. First, the *Smith* decision adopts for the first time in the Fourth Circuit the position other courts of appeals have taken that the standard of proof necessary to establish discrimination in Title VII cases applies equally to Title VIII actions. The second and potentially more far-reaching holding is that both Title VIII and the Constitution prohibit a municipality or other political entity from substantially constructing public housing and then interfering with its completion for racially discriminatory reasons. In stating this rule, we emphasized the need for precisely tailored remedies, and accordingly we modified the district court's order to require Clarkton to pursue aggressively and in good faith the plans in progress prior to the town's withdrawal from the project. When we reached this decision, however, we left open the question of whether under other circumstances requiring a municipality itself to complete the project might be justifiable.

The court in *Adams v. Proctor & Gamble*[6] struggled with a narrow but important question of congressional intent. *Adams* concerned an EEOC settlement of a civil action charging employment discrimination

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[3] 682 F.2d 1055 (4th Cir. 1982).

[4] Lindsay v. Normet, 405 U.S. 56 (1972).

[5] *See* Otero v. New York City Hous. Auth., 484 F.2d 1122 (2d Cir. 1973).

[6] 678 F.2d 1190 (4th Cir. 1982).

via a consent decree *after* plaintiffs filed a lawsuit. The question we addressed was whether charging parties who had not intervened as parties could disavow the settlement, and insist that the agency issue them right-to-sue letters. The panel majority held that any charging party who declined to intervene as a formal party and who declined to accept the individual monetary award provided by a consent decree could be issued a right-to-sue letter. Judge Haynsworth dissented, reasoning that if the Commission timely filed a suit and a charging party failed to formally intervene, that party should be held to have authorized the EEOC to enter into a settlement agreement on his behalf. *Adams* was reargued en banc, but as of the date of this writing the court has not handed down the decision.

Hill v. Western Electric Co.[7] addressed a related problem concerning the right to intervene in class action discrimination suits. In an earlier appeal in the same case, we ruled that the class representatives would not adequately protect the proposed intervenors' interests. The intervenors filed the motion to intervene as representatives following a remand, and the principal problems were timeliness and possible prejudice. The panel majority stated that "[i]n a class action, the critical issue with respect to timeliness is whether the proposed intervenor moved to intervene 'as soon as it became clear . . . that the interests of the unnamed class members would no longer be protected by the named class representatives.' "[8] The court found that since the representatives filed the motion to intervene within ninety days after the Supreme Court denied certiorari on the class representation issue, the motion was timely filed. The majority opinion then stated that an important consideration in passing on an application for intervention is whether the delay has prejudiced the other parties. Because the filing of the complaint notified the defendant of the possibility of classwide liability, the defendant was not prejudiced. The court further ruled that any prejudice to the members of the plaintiff class could be avoided by bifurcating the proceedings. Finally, the panel majority stated that the post-remand timing of the motion should not militate against allowing intervention, and remanded the case for further proceedings consistent with its opinion.

Chisholm v. United States Postal Service[9] involved class action and administrative exhaustion requirements and continued the effort to settle the evidentiary problems inherent in employment discrimination cases. *Moultrie v. Martin*[10] clarified the proper use of statistical data in discrimination cases generally. *Brady v. Allstate Insurance Co.*[11] illustrated the difficulty white employees face in establishing race

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[7] 672 F.2d 381 (4th Cir. 1982).

[8] *Id.* at 386 (quoting United Airlines, Inc. v. McDonald, 432 U.S. 385, 394 (1977)).

[9] 665 F.2d 482 (4th Cir. 1981).

[10] 690 F.2d 1078 (4th Cir. 1982).

[11] 683 F.2d 86 (4th Cir. 1982).

discrimination and noted the possibility that a stricter standard applies in reverse discrimination cases.

Ford Motor Co. v. EEOC[12] established an important "back pay" precedent. *Ford* involved a sex discrimination suit based in part on the company's hiring practices in 1971, when Ford refused to hire three women for warehouse jobs. In 1973, Ford offered the same jobs to two of the women, but without seniority retroactive to 1971. Both women declined. A majority of the panel concluded that Ford's subsequent offer of employment did not terminate the company's liability for purposes of back pay. The court accordingly affirmed the district court's decision to award back pay that accrued after each woman rejected Ford's 1973 job offer. The Supreme Court reversed, holding that absent special circumstances, the rejection of an employer's unconditional job offer ends accrual of potential back-pay liability.[13]

The Supreme Court granted certiorari[14] in the case of *Brown v. Eckard*,[15] and remanded it to us with instructions to reconsider *Brown* in light of *General Telephone Co. of Southwest v. Falcon*.[16] A majority of our panel in *Brown* had held that employees who had particularized claims of discriminatory discharge could represent a class of employees who allegedly suffered discrimination in promotion practices. *General Telephone*, however, held that an employee complaining of individual discriminatory promotion practices failed to prove himself to be a proper representative, under Rule 23(b), of an "across-the-board" class of persons allegedly discriminated against in hiring and other employment practices.

These discrimination cases individually may vary in historical importance, but they are significant in at least one unified respect. Each case resolved issues involving rights our national legislature created, accompanied only by general instructions as to how courts should implement these rights. We naturally resort to traditional jurisprudential concepts and procedures, and the results are absolutely predictable—traditional concepts and procedures are expanded.

As in every term, this past year presented a number of criminal law issues of precedential magnitude.[17] A much greater number of criminal appeals were disposed of by per curiam opinions, perhaps as a result of many counsel's perceived need to appeal every case. A substantial number of the published opinions concern the constitutionality of searches and seizures. Appellants attacked the detection of drugs concealed in

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[12] 645 F.2d 183 (4th Cir. 1981), *rev'd*, 102 S.Ct. 3057 (1982).

[13] 102 S.Ct. 3057, 3070 (1982).

[14] Eckerd Drugs, Inc. v. Brown, 102 S.Ct. 1952 (1982).

[15] 663 F.2d 1268, *reh'g denied by an equally divided court*, 669 F.2d 913 (4th Cir. 1981).

[16] 102 S.Ct. 2364 (1982).

[17] I, of course, subscribe to the view that every case is the most important case to the litigants involved and that dispute resolution is our most important task.

bales of hay, paper bags, wrapped packages, suitcases, glove compartments, trunks, campers, cars, trucks, boats, and airplanes. Faithful to our obligation to follow precedents that other panels first established even when we disagree with the precedents, our opinions were generally consistent. A review of fourth amendment opinions in the Fourth Circuit and other circuits, however, breeds a suspicion that an appellant's success at least sometimes rests on the "luck of the draw" in panel assignments. Search cases frequently are so fact-intensive that individual judges sometimes interpret identical facts differently under the same rule of law.[18] Moreover, this discrete area of constitutional law is one of the most discernable on-going examples of jurisprudential realism in operation. As smugglers and narcotics dealers invent more sophisticated and exotic methods of plying their trade, police attempt to keep pace, and courts are required to referee new games with old sets of rules. Changing views in the United States Supreme Court both affect and reflect this syndrome.

In *Sharpe v. United States*,[19] for example, a divided Fourth Circuit panel held that the trial court should have suppressed marijuana evidence at trial, as the fruit of an illegal detention. The *Sharpe* court also held that the warrantless search of burlap-wrapped marijuana bales

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[18] I am continually impressed, especially in view of the great increase in the number of appellate judges, with the collegiality of the federal appellate courts. En banc rules and honored tradition work toward conformity of precedent both within our circuit and among the circuits. As Justice Rehnquist recently said, however, "Judges, whether at the trial or appellate level, are not fungible: Each brings to the bench a mind imprinted with his or her previous experience." Remarks of Justice William Rehnquist, Mac Swinford Lecture, University of Kentucky (Sept. 23, 1982).

The collegial mechanics of the Fourth Circuit are time consuming for each judge, but the system is honored, respected, and it works. Intracourt precedential conflicts rarely occur and the court rules and attitudes respecting collegiality practically always resolve thse conflicts. Some precedents, however, take longer than others to stabilize. *See, e.g.*, Epsilantis v. Califano, No. 80-1600 (4th Cir. April 13, 1982).

Epsilantis, a former delicatessen clerk, filed a claim for Social Security disability benefits. He established a prima facie case of disability by showing that his medical impairments prevented him from working as a clerk. The Secretary concluded that Epsilantis was not disabled because he could use the skills he had acquired as a clerk in other sedentary occupations. Significantly, the Secretary did not identify the specific jobs to which Epsilantis could transfer his skills.

The Secretary's use of administrative notice appeared to be contrary to Taylor v. Weinberger, 512 F.2d 664, 668 (4th Cir. 1975), which held that the Secretary can administratively notice only the existence of specifically identified alternative jobs. However, in Frady v. Harris, 646 F.2d 143, 144 (4th Cir. 1981), the majority approved of a regulation which effectively relieved the Secretary of any burden to identify specific job alternatives. Later, the majority in Hall v. Harris, 658 F.2d 260, 268 (4th Cir. 1981), criticized the regulation, but stopped short of rejecting it because of the precedential effect of *Frady*.

Recognizing the obvious conflict, the court voted to hear Epsilantis en banc. After briefing and argument, the en banc court affirmed the district court by a five-five vote, thus unavoidably maintaining a possible precedential conflict.

[19] 660 F.2d 967, 970-72 (4th Cir. 1981), *vacated*, 102 S.Ct. 2951 (1982).

found in the back of a camper was unconstitutional. The panel cited *Robbins v. California*[20] as precedent for this latter ruling. In the interim, however, the Supreme Court decided *United States v. Ross*.[21] The Supreme Court conceded that its holding in *Ross* was inconsistent with *Robbins*, but the court nonetheless held that the scope of a warrantless search of an automobile is not defined by the nature of the container in which the contraband is secreted. The Court later remanded *Sharpe* for our court to reconsider in light of *Ross*.

United States v. Steed,[22] a criminal procedure case, illustrates the necessary twentieth century judicial mobility The government by statute now may appeal post-verdict acquittals[23] without offending the double jeopardy clause of the fifth amendment.[24] The question in *Steed* concerned the standard of review of such acquittals by a trial court after a jury verdict of guilty

Judge Phillips, writing for the majority of the original panel, felt that appellate courts reviewing a post-verdict judgment of acquittal should limit themselves to correcting errors of "pure" law and otherwise should accord absolute deference to a trial court's assessment as to whether there was sufficient evidence to support a verdict. A majority of the court sitting en banc disagreed and held that the applicable standard is whether the evidence, when viewed in the light most favorable to the government, supports the jury's verdict—the same standard applicable to a defendant's appeal of his conviction on evidentiary grounds.

Pro se prisoner cases continue to demand much court time from judges and staff. Surprisingly, the number of prisoner filings has subsided. There were twenty-four percent fewer filings in the first nine months of 1982 as compared with the same period in 1981. No one is quite sure what this reduction means. Have the adjudicated principles been with us long enough to make prisons aware of the unfavorable results in frivolous filings? Are we articulating the rules more clearly? Are district courts spending more time dealing with these cases? The answers are not apparent to us, nor to our staffs. Despite this year's reduction, however, *pro se* prisoner cases comprised a substantial portion of our decisional work.

During the survey year we saw the usual wide variety of these appeals. From the time the judicial doors were opened widely to prisoner cases, the inherent problem of separating cases involving real and serious questions from those of a de minimis or frivolous nature has

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[20] 453 U.S. 420 (1981).

[21] 102 S.Ct. 2157 (1982).

[22] 674 F.2d 284 (4th Cir. 1982).

[23] Criminal Appeals Act of 1970, 18 U.S.C. § 3731 (1976).

[24] United States v. Wilson, 420 U.S. 332, 348-51 (1975); United States v. Dixon, 658 F.2d 181, 187 (3d Cir. 1981); United States v. Rojas, 554 F.2d 938, 941 (9th Cir. 1977). *See also* United States v. DiFrancesco, 449 U.S. 117, 130 (1980).

troubled courts. Trial and appellate courts alike realize that prisoners see their rights through a different looking glass. Liberty or property interests of seemingly small consequence to those in the outside world take on great value to those incarcerated. Prisoners also may exaggerate perceived injuries to rights in the strained, artificial atmosphere of a prison. Distinguishing those cases with possible merit from frivolous ones, then, represents a large part of our task of administering that portion of our judicial system relating to prisoner complaints. The Supreme Court in several recent cases eased this burden and we gladly followed their lead. In *Parrott v. Taylor*,[25] the Supreme Court held that a prisoner's due process rights were not violated when prison employees negligently lost his property since the state in which the prison was located had a post-deprivation tort claim procedure. We reviewed numerous cases this year involving the *Parrott* issue, and found no basis for section 1983 claims against states with proper tort claim procedures. If the sufficiency of a state's tort procedure was unclear, we normally remanded to the district court to make that determination.

Exhaustion of state remedies was an important issue in many of the prisoner cases, and courts continue to define the parameters of this requirement, as evinced by the Supreme Court's recent holding in *Rose v. Lundy*.[26] *Rose*, holding that a federal court must dismiss section 2254 habeas corpus petitions which present both exhuasted and unexhausted claims, already has led to dismissal of scores of petitions.

Our court considered exhaustion of state remedies in *Harding v. North Carolina*,[27] in which we disallowed the practice of "conditional waiver" of exhaustion by state authorities. With conditional waiver, the state agrees to be bound by a federal court's decision when the federal court reviews on habeas corpus an unexhausted challenge to a state conviction, only if the federal court decides the claim is meritless. We held that the conditional waiver practice could not comport with the principles of federalism underlying the exhaustion requirement.

Exhaustion concerns also arose in section 1983 actions. In *Hamlin v. Warren*,[28] a divided panel held that courts should treat a prisoner's section 1983 claim which attacks the validity of a state court's judgment of conviction as a habeas corpus petition, subject to the exhaustion requirement even though the prisoner couches the remedy demand in terms of damages and declaratory judgment. Both the majority and dissent acknowledged that the case presented a novel issue that the Supreme Court never directly addressed, but differed on their readings of the Court's related holdings in this area. In *Patsy v. Florida Board of*

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[25] 451 U.S. 527 (1981).

[26] 102 S.Ct. 1198, 1199 (1982).

[27] 683 F.2d 850, 852-53 (4th Cir. 1982).

[28] 664 F.2d 29, 31-32 (4th Cir. 1981), *cert. denied*, 102 S.Ct. 1261 (1982).

Regents,[29] the Supreme Court later ruled that courts cannot require exhaustion of administrative remedies in section 1983 cases.

Violations of first amendment rights, real or alleged, still comprise a basis for many section 1983 actions in the Fourth Circuit. Municipal employees, particularly firemen, have asserted their right to criticize their public employers and the court uniformly has upheld those rights.[30] Other first amendment cases include *Local 391, International Brotherhood of Teamsters v. City of Rocky Mount*,[31] a picketing case, and *Davenport v. City of Alexandria*,[32] which involved an attack on a city ordinance's time-space limitations, which restricted first amendment activities on city streets.

Lawyers of yesteryear, faced suddenly with today's federal court system, would have found it impossible to list to their clients the plethora of federal rights available to them. Today's average generalist no doubt has difficulties keeping pace. Five years ago, for example, a statutory scheme rarely provided attorney fees and expenses to a winning litigant. Many lawsuits have been "killed aborning" by the compassionate advice that "you may be right but you can't afford the expense involved in proving it." This is no longer the case, at least not necessarily. Today many statutes provide that the unsuccessful litigant pay his opponents' attorney fees. Litigation involving those attorney fees reflects and symbolizes perhaps more than any other aspect of modern practice the drastic evolution of the pursuit of rights in a federal forum. We decided several such cases in the reported year. None of those cases may be remarkable, but the number of attorneys' fees cases decided in one year in one circuit throws considerable light on the federal system's new structures.[33]

While we refused in *Taylor v. Kelsey*[34] to referee a private fee dispute between two attorneys, the court granted en banc consideration of a case involving disqualification of counsel. In *Greitzer & Locks v. Johns-Manville Corp.*,[35] the issue on appeal was whether the district court erred in disqualifying a law firm from participating in approximately seventy-seven Virginia asbestosis cases. A former Justice

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[29] 102 S.Ct. 2557, 2560 (1982).

[30] Neal v. Howell, 689 F.2d 473, 476-78 (4th Cir. 1982); Hickory Fire Fighters Ass'n v. City of Hickory, 656 F.2d 917, 920-21 (4th Cir. 1981); Henrico Professional Fire Fighters Ass'n v. Bd. of Supervisors, 649 F.2d 237, 241 (4th Cir. 1981).

[31] 672 F.2d 376, 377 (4th Cir. 1982).

[32] 683 F.2d 853, 854 (4th Cir. 1982).

[33] Allen v. Burke, 690 F.2d 376 (4th Cir. 1982); Morris v. Social Sec. Admin., 689 F.2d 495 (4th Cir. 1982); Consumers Union of United States, Inc. v. Virginia State Bar, 688 F.2d 218 (4th Cir. 1982); DeMier v. Gondles, 676 F.2d 92 (4th Cir. 1982); Anderson v. Morris, 658 F.2d 246 (4th Cir. 1981).

[34] 666 F.2d 53 (4th Cir. 1981).

[35] No. 81-1379, slip op. at 3-4 (4th Cir. March 5, 1982).

Department attorney, who had participated in defending the United States in Virginia asbestosis litigation, recently had joined the firm. The panel majority overturned the disqualification order of the district court. It was undisputed that the Ethics in Government Act disqualified the former Justice Department attorney from participating in the Virginia asbestosis cases. The panel majority held, however, that the law firm properly screened the former government attorney from Virginia asbestosis cases. The panel dissent argued that the law firm failed to timely impose the screen, and the firm unilaterally regulated the screen, which the district court found had tarnished the firm's reputation for reliability and dependability in screening the former government attorney. After en banc consideration, an equally divided court affirmed the judgment of the district court.

Our decisions increasingly recognize that attorneys are integral to the administration of justice as participating partners in the system.[36] The concept is as old as Anglo-American jurisprudence. Spurred by congressional action, however, federal court decisions are shaping the attorney-client relationship into a more active and responsible one.

[36] The reverse side of this is that we, like a good many other courts, also expressed concern that attorneys had used the attorney-client privilege as a shield for possible criminal activity. *See In re* Grand Jury Proceedings, 674 F.2d 309, 310 (4th Cir. 1982); *In re* John Doe, 662 F.2d 1073, 1079-81 (4th Cir. 1981).