In the Courts

High Court Ruling Undercuts N.C. Law Aimed at Limiting Political Mudslinging

by Katherine White

In State v. Petersilie, *the N.C. Supreme Court let stand a 60-year-old statute outlawing true but anonymous political speech. No recorded reference to the statute is found in court documents until the* Petersilie *case, in which Frank Petersilie was convicted in 1989 of distributing anonymous campaign materials in a Boone Town Council Race. There followed a raft of similar prosecutions under the law. In a ruling with great First Amendment implications, Petersilie's conviction was upheld by the state's highest court in a 1993 decision. Ultimately, the ruling was clouded by a U.S. Supreme Court ruling in an Ohio case. But the high court did not have the North Carolina case before it, and it left enough room for the state to revisit the idea of regulation of political speech in the future. While cleaning up vicious political campaigns may have merit, the author reminds us there are also free speech issues to consider.*

Politicians, citizens, and news commentators often deride the current mudslinging, vicious attacks, and distortions in many campaigns for electoral offices and referendums. But such sentiments didn't get much support from a recent decision of the U.S. Supreme Court that called into question the continuing validity of a North Carolina statute governing anonymous political speech.

In *McIntyre v. Ohio,*[1] the high court ruled that an Ohio statute prohibiting the distribution of anonymous but truthful campaign literature was unconstitutional because it violated the First Amendment's protection of political speech. The April 19, 1995, decision may have effectively nullified a North Carolina ruling that had let stand a law limiting political speech in the interest of fairer campaigns. And the U.S. Supreme Court ruling makes it harder for states to limit political mudslinging, a result which brought the court jeers from a noted syndicated columnist at *The Washington Post.*

"It is presumably not the purpose of the [U.S.] Supreme Court to screw up the political process in this country more than it is already," political commentator David S. Broder wrote of the decision. "But if the learned justices had that intent, they could not be doing a better job."[2]

But did the high court err in its ruling? Should proper decorum in political campaigns really take precedence over free speech concerns? The answer is, probably not—at least not in the case of *State v. Petersilie.* The U.S. Supreme Court ruling means the state must find another vehicle in its quest for cleaner campaigns.

Already, the search is underway. The North Carolina Supreme Court's decision, *State v. Petersilie*[3] was reviewed by a 1994 study commission of the N.C. General Assembly as it considered ways of improving the quality of political debate.[4] With the same purpose, state Sen. Wib Gulley (D-Durham) introduced a bill in the 1995 session of the General Assembly that would have provided state funding for candidates who take a "standard of conduct" pledge for running clean campaigns.[5]

And at least one North Carolina Supreme Court justice, despite the court's setback in *Petersilie,*

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remains sympathetic to establishing some ground rules for campaigns. Justice Willis Whichard, a member of the 5-1 majority in the North Carolina decision, says he understands the U.S. Supreme Court's rationale in the *McIntyre* ruling—which undercut *State v. Petersilie.* But Whichard, a former state legislator, still wishes that some controls could be placed on negative campaigning. And Deputy Attorney General Charles Hensey believes the North Carolina law is sufficiently different from the Ohio law to allow its continued use.

That sentiment is not universal. For North Carolina Supreme Court Chief Justice Burley Mitchell, the *Petersilie* court's sole dissenter, the United States Supreme Court resurrected North Carolina's long history of freewheeling and anonymous political campaigning and debate.

The ruling also prompted a sigh of relief from William Van Alstyne, a renowned scholar of the First Amendment of the United States Constitution and a professor in the Duke University School of Law. Van Alstyne says the U.S. Supreme Court ruled correctly in the *McIntyre* case, and the North Carolina Court erred in its *Petersilie* decision. "Burley Mitchell has been vindicated in his lonely and solitary dissent," he says.

In *McIntyre*, Justice John Paul Stevens wrote for the U.S. Supreme Court: "Under our Constitution, anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent. Anonymity is a shield from the tyranny of the majority."

Those words may have effectively nullified the North Carolina Court's decision in July 1993. In *Petersilie*, the state Supreme Court upheld a North Carolina law that was similar to the one in Ohio. The state court concluded that the law was constitutional under the First Amendment of the U.S. Constitution[6] and Article I, Section 14 of the North Carolina Constitution,[7] both of which guarantee free speech for all citizens.

Chief Justice James G. Exum, now retired, wrote for a majority of the state court that: "Because the statute expressly regulates political speech, it is content-based. . . . We must give it exacting scrutiny; and we must be satisfied that it is necessary to serve the State's compelling interest in having fair, honest elections."[8] The N.C. Supreme Court concluded that the law was narrowly tailored to serve the state's interest in fair elections and that the law did not infringe on anyone's First Amendment rights of free speech.

The North Carolina law makes it a misdemeanor "for any person to publish in a newspaper or pamphlet or otherwise, any charge derogatory to any candidate or calculated to affect the candidate's chances of nomination or election, unless such publication be signed by the party giving publicity to and being responsible for such charge."[9] Ohio's version prohibited anonymous political campaign leaflets designed to "influence voters in any election."[10]

Van Alstyne says that the North Carolina statute "is dead in the water" as a result of the *McIntyre* decision. It also affects 39 other state laws as well as a similar act of Congress.

The public outcry in North Carolina against perceived abuses of political speech, including the cries of losing politicians in heated campaigns, prompted the North Carolina General Assembly to set up a 1994 study commission to look for ways to clean up the state's campaigns. As part of that study, legislators reviewed the statute under which Petersilie was convicted, in existence since 1931,

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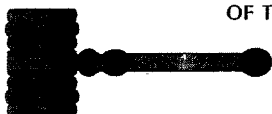
—POLITICAL COMMENTATOR DAVID S. BRODER OF THE *WASHINGTON POST* ON THE *MCINTYRE* DECISION



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that makes it a crime to publish truthful but anonymous speech.[11]

North Carolina's retreat to the English tradition of punishing true but anonymous speech emerged some sixty years ago when this portion of the campaign law was adopted. But no reference to the statute is found in recorded court decisions until the *Petersilie* case.[12]

Although no new legislation was proposed by the 1994 study committee, the legislature's focus, in part, stemmed from some truthful, but negative and anonymous, campaign leaflets circulated in 1994 state legislative races. Former House member Maggie Jeffus (D-Guilford) objected to signs posted at polling places on election day stating that she had been endorsed by a gay rights organization. The information was true. Its distribution fell within the *Petersilie* statute and, therefore, exposed the person who posted the signs to potential criminal charges.

After decades of silence, the statute had regained statewide recognition in November 1989. Frank W. Petersilie, after failing to gain sufficient votes to qualify for a run-off race for a seat on the Boone Town Council, distributed a copy of a *Washington Post* article written by Nan Chase, the wife of Saul Chase, one of the candidates in the run-off election.

The article expressed Mrs. Chase's opinion about prayer in school. An unsigned letter distributed with the article quoted Mrs. Chase's description of herself as an "unbeliever (in Christianity) in the midst of the pious" who found herself unable to criticize "religious paraphernalia displayed in public offices and on state-owned vehicles."

The article and the views attributed to Mrs. Chase in the letter would have been unpopular with a segment of the Boone electorate, and distributing these materials was likely intended to damage Saul Chase's candidacy. Petersilie did not sign his name to the material he sent out. He eventually admitted that he addressed some of the envelopes.

A few days later, Petersilie received a flyer urging voters to support the "pro liquor" candidates—Chase and another contender, Louise Miller. Petersilie remailed that flyer to about 20 or 25 individuals—again without signing his name.

He was charged with 11 counts of violating the anonymous political advertising statute and faced a maximum sentence of 22 years in prison. Instead, a Watauga County Superior Court judge sentenced him to a two-year prison term, which was suspended, and placed Petersilie on supervised probation for three years. He also was ordered to spend seven weekends in jail, to pay a $400 fine and court costs, and to perform 180 hours of community service.[13]

Petersilie appealed his conviction on constitutional and jurisdictional grounds. The Supreme Court ordered a new trial for him on jurisdictional grounds but upheld the constitutionality of the statute upon which the conviction rested.[14]

After Petersilie's conviction, other individuals across the state were singled out for similar prosecution:

- Rick Rosen, a leader of a citizen's group opposed to an Alamance County landfill, was convicted of violating the law in June 1992 when his organization placed an advertisement in the Burlington *Times-News* that did not state the sponsor. Never mind that the organization had run similar ads with its sponsorship listed and that many people may have known the source. The county manager and four county commissioners, two of whom were up for reelection, sought retribution. Rosen was convicted and ordered to pay $55 in court costs as punishment.[15] He appealed the decision and the prosecutor decided not to pursue the case further. The newspaper was not charged for publishing the ad.
- A former wife of Chapel Hill lawyer Barry Winston was charged in May 1994 with distributing anonymous flyers during his campaign for Orange County district attorney. Anne Russell of Wilmington distributed the flyers to businesses and placed them on car windshields. The flyers challenged Winston's integrity in dealings with former wives and included excerpts from a lawsuit seeking unpaid legal fees, part of an Internal Revenue Service letter declaring a tax lien, and a deposition concerning Winston's personal life.[16]

VOTE
LIQUOR BY THE DRINK
FOR BOONE

FOUR YEARS AGO, WITH THE HEIP OF SAUL
CHASE, THE A.S.U. STUDENTS BROUGHT BEER
TO BOONE. NOW IS THE TIME TO COMPLETE
THE PARTY!
SUTTLE, DUGGER, & MARSH REFUSE TO
ENDORSE THIS ISSUE AND WOULD WORK
TO DEFEAT A LIQUOR BY THE DRINK
REFERENDUM.

VOTE
SAUL CHASE AND LOUISE MILLER
NOV. 7TH
THE "PRO-LIQUOR"
CANDIDATES

Dear Fellow Christians:

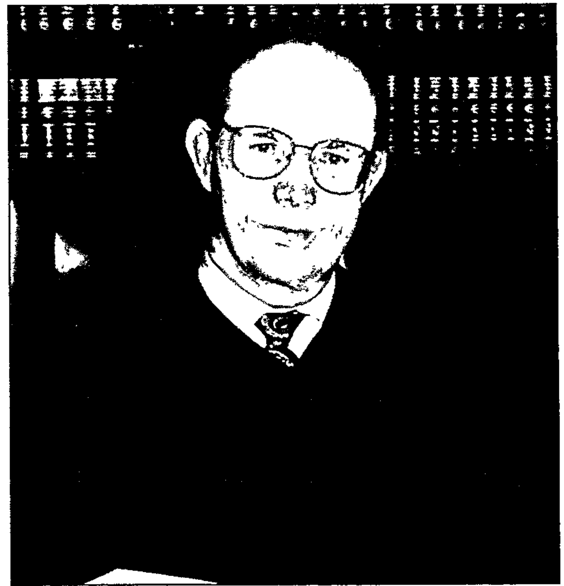
Chase wants to take away aggressive Christian influence from public
buildings and gathering places, such as our schools!

In an article published in the Washington Post, Mrs. Saul Chase
ridiculed the people of Boone for their support of Christianity
stating that here "Christianity is...intimidating and self-
perpetuating.

Calling herself an "unbeliever (in Chrisianity) in the midst of the
pious", Mrs. Saul Chase states that she is unable to openly criticize
"religious paraphernalia displayed in public offices and on state
owned vehicles", and she also says that "if (anyone) speak(s) out
forcefully against what may be an unconstitutional mixing of church
and state, they will be unable to enter the political mainstream that
has the power to seperate the two spheres". --This thought has not been
spoken to the people of Boone by Mrs. Chase, only to the Washington
Post. Why keep it from us? Because her husband is on our Town Council,
and was just put in the run off for re-election. If he wins, he will
have the power to take away any Christian influence from the Town
employees, buildings, etc.. It can be assumed that Chase alledgedly
has a goal to wipe out Christian influence from our town, take it away
from the very God-fearing Christian people who helped put him in office
Candidates should be open about all of their feelings of all issues
and it appears that Saul Chase has been deceptive to us by not
supporting the good, wholesome beliefs of our people. A deception
that is alledgedly a deliberate attempt to gain power to take our
Christian atmosphere from us. We, the town, should stop him, keep
him out of our town government and hold fast to our Christian freedoms
that our forefathers fought hard to establish. Vote against Saul Chase

This flier and an anonymous letter distributed by Boone resident Frank Petersilie led to criminal charges against Petersilie through a 60-year-old statute outlawing anonymous political speech.

***Chief Justice Burley Mitchell, the lone dissenter in* Petersilie**



- In May 1994, Cumberland County District Attorney Ed Grannis asked the State Bureau of Investigation to investigate a negative ad against a candidate for the General Assembly that ran in the *Fayetteville Observer-Times* three days before the May 3 primary.[17] Again, the Fayetteville paper was not charged. The person placing the advertisement through an ad agency was the target of the investigation.
- In 1992, *The Shelby Star* ran an ad without the appropriate identifying information and the individual, not the newspaper, was prosecuted under the statute.[18]
- Again in 1992, *The Bugle Calls*, an anonymous newsletter written by "The Town Tattler" (whose real name is Frances Winslow), received a remonstration from Assistant District Attorney Ernie Lee in Onslow County. Lee wrote a letter stating that the paper might be found in violation of the law if it continued writing anonymous criticism of political candidates.[19]

Curiously, newspapers printing such advertisements have yet to be prosecuted. Before the state Supreme Court ruled in *Petersilie*, Charles Hensey, an assistant attorney general representing the state in election law violations, said that he wouldn't go after a newspaper because he believed the state could not withstand a challenge from newspapers of the First Amendment principles involved.

Then-Chief-Justice James Exum, writing for the majority of the court in *Petersilie*, concluded that the statute did not infringe upon free speech rights. He narrowly construed the statute to read that it is illegal to publish an anonymous accusation derogatory to a candidate in a political campaign. The state court balanced two U.S. Supreme Court cases—*Burson v. Freeman*[20] and *Talley v. California*[21]—which reached opposing results.

In *Burson*, the U.S. Supreme Court upheld a statute that prohibited election day solicitation of votes within 100 feet of a polling place. The Court explained that "a facially content-based restriction on political speech in a public forum. . . must be subject to exacting scrutiny: The State must show that the regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end."[22] The court felt the election day restriction met that test.

The U.S. Supreme Court in *Talley*, on the other hand, with facts more similar to Petersilie's situation, applied the same standard, and concluded that the law prohibiting the distribution of anonymous pamphlets and leaflets on public matters of importance was void because "it would tend to restrict freedom to distribute information and thereby freedom of expression."[23]

Justice Willis Whichard still wishes some controls could be placed on negative campaigning.

The N.C. Supreme Court, faced with these and other U.S. Supreme Court opinions, concluded that the North Carolina law fell between the *Burson* and *Talley* decisions. "In the context of a campaign it is necessary for accusers of candidates to identify themselves, even if they speak the truth, in order for the electorate to be able to assess the accusers' bias and interest. . . . This kind of information is required in order for the electorate to determine what weight, if any, should be given the accusation, even if it is true. The source of the charge is as much at issue as the charge itself."[24] Therefore, the court held that the statute was narrow enough to withstand free speech scrutiny.

Justice Burley Mitchell, the lone dissenter in the case, wrote, "The decision of the majority to uphold this flagrant violation of the First Amendment opens a sad chapter in the history of this Court. I can only pray that this chapter and the inevitable harm that will result to this State's people and their government will be brief."[25]

He stated, "I have grave reservations as to whether, consistent with the First Amendment, any public purpose can justify such a limitation on pure political expression. . . . The right to anonymity has long been recognized in this country as a necessary component of the constitutional rights of free speech and a free press."[26]

Indeed, Justice Mitchell's dissent is consistent with North Carolina's early history and recent North Carolina Supreme Court decisions affecting other speech-related issues.[27] This state has stopped punishing invasion of privacy claims such as publication of private facts[28] and placing a person in a "false light."[29] North Carolina was the first state court to require public officials to meet a high standard of proof in libel cases.[30]

[I]n for a calf is not always in for a cow. . . . we do not thereby hold that the state may not in other, larger circumstances, require the speaker to disclose its interest by disclosing its identity.

— Justice Ruth Bader Ginsburg
U.S. Supreme Court

North Carolina refused to ratify the U.S. Constitution because it lacked a freedom of speech and press clause. The *Petersilie* decision ran counter to the state's early determination to allow free flow of debate. As the late U.S. Supreme Court Justice Hugo Black wrote in Talley:

> Anonymous pamphlets, leaflets, brochures and even books have played an important role in history. Persecuted groups and sects have been able to criticize oppressive practices and laws either anonymously or not at all. The press licensing law of England, enforced against the Colonies, was due in part to the knowledge that exposure of the names of printers, writers and distributors would lessen the circulation of literature critical of the government. The old seditious libel cases in England show the lengths to which government had to go to find out who was responsible for books that were critical of the rulers. . . .[31]

Before the Revolutionary War, colonial patriots frequently had to conceal their authorship or distribution of literature that easily could have brought down on them prosecutions by English-controlled courts. During that period the Letters of Junius were written to urge the colonists to rid themselves of English rule. The identity of their author is unknown to this day. Even the *Federalist Papers*, written in favor of the adoption of our Constitution, were published under fictitious names. It is plain that anonymity has sometimes been assumed for the most constructive purposes.

The anonymous but truthful political speech law of North Carolina harkens back to the English practice of punishing those individuals who distributed true information without identifying themselves. Had the authors of the *Federalist Papers* circulated their material in North Carolina today, they could now be languishing in jail.

The United States Supreme Court decision in *McIntyre v. Ohio* clearly calls into question the validity of the North Carolina statute. But the North Carolina statute is more narrowly drawn. And the high court left the door open a crack. As U.S. Supreme Court Justice Ruth Bader Ginsburg wrote in her concurring opinion in *McIntyre*:

> [I]n for a calf is not always in for a cow. . . . we do not thereby hold that the state may not in other, larger circumstances, require the speaker to disclose its interest

by disclosing its identity. Appropriately leaving open matters not presented by McIntyre's handbills, the court recognizes that a State's interest in protecting an election process 'might justify a more limited identification requirement.'[32]

So the Supreme Court may have left the state some room to regulate political speech. But the court's overall ruling is a high hurdle for any state that wishes to constrain First Amendment rights to achieve that purpose.

FOOTNOTES

[1] *McIntyre v. Ohio Elections Commission*, 115 S.Ct. 1511 (1995).

[2] David S. Broder, *The Washington Post*, editorial, May 7, 1995, p. 7A.

[3] *State v. Petersilie*, 334 N.C. 169, 432 S.E.2d 832 (1993).

[4] "Questions about Regulating Negative Electioneering," Report by William R. Gilkeson, Staff Attorney, General Research Division, Legislative Services Office, December 1, 1994, p. 2.

[5] Senate Bill 1040. The bill was packaged with a House bill setting term limits for legislators (HB 12) and voted down in the Senate.

[6] The First Amendment of the U.S. Constitution states, "Congress shall make no law. . . abridging the freedom of speech, or of the press. . . ."

[7] Article I, Section 14 of the North Carolina Constitution states, "Freedom of speech and of the press are two of the great bulwarks of liberty and therefore shall never be restrained, but every person shall be held responsible for their abuse."

[8] *Petersilie*, note 3 above, at p. 184.

[9] N.C. General Statute 163-274(7).

[10] Ohio Code, Section 3599.09(A).

[11] Gilkeson, note 4 above.

[12] The statute was used in 1986 to force the resignation of Bill Lashley, then a Burlington City Councilman, from office. Lashley had distributed an unsigned flier that said "Alamance County can't afford four more years of John Freeman wasting the taxpayer's money." Freeman was a Democratic county commissioner who was defeated in the November, 1984 election. Lashley also distributed other anonymous material in 1985 against other candidates. Then District Attorney George Hunt "claimed that Lashley was a danger to American society because he was trying to get people into office who held the same views he did." See "In defense of free speech, tax protestors, and Bill Lashley," *The Alamance News*, Dec. 8, 1993, p. 2.

[13] Charlie Peek, "Judge Orders Petersilie to 7 Weekends in Jail," *Winston-Salem Journal*, Winston-Salem, N.C., Oct. 20, 1990, p. 17.

[14] Saul Chase says that while he can understand the Supreme Court's ruling in favor of true but anonymous political speech, it's important to note that not all of the material circulated against him was true. For example, in the letter mailed anonymously along with the *Washington Post* article, the author writes, "If he wins, he will have the power to take away any Christian influence from the Town employees, buildings, etc... It can be assumed that Chase allegedly has a goal to wipe out Christian influence from our town, take it away from the very God-fearing Christian people who helped put him in office." Chase says he had neither the power nor the intent to wipe out Christian influence in Boone. Ultimately, Chase was vindicated at the polls. He ran for the Town Council again in 1994 and led the ticket. He now is mayor pro tempore of Boone.

[15] Alamance County District Court Division 92 CR 10807.

[16] Noah Bartolucci, "Candidate's Ex-Wife Charged in Flier Case in Orange DA's Race," *The News & Observer*, Raleigh, N.C., May 20, 1994, p. B6. Russell is seeking a reversal of her conviction in light of the McIntyre case. So far, her petitions have been denied, most recently on July 12, 1995, by the N.C. Court of Appeals (P95-269).

[17] Marc Barnes, "Richardson Attack Cut Short by Judge," the *Fayetteville Observer-Times*, Fayetteville, N.C., Dec. 20, 1994, p. 1A.

[18] Author's personal knowledge, based on a public seminar she participated in for media and elections officials in Shelby.

[19] Ben Stocking, "Some think law's a gag," *The News & Observer*, Raleigh, N.C., Aug. 3, 1992, p. A1.

[20] 504 U.S. 191, 112 S.Ct. 1846 (1992)

[21] 362 U.S. 60 (1960).

[22] *Burson* at p. 1851.

[23] *Talley* at p. 65.

[24] *Petersilie* at p. 187.

[25] *Petersilie* at p. 207.

[26] *Petersilie* at p. 199.

[27] For more on the court's decisions affecting speech-related issues, see Katherine White, "The N.C. Supreme Court at 175: Slow on Civil Rights But Fast on Free Speech?" *North Carolina Insight*, Vol. 15, Nos. 2-3 (September 1994), pp. 106-111.

[28] *Hall v. Post*, 323 N.C. 259, 372 SE2d 711 (1988).

[29] *Renwick v. News & Observer Publishing Co.*, 310 N.C. 312, 312 S.E. 2d 405 (1984).

[30] *Ponder v. Cobb*, 257 N.C. 281, 126 S.E.2d 67 (1962).

[31] *Talley v. California* at pp. 64-65 (footnotes omitted).

[32] *McIntyre v. Ohio Elections Commission*, note 1 above.