North Carolina Central Law Review

Volume 6
Number 1 *Volume 6, Number 1*

Article 11

10-1-1974

# Non-Renewal of Untenured Teacher's Contract: Cook v. Hudson

Charles Holmes

does not alleviate one of the main objections to polygraph use by the employer. As Congressman Cornelius Gallagher stated, "even if the polygraph testing was trustworthy, there is still no possible justification for such mental wire-tapping."[74]

Possible vehicles for employee protection against polygraph testing include "judicial recognition of the right of privacy, together with the demise of the 'doctrine' of privilege in government employment and the increasing recognition of the 'state action' elements involved in Corporate enterprise."[75] The most effective method of protection, however, would be through federal legislation which recognizes the employee's right of privacy. In many states, it is certainly a needed recognition and would indeed be a welcomed one.

VICTOR JEROME BOONE

**Non-Renewal of Untenured Teacher's Contract: Cook v. Hudson**

In *Cook v. Hudson*,[1] the court presented a somewhat unique approach in interpreting the rights of untenured teachers. The court in *Cook* upheld the school board's action in refusing to renew plaintiffs one-year contract without giving them a hearing concerning their discharge. This note will analyze the meaning of *Cook v. Hudson* with respect to the "subjective expectancy" of employment doctrine as it relates to public employees. Additionally the note will be concerned with the effect of *Cook* on procedural rights of untenured teachers in the light of *Perry v. Sindermann*[2] and *Roth v. Board of Regents*.[3]

The litigation in *Cook* arose when the plaintiffs as teachers in the Calhoun City, Mississippi refused to keep their children in the city school system as required by the school board. The school board had verbally adopted a policy in 1972, requiring new and existing teachers living in the city to send their children to the public schools of the county. The policy was established to prohibit public school teachers from enrolling their children in racially discriminatory private schools.[4] Although this policy was unwritten, it had been made known to the teaching staff. Upon plaintiffs refusal to comply with the policy, the

74. *House Rep't on Polygraphs.*
75. HERMANN, at 154.

1. 365 F. Supp. 855 (N.D. Miss. 1973).
2. 408 U.S. 564 (1972).
3. 408 U.S. 593 (1972).
4. 365 F. Supp. at 857.

principal in April-May, 1973 did not recommend them for teaching positions. Plaintiffs sued the school board, alleging they had been unconstitutionally discharged in violation of the First, Fifth and Fourteenth Amendments of the Constitution. The court held

> Plaintiffs held one-year contracts which expired at the end of 1972-73 school year; they were not discharged during the school years. Although all of the plaintiffs had been employed in the Calhoun County school system for several years, none had more than a "subjective expectancy" of re-employment generated by periods of employment under those circumstances, it is settled that a hearing was not necessary.[5]

## BACKGROUND

Public employees fall into two categories with respect to retention of their jobs. The first involves the employee whose position is protected by a statute which guarantees notice and hearing in the event of nonretention.[6] The second encompasses those who are not protected by such a statute. The latter's procedural rights are protected, if at all, only by judicial enforcement.[7] Usually public school teachers' tenure rights are protected by statute.[8] Central to the tenure system is the provision that a tenured teacher may discharged only "for cause."[9] While tenure may be attained in several ways,[10] it is normally

5. Mississippi does not have a tenure statute, however MCA § 37-9-25 provides for contracts for principals or teachers for a period no greater than three years. The board of trustees of any school district shall have the power and authority, in its discretion, to elect the superintendent for not exceeding four scholastic years and the principals or teachers for not exceeding three scholastic years. However, in Henry v. Coahoma County Board of Education, 246 F. Supp. 517, *aff'd* 35 F.2d 648, *cert. denied*, 384 U.S. 962 (1966), the court decided that, where by law teachers contracts of employment were made only for one year, and re-employment was conditional entirely upon the recommendation of the county superintendent of education, the fact that a teacher had been previously employed for one year, or more than one year, gave her no right to employment during a succeeding school year.

6. MASS. GEN. LAWS ANN., ch. 71, 41 (1971); TENN. CODE ANN. 49-140z (Repl. Vol. 1966).

7. *See e.g.*, Pickering v. Board of Ed., 391 U.S. 563 (1968); Drown v. Portsmouth School Dist., 435 F.2d 1182 (1st Cir. 1970), *cert. denied*, 402 U.S. 972 (1971). This substantive constitutional protection is not affected by the presence or absence of state tenure laws. Johnson v. Branch, 365 F.2d 177 (4th Cir. 1966), *cert. denied*, 385 U.S. 1003 (1967).

8. MASS. GEN. LAWS ANN. ch. 71, 41 (1971); TENN. CODE ANN. 49-140z (Repl. Vol. 1966).

9. "For cause" could include dismissal for insubordination, immoral character, conduct unbecoming a teacher, inefficiency, incompetency, physical or mental disability, or neglect of duty. N.Y. ED. LAW § 3012(2) (McKinney 1970). Other statutes merely refer to the lack of efficiency or good behavior. *See, e.g.*, WIS. STAT. ANN. § 37.30 (Supp. 1971).

10. Since many states do not have tenure statutes, and most existing statutes only protect public school teachers, tenure by contract is very important. Absent a tenure statute, a teacher is limited to those substantive and procedural rights which are stated

granted only after a probationary period of two to five years.[11] The teacher is also assured that once charges are brought, he will have notice of their content and an opportunity to answer them at an administrative hearing.[12] The nontenured public school teacher, however has the same rights as those held by public employees unprotected by statute.[13]

Though untenured teachers generally possess few, if any procedural rights, the Court of Appeals for the Fifth Circuit has extended their rights by equating an "expectancy of employment" with tenure.[14] The "expectancy of employment" was established by Judge Learned Hand in *Bomar v. Keyes*.[15] The *Bomar* case was concerned with the law of torts, and did not present a constitutional question. Nevertheless, the phrase was imbued into due process considerations by the Fifth Circuit which established the criteria of "expectancy of employment" as the basis for entitlement to a statement of reasons and hearing in 1970.[16] The concept was expanded by a later case to the determination that

> "the substance of due process required that no instructor who has an expectancy of continued employment be deprived of that expectancy by mere ceremonial compliance with due process."[17]

Various state statutory schemes have sought to strike a balance be-

in his contract. However, during the terms of the contract, a teacher, unless he or she waives the right, may only be dismissed "for cause," just as under a tenure statute. Parker v. Board of Ed., 237 F. Supp. 22, 226 (D. Md.), *aff'd* 348 F.2d 464 (4th Cir. 1965), *cert. denied*, 382 U.S. 1030 (1966). *See* Millar v. Joint School Dist. No. 2, 2, 86 N.W.2d 455 (1957). *See generally*, Comment, *Developments in the Law—Academic Freedom*, 81 HARV. L. REV. 1045, at 1099-1104 (1968).

11. *See, e.g.*, N.Y. ED. LAW § 3012(1) (McKinney 1970) (three years probation); WIS. STAT. ANN. § 37-31 (Supp. 1971) (five year probation); *but see*, WASH. REV. CODE § 28A.67.070 (1970) (no probation).

12. Employees protected by statute must receive written notice stating the reasons for dismissal and an opportunity to reply to the charges; 5 C.F.R. § 752.202 (1971). Even where the statute itself does not provide for notice and hearing, the fact that removal is "for cause" implies such a result. Shurtlyf v. United States, 189 U.S. 311 (1903); Regan v. United States, 182 U.S. 419 (1901); Freeman v. Gould Special School Dist., 405 F.2d 1153 (8th Cir.), *cert. denied*, 396 U.S. 842 (1969); Napolitano v. Ward, 317 F. Supp. 79 (N.D. Ill. 1970); Winslow v. Minto, 164 Ore. 495, 192 P.2d 919 (1940).

13. Pickering v. Board of Ed., 391 U.S. 563, 568 (1968); *see, e.g.*, Drown v. Portsmouth School Dist., 435 F.2d 1182 (1st Cir. 1970), *cert. denied*, 402 U.S. 972 (1971); Freeman v. Gould School Dist., 405 F.2d 1153 (8th Cir.), *cert. denied*, 396 U.S. 843 (1969) on the college level several universities recently have abolished tenure. NEWSWEEK, June 10, 1974 p. 75.

14. Lucas v. Chapman, 430 F.2d 945 (5th Cir. 1970). In that case the court held that a nontenured teacher's long employment in a continuing relationship through the use of renewals of short-term contracts was sufficient to give him the expectancy of reemployment necessary to construct a protectible interest. *Id.* at 947.

15. 162 F.2d 136 (2d Cir. 1947).

16. Pred. v. Bd. of Public Instruction, 415 F.2d 851 (5th Cir. 1970).

17. Ferguson v. Thomas, 430 F.2d 852 (5th Cir. 1970).

tween the teacher's interest in retaining his job of knowing the reasons for his nonretention on the one hand, and the school board's interest in having extensive discretion in rehiring or not rehiring probationary teachers with a view toward maintaining a high quality faculty on the other hand. Two questions arise. First, when and under what circumstances must a nonretained teacher be accorded a hearing or a statement of reason for dismissal; and second, when do the procedural safeguards of due process of law attach as a right?

The "balancing of the interests" of the school board and the employee was weighed in *Cafeteria Workers Local 473 v. McElroy*.[18] The case was concerned with a cook in a food concession on a military installation who was denied a security clearance, thereby deprived of access to her place of employment.[19] The court held that she was not entitled to a hearing respecting the reasons for the denial of a security clearance, thus depriving her of "the right to follow a chosen trade or profession."[20] The court, applying a balance test, concluded that her interest in keeping one specific job was not sufficient to outweigh contravening governmental security interests.[21]

This balancing test was emphasized in teaching nonretention cases in three different circuits,[22] with different results in each case. In *Orr v. Trinter*,[23] the Court of Appeals for the Sixth Circuit held that a probationary teacher's interest in receiving a statement of reasons and a hearing respecting his nonretention was outweighed by the school board's interest in discretionary hiring practices.[24] In *Drown v. Portsmouth School District*,[25] the First Circuit required a statement of reasons, but not a hearing. The court considered at length the competing interests of the teachers and the school board. It noted that a statement of reasons could give the teacher an opportunity to convince the school board that its decision was based on mistaken facts, or it could

18. 367 U.S. 886 (1961).

19. *Id.* at 897-98.

20. *Id.* at 895-96. The Cafeteria Workers case represented a departure from the decision in Greene v. McElroy, 360 U.S. 474 (1959). Where the court held that an aeronautical engineer was entitled to a full-blown hearing because "the revocation of security clearance . . . has seriously affected, if not destroyed his ability to obtain employment in the aeronautics filed." *Id.* at 492.

21. 367 U.S. at 895-96. This balancing test requires that a determination of:

> . . . what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government fraction involved as well as of the private interest that has been affected by governmental action. Id. at 895.

22. Roth v. Board of Regents, 446 F.2d 806, 809 (7th Cir. 1971), *rev'd*, 408 U.S. 564 (1972); Orr v. Trinter, 444 F.2d 128, 135 (6th Cir. 1971), *cert. denied*, 408 U.S. 943 (1972); Drown v. Portsmouth School Dist., 435 F.2d 1182, 1184-88 (1st Cir. 1970), *cert. denied*, 402 U.S. 972 (1971).

23. 444 F.2d 128 (6th Cir. 1971), *cert. denied*, 408 U.S. 943 (1972).

24. 44 F.2d at 135.

25. 435 F.2d 1182 (1st Cir. 1970), *cert. denied*, 402 U.S. 972 (1971).

provide him with evidence that his dismissal was in violation of his constitutional rights. The statement could inform the teacher of his shortcomings for subsequent self-improvement. Moreover, the statement could serve as a recommendation to a future employer, where for example, the state reasons cited the teacher as too innovative.[26] The court concluded that the slight administrative burden imposed upon the school board in furnishing a statement of reasons and affording the teaching access to evaluation reports was outweighed by the enumerated interests of the probationary teacher.[27]

While continuing to pursue the balance of interests, the court refused to mandate a hearing. Administrators might be inclined to tolerate incompetent, or marginally competent teachers rather than encounter the expense and discomfort of a hearing. The court also felt that administrators might be unwilling to hire innovative teachers who could be the cause of future trouble.[28] The court stated that although a teacher's allegation of a violation of constitutional rights would not be adequately answered by a statement of reasons, the teacher, unburdened by double hearings, would have adequate recourse to the federal courts.[29]

The "balancing test" was examined in *Roth v. Board of Regents*[30]

26. *Id.* at 1184-85.

27. *See* Frokt, *Non-Tenure Teachers and the Constitution*, 18 U. KAN. L. REV. 27, at 28-32 (1969). The American Association of University Professors was concerned that a nonretention notice with a statement of reasons would be confused with a dismissal for cause and erode the distinction between tenured and probationary teachers. Nevertheless, it "Concluded that the reasons in support of the faculty member's being informed outweigh the countervailing risks." COMMITTEE A ON ACADEMIC FREEDOM AND TENURE, AMERICAN ASSN. OF UNIV. PROFESSORS PROCEDURAL STANDARDS IN THE RENEWAL OR NONRENEWAL OF FACULTY APPOINTMENTS, 56 A.A.UP. BULL. 21, 23 (1970).

28. 435 F.2d at 1186. The Court of Appeals for the Fifth Circuit expressed a similar concern that the requirement of a hearing "would nullify the probationary system, whose purpose is to provide the school board a short-term test period during which the fledgling teacher may be examined, evaluated, and if found wanting for any constitutional reasons, not rehired. Than v. Board of Pub. Instr., 432 F.2d 98, 100 (5th Cir. 1970); *accord*, Roth v. Board of Regents, 446 F.2d 806, 812 (7th Cir. 1971), *rev'd* 408 U.S. 564 (1971); Orr v. Trinter, 444 F.2d 128, 134-35 (6th Cir. 1971), *cert. denied*, 408 U.S. 943 (1972); Freeman v. Gould Special School Dist., 405 F.2d 1153, 1160 (8th Cir.), *cert. denied*, 396 U.S. 483 (1969); Note, *Non-Tenure Teachers Procedural Rights Upon Dismissal*, 3 LOY. U.L.J. 114, at 131 (1972).

29. 435 F.2d at 1186-87. However, action subsequent to termination might be insufficient to protect the teacher's interests. *See* Van Alstyne, *The Constitutional Rights of Teachers and Professors*, 1970 DUKE L.J. 841, 858. Professor Van Alstyne thinks that court litigation may be too costly for the individual teacher, and the slow process of judicial proceedings may prevent the teacher, from resigning his duties at the same institution since a final judgment may not be reached until years after the teacher has been separated from his position. *Id.* at 859-60. However, precedent has been set for a teacher to secure a temporary court injunction staying the nonretention until final judgment in the 1983 action, Mailloux v. Kiley, 436 F.2d 565, 566 (1st Cir. 1971); Keefe v. Geanakos, 418 F.2d 359 (1st Cir. 1969); *see also* Note, HARV. L. REV. 1327, 1335 (1972).

where the court agreed that the test required a hearing as well as a statement of reasons.[31] The court further ruled that a nonretention decision could not be made on a "basis wholly unsupported in fact, or on a basis wholly without reason.[32] Furthermore, the court suggested as an additional reason for requiring a pre-termination hearing, that "it serves as a prophylactic against nonretention decisions improperly motivated by exercise of protected rights."[33]

In several cases involving the rights of nontenured teachers, the United State Supreme Court has ruled that generally a teacher cannot be dismissed because of an exercise of constitutional rights.[34] However, the teachers may be released if evidence shows that his comments or actions substantially interfere with the orderly operation of the school. A violation of this rule would give the teacher a right of action.[35] The question remained, however, whether it would also entitle him to an administrative hearing as a right upon a mere allegation of such a constitutional violation.[36]

### *Perry v. Sindermann* and *Roth v. Board of Regents*

The *Sindermann* and *Roth* decisions were the first cases in which the Supreme Court examined the question of the re-employment rights of probationary school teachers whose contracts were not renewed. *Sindermann*,[37] a companion case to *Roth*, presented the court with a question concerning notice and hearing upon the state school's failure to renew a nontenured teacher's employment contract. Sindermann

30. 446 F.2d 806 (7th Cir. 1971), *rev'd*, 408 U.S. 565 (1972).

31. *Id.* at 809.

32. *Id.* at 979. The court noted that the basis for dismissal did not have to be as severe as the standard of "cause" for tenured teachers and the courts would "be bound to respect bases for non-retention enjoying minimal factual support and bases for non-retention supported by subtle reasons." *Id.*

33. 446 F.2d at 810; *aff'd*, Sindermann v. Perry, 430 F.2d 939, 944 (5th Cir. 1970).

34. *See* Pickering v. Board of Ed., 391 U.S. 563 (1968); Keyishian v. Board of Regents, 385 U.S. 589 (1967); Shelton v. Tucker, 364 U.S. 479 (1960); Slochower v. Board of Higher Ed., 350 U.S. 551 (1956); Wieman v. Updegraff, 344 U.S. 183 (1952). The *Shelton* and *Keyishian* decisions were specifically concerned with the situation of nontenured teachers whose contracts were not renewed because of their exercise of first and fourteenth amendment rights.

35. 42 U.S.C. § 1983 (1970) provides

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

36. Board of Regents v. Roth, 408 U.S. 564, 574 n.14 (*dictum*); Perry v. Sindermann, 408 U.S. 593, 599 n.5 (*dictum*); *see* Van Alstyne, *The Supreme Court and the Nontentured: A Comment on Board of Regents v. Roth and Perry v. Sindermann*, 58 A.A.U.P. BULL. 267 (1972).

37. 408 U.S. 593 (1972).

had been employed at a state college for a period of ten years, all under a series of one-year contracts. The Regents declined to renew his contract for the following year, without giving him a statement of reasons for the action. He alleged that the nonrenewal was due to his public criticism of the college administration. The Supreme Court affirmed his claim to procedural due process after a reversal by the Court of Appeals, and held

> The respondent alleged that the college had a de facto tenure program. . .based on rules and understanding, promulgated and fostered by state officials . . . and he must be given an opportunity to prove the legitimacy of his claim . . . Such proof would obligate college officials to grant a hearing at his request, where he could be informed of the grounds for his nonretention and challenge their sufficiency.[38]

The court acknowledged that in the companion case of *Roth*,[39] that a claimant's property interest may warrant a hearing. The court stated

> Property interest are subject to due process protection if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing.[40]

The court went on to say that the claim of a mere subjective expectancy was insufficient to require constitutional protection. However, the teacher should be given an opportunity to prove the legitimacy of his claim of such entitlement in light of the policies and practices of the institution.[41] Thus the court answered the critical question of whether the respondent's lack of a contractual or tenure right to re-employment, taken alone, defeats his claim that the non-renewal of his contract violated the First and Fourteenth Amendment. *Sindermann* held that it did not.[42]

In *Roth*,[43] a nontenured professor, contracted to teach at a state university for one year. During that year the president of the university notified him that he would not be retained for the succeeding year. No reasons were given nor was a hearing offered. The complaint alleged that the university's action was taken in retaliation for the professor's constitutionally protected expression of his opinions.

The court discarded or avoided the *Cafeteria Workers* balancing test,[44] changing the emphasis from the relative weights of the interests

38. Perry v. Sindermann, 408 U.S. at 597-603 (1972).
39. 408 U.S. at 577.
40. 408 U.S. 601.
41. *Id.*
42. *Id.* at 601, 602.
43. 408 U.S. 564.
44. i67 U.S. at 895-6. This balancing test requires that a determination of . . . what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government fraction involved as well as of the private interest that has been affected by governmental action. Id. at 895.

involved to the very nature of the interests themselves.[45] Mr. Justice Stewart reasoned that an individual is entitled to procedural due process protection of his interests only if the interest is within the Fourteenth Amendment's protection of "liberty and property."[46] A weighing of interests would be appropriate only to determine the form of a hearing once it has been determined that a hearing is required.[47] The court then concluded that the plaintiff's interest in retention for the next school year was neither a "liberty" nor a "property" right under the Fourteenth Amendment. His liberty had not been infringed since he suffered neither a serious attack on his reputation[48] nor a loss of subsequent employment opportunities.[49] The *Roth* court did state however, that one may be entitled to a hearing before a state can directly infringe upon his first amendment interest.[50]

In the *Cook* case, the court cited *Sindermann* as controlling, and therefore, discharged the plaintiff's claim holding that five years of previous employment were less than "subjective expectancy,"[51] and concluded that a hearing was unnecessary.[52] Apparently, the court overlooked *Lucas v. Chapman.*[53] The court added that plaintiffs were advised of the reason for their nonretention and had every opportunity to seek a hearing before the board if they desired one. Under *Lucas v. Chapman,* a plaintiff's claim of denial of a constitutionally protected right merits him a hearing by an administrative body. The court's construction in *Cook* was that plaintiffs were guilty of laches; they were slothful in their failure to ask for a hearing before the board. The question remains regarding whether a teacher should be apprised of due process channels through which he may present his claim? *Cook* does not require the school board to apprise the claimants that such channels exist. The court acknowledged that the board did not make express provisions for a hearing for any teacher affected by their policy.[54] Minimum procedural due process requires a party to be put on notice as to available opportunities to redress alleged grievances.[55]

In *Cook,* the court alludes to the difficult "balancing of interests" test: The teacher's interest in the exercise of his First Amendment rights must be weighed against the state's interest in promoting the effi-

45. 408 U.S. at 570-571.
46. *Id.*
47. *Id.* at 570.
48. *Id.* at 573.
49. *Id.* at 573-74.
50. *Id.* at 575.
51. 365 F. Supp. 861.
52. *Id.*
53. 430 F.2d at 947.
54. 365 F. Supp. at 857.
55. 42 U.S.C. § 1983 (1970).

cient dispensation of public services. The court cited *Adler v. Board of Education*[56] as a basis for the theory that so long as the board's policy is reasonable and constitutional, plaintiffs may not complain of being released as public school teachers for having exercised their right to send their children to a private school. However, both *Roth*[57] and *Sindermann*[58] allow a plaintiff to complain especially if a first amendment right is alleged and the plaintiff has a "property interest." *Lucas*[59] and *Sindermann*[60] gives more credence to "subjective expectancy" as being a property right than does *Cook*.[61]

## CONCLUSION

The United States Supreme Court confronted with the judicial and academic controversy surrounding the non-renewal of nontenured teachers, in *Roth* and *Sindermann* has responded by holding, that the interest of the institution in staffing its facilities with a competent faculty deserves greater protection than do the individual teachers whose contracts have been terminated. The decisions of the other courts, federal and state principally, within the Fifth Court Circuit are compatible with this decision. *Cook v. Hudson*, while contrary to the general case law in like situations is also compatible with several state laws.[62] The effect of the decision should be tremendous regarding the non-renewal of contracts of untenured teachers. At the public school level, Mississippi and its Fifth Circuit counterparts should fall within the ambit of *Roth*. That case established that no right to a hearing or statement automatically accrues because of the statutory provision for non-renewal. At the higher education level, the presence of a sufficient property interest to invoke due process considerations will depend on the institution involved. Many institutions yet have some form of an explicit tenure system, though increasingly, others are relinquishing this status.

Any future Fifth Circuit litigation on the question of due process rights of nontenured teachers will center on the exceptions enunciated in the *Roth* and *Sindermann* decisions. Perhaps, cases involving deprivation of liberty should be handled on a case by case basis. Thus school officials can avoid needless litigation on such a question by (1) complying with the applicable statutes or case law for non-renewal of contracts for

56. 365 F. Supp. at 859.
57. 408 U.S. at 573.
58. 408 U.S. at 599.
59. 430 F.2d 945.
60. 408 U.S. 502.
61. 365 F. Supp. 861.
62. *Supra*, note 7.

public school teachers, and (2) avoiding any accusations against dismissed professors that would require later substantiation at a hearing.

CHARLES HOLMES

**STATE v. DIX: Common Law Kidnapping Requires A Substantial Asportation and an Increased Risk of Harm***

The day after defendant escaped from a state prison camp he returned to a county jail to free three of his friends. He knocked on the front door of the jail, and the assistant jailer opened it. Defendant then pulled a gun on the jailer and threatened to kill him if he would not release his companions. Holding the gun to the jailer's back, defendant marched him from the jail vestibule, through his office, and down a hall to a cell block which he compelled the jailer to open. After his three "buddies" came out defendant forced the jailer into the cell. He again threatened to kill the jailer, held the pistol to his head and pulled the trigger, but the gun did not discharge. Defendant then withdrew, locked the cell block, and fled with his three companions. The jailer was released nine minutes later by a trustee who heard his cries for help. Defendant was convicted of kidnapping by the trial court. The court of appeals, finding no error, affirmed. *Held*, reversed. Defendant's conduct in forcing the jailer to walk from the front door to the cell, and in locking him inside, did not amount to asportation within the common law definition of kidnapping. *State v. Dix*, 282 N.C. 490, 193 S.E.2d 897 (1973).

The question presented to the North Carolina Supreme Court was whether the jailer was "carried away" or "conveyed to some other place" as these terms are used with reference to asportation as an element of kidnapping.[1] The majority stated that the "carrying away, transportation, or asportation of the victim from the place where he is seized to some other place is an essential element of common law kidnapping."[2] After reviewing past kidnapping cases from North Carolina as well as other common law jurisdictions, they noted that every such

* By Alan M. Ahart. Mr. Ahart is a law student at the School of Law, State University of New York at Buffalo and the Articles Editor of the Buffalo Law Review.

1. 282 N.C. 490, 494, 193 S.E.2d 897, 899 (1973).

2. *Id.*