Separation of Powers -- The Suspended Sentence

Thomas Joseph Farris

social welfare it does have expertise in the field of social policy. That is, the criteria for determining the time of death should *not* be a factual issue to be decided by the jury in each case but, instead, should be a socially accepted statement of the law, duly responding to medical advancements but not completely controlled by a purported consensus of medical science.[58]

Second, by recognizing brain death as a possible means for determining the time of death, the *Tucker* case, like the Kansas statute, acknowledges medical realities. Since the appearance of the *Harvard Report,*[59] which stated the "brain death" criteria in 1968, there has been general acceptance by the medical profession that one is dead when his brain is not functioning and his respiration is not spontaneous.[60] Again, the medical need for transplant organs and the social need for protecting potential donors from premature transplantation are not issues to be resolved by exclusive reliance upon the medical profession.

While the medical profession would doubtless approve of the verdict reached in *Tucker,* the death criteria and the clinical tests applied to indicate the satisfaction of these criteria are questions too socially important to be considered factual issues to be decided by a jury. Since there is no legal precedent for the courts to follow in establishing death criteria to be employed in the transplant context, the various legislatures of the states should recognize the dilemma with which the courts and physicians are faced and should return to the pronouncement of death the much needed characteristic of finality.

RICHMOND STANFIELD FREDERICK II

Separation of Powers—The Suspended Sentence

Every day more than one hundred and fifty Americans are killed in automobile accidents.[1] Over half of these fatalities involve alcohol-

[58]There are other problems with which law-makers will have to grapple in this complex area of transplantation. Who is to decide how the limited number of available organs is to be distributed for transplantation? Are physicians to be given absolute freedom to determine who is to live and who is to die? When human resources are to be allocated, who is to exercise the ultimate control? Unfortunately, discussion of these issues is beyond the limitations of this note.

[59]Harvard Medical School Ad Hoc Committee to Examine the Definition of Brain Death, *supra* note 1.

[60]*See* authorities cited note 48, *supra.*

[1]McDowell, *How Phoenix Gets Drunks Off the Road,* READER'S DIGEST, Feb. 1972, at 52.

related accidents.[2] Outraged by this senseless carnage, various state legislatures and governmental agencies have commenced an all-out campaign against driving under the influence of alcohol. In Wisconsin, the arresting officer uses a mobile videotape camera to record the vehicle's abnormal operation and the driver's behavior.[3] Vermont has a tough program of interrogation and coordination tests given to special enforcement officers while measured amounts of alcohol gradually bring their blood alcohol level up to the state's intoxication standard.[4] In Nassau County, New York, a twenty-four hour telephone service is maintained so drunks can call for transportation.[5] The Idaho state legislature has cracked down by setting a mandatory ten-day sentence on all drivers convicted of driving under the influence.[6] The statute provided that the sentence shall be imposed by every judge in Idaho without any right to exercise judicial discretion.

Found guilty of driving under the influence by an Idaho probate court, Ernesto Medina was fined one hundred and seventy-five dollars and sentenced to thirty days in the county jail.[7] The judge then suspended the entire jail sentence and most of the fine, placing Medina on probation for six months. The prosecutor promptly filed a writ of mandate to compel the judge either to sentence the defendant according to the mandatory ten-day provision or to show cause why. The district court quashed the writ, and on appeal the Idaho Supreme Court held that the mandatory provision of the statute was an unconstitutional breach of the separation of powers and an invalid limitation upon the

---

Another 9,560 are injured daily. *Id.* These figures are, of course, averages.

[2]*Id.* The National Highway Traffic Safety Administration estimates that a driver with 0.10% blood-alcohol concentration is almost seven times more likely to have a vehicle collision than his non-drinking counterpart. Once the blood-alcohol concentration reaches 0.15% the driver is 25 times more likely to have a collision than a non-drinker. NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, U.S. DEP'T OF TRANSPORTATION, THE ALCOHOL SAFETY COUNTERMEASURES PROGRAM 3-4 (rev. ed. 1971).

[3]TIME, Apr. 3, 1972, at 59. As of April 1972, every driver videotaped and charged has pleaded guilty to operating while intoxicated. Most of these drivers have been placed on a corrective probationary program. *Id.*

[4]TIME, Mar. 6, 1972, at 55.

[5]McDowell, *supra* note 1, at 54.

[6]IDAHO CODE § 49-1102(d) (Supp. 1971): "Every person convicted under this section shall serve at least ten (10) days in the county or municipal jail and this sentence shall be mandatory on every judge of every court of the state of Idaho without any right to exercise judicial discretion in said matter. . . ."

[7]State v. McCoy, 94 Idaho 236, ____, 486 P.2d 247, 248 (1971).

court's inherent right to suspend sentences.[8] The court rested its decision upon the common law power to suspend sentences, the tripartite separation of powers of the Idaho constitution, the inherent powers of the judiciary, and a common-sense interpretation of the role of the judge in our system of law.[9]

At common law the severity of sentences, the inability to decree new trials, and the lack of an effective appellate review of the facts gave rise to the court's power to suspend sentence, at least temporarily, even in the absence of an enabling statute.[10] In Sir Matthew Hale's *Pleas of the Crown*, a scholarly work on the criminal law by the chief justice of the Court of the King's Bench in the seventeenth century, the author noted three kinds of suspension:

> Reprieves or stays of judgment or execution are of three kinds. *viz.*
>
> I. *Ex mandato regis* [from the King's order], . . . by some message, or by sending his ring, but at this day it is ordinarily signified by the privy signet, or by the master of requests.
>
> II. *Ex arbitrio judicis* [from the authority of the judge]. Sometimes the judge reprieves before judgment, as where he is not satisfied with the verdict, or the evidence is uncertain, or the indictment insufficient, or doubtful whether within clergy; and sometimes after judgment, if it be a small felony, tho out of clergy, or in order to a pardon or transportation. . . .
>
> III. *Ex necessitate legis* [from the law of necessity], which is in case of pregnancy, where a woman is convict of felony or treason.[11]

However, a later commentator, the famous Sir William Blackstone, stressed the temporary nature of suspension:

> I. A reprieve, from *reprendre*, to take back, is the withdrawing of a sentence for an interval of time: whereby the execution is suspended. This may be, first, *ex arbitrio judicis*; either before or after judgment: as, where the judge is not satisfied with the verdict, or the

---

[8] *Id.* at ____, 486 P.2d at 252. The power to suspend sentences refers to two distinct procedures: suspension by refusing to impose and pronounce sentence once guilt has attached or the suspension of the execution of a sentence already pronounced. The Idaho court was dealing with the latter interpretation of suspended sentence. Unless otherwise indicated, this note is concerned with suspension of the execution of sentence.

[9] *Id.* at ____-____, 486 P.2d at 249-52.

[10] People *ex rel.* Forsyth v. Court of Sessions, 141 N.Y. 288, 292-93, 36 N.E. 386, 387 (1894). *See also* 30 HARV. L. REV. 369 (1917).

[11] 2 M. HALE, THE HISTORY OF THE PLEAS OF THE CROWN 412-13 (S. Emlyn ed. 1778).

> evidence is suspicious, or the indictment is insufficient, or he is doubtful whether the offence be within clergy; or sometimes if it be a small felony, or any favorable circumstances appear in the criminal's character, in order to give room to apply to the crown for either an absolute or conditional pardon.[12]

Relying mainly on Blackstone's qualification of the temporary nature of suspended sentences, in 1916 the United States Supreme Court held in *Ex parte United States*[13] that the federal district courts did not have the power to suspend sentences. The majority of state courts now hold that in the absence of statute a court may withhold temporarily the imposition of sentence for a term, but the court is powerless to suspend permanently the operation of a sentence already imposed.[14] The courts of a handful of states, including New York,[15] New Jersey,[16] North Caro-

---

[12]4 W. BLACKSTONE, COMMENTARIES *394. Blackstone also recognized the pregnancy, insanity, and non-identity pleas for temporary suspension or stay of execution as well as the permanent King's pardon. *Id.* at *396.

[13]242 U.S. 27 (1916). In 1925 Congress passed a federal probation act the present version of which provides in part as follows:

> Upon entering a judgment of conviction of any offense not punishable by death or life imprisonment, any court having jurisdiction to try offenses against the United States when satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby, may suspend the imposition or execution of sentence and place the defendant on probation for such period and upon such terms and conditions as the court deems best.

18 U.S.C. § 3651 (1970).

[14]ALI-ABA JOINT COMM. ON CONTINUING LEGAL EDUC., THE PROBLEM OF SENTENCING 40 (1962). *See also* J. WAITE, THE PREVENTION OF REPEATED CRIME 95 (1943).

[15]People *ex rel.* Forsyth v. Court of Sessions, 141 N.Y. 288, 292, 36 N.E. 386, 387 (1894): "There can, I think, be no doubt that the power to suspend sentence after conviction was inherent in all such courts at common law." Therefore, the New York Court of Appeals concluded that the court of sessions, a court with superior criminal jurisdiction, had the power to suspend the imposition of sentence. In People v.Oskroba, 305 N.Y. 113, 117, 111 N.E.2d 235, 236-37 (1953), the court of appeals stated, "It has long been accepted practice in the administration of criminal law that, after conviction, a court may suspend the sentence or execution of judgment and place the defendant on probation, a power inherent in the court at common law. . . ."

However, some New York cases restrict this power to suspend as applying only to crimes set out in the penal code, and in a case involving the sale of spirituous liquors, a violation of the Liquor Tax Law and not the Penal Code, the New York Supreme Court held that a lower court judge could not suspend the execution of a sentence where the specific statute required that one convicted be imprisoned. People *ex rel.* Hirschberg v. Seeger, 179 App. Div. 792, 166 N.Y.S. 913 (1917).

[16]"Enough, however, can be gathered from the English precedents to show that courts of criminal jurisdiction exercised the power of delaying the imposition of a sentence for variou reasons, and of delaying the operation of an imposed sentence, and did not do this by virtue of any statute, and therefore must have inherently had the power so to do." State *ex rel.* Gehrmann v. Osborne, 79 N.J. Eq. 430, 441, 82 A. 424, 428 (Ch. 1911). The court held that, if the defendant

lina,[17] Michigan,[18] Ohio[19] and now Idaho,[20] regard the power to suspend as inherent in the judiciary, although only in the Idaho case was a court faced with overruling a specific legislative mandate in the criminal statute itself prohibiting the suspension of sentence. Nevertheless, today virtually all states empower their courts to suspend the execution or the imposition of sentence in conjunction with a probation system.[21]

Conceding that the power might have existed at common law, the state prosecutor in the Idaho case argued that the state legislature clearly has the power to abrogate the common law.[22] The state is not inexorably bound by common law principles. The Idaho Supreme Court readily agreed but pointed out that this power is not merely a substantive element of the common law; rather, it goes to the very nature of the judiciary branch of the state government.[23]

According to the Idaho state constitution, the judicial power is vested in the courts;[24] however, state constitutions have traditionally been regarded as limitations upon power, not grants of power.[25] Like most state constitutions, the specific powers of the judiciary are not

---

does not object, it can suspend the imposition of sentence. *Id.* at 443, 82 A. at 429. Concerning the power to suspend the execution of a sentence once pronounced, *see* Clifford v. Heller, 63 N.J.L. 105, 116, 42 A. 155, 159 (1899): "At common law reprieve might be granted either by the king under his power to pardon or by the court, and every court which had power to award execution had power to grant a reprieve. This reprieve was simply a suspension of the sentence."

[17]State v. Simmington, 235 N.C. 612, 614, 70 S.E.2d 842, 844 (1952): "A court has the inherent power to suspend a judgment or stay execution of a sentence in a criminal case."

[18]People v. Stickle, 156 Mich. 557, 564, 121 N.W. 497, 499 (1909): "Assuming the power to be, as it was at common law asserted to be, a power inherent in courts, no new power is conferred upon courts when the legislature in terms authorizes courts to suspend sentence."

[19]An early Ohio case recognized the inherent power of the court to suspend sentence, but apparently in Ohio the power could be abrogated by the state legislature. Weber v. State, 58 Ohio St. 616, 619, 51 N.E. 116, 117 (1898): "The power to stay the execution of a sentence, in whole or in part, in a criminal case, is inherent in every court having final jurisdiction in such cases, unless otherwise provided by statute."

[20]94 Idaho at ____, 486 P.2d at 251: "In this light, we perceive that the authority possessed by the courts to sentence necessarily includes the power to suspend the whole or any part of that sentence in proper cases and this is more than a bare rule of substantive law subject to change by the legislature. Rather, it is in the nature of an inherent right of the judicial department. . . ."

[21]Professor John Waite has listed statutory programs of probation and suspended sentence for forty-five states, the District of Columbia, and the federal system. J. WAITE, *supra* note 14 at 96-105.

[22]94 Idaho at ____, 486 P.2d at 249.

[23]*Id.* at ____, 486 P.2d at 251.

[24]IDAHO CONST. art. 5, § 2.

[25]*See, e.g.*, Los Angeles Met. Transp. Auth. v. Public Util. Comm'n, 59 Cal. 2d 863, 868, 382 P.2d 583, 585, 31 Cal. Rptr. 463, 465 (1963); McIntyre v. Clarkson, 254 N.C. 510, 515, 119 S.E.2d 888, 891 (1961); Shepherd v. San Jacinto Junior College Dist., 363 S.W.2d 742, 743 (Tex. 1962).

enumerated in the Idaho Constitution; however, article V, section thirteen provides that the legislature has no power "to deprive the judicial department of any power or jurisdiction which rightly pertains to it as a coordinate department of the government."[26] Although the concept of vested judicial power is difficult to define, many aspects of this inherent power have been recognized by state and federal courts in the evolution of case law. The contempt power,[27] the power of the attorney general to enter nolle prosequi on an indictment,[28] and the power to run sentences concurrently[29] have all been recognized as not requiring any enabling legislation. These powers, as well as the power to suspend sentences, are illustrative of the vested judicial power as interpreted by different courts without being all-inclusive.

If courts do have the inherent power to suspend sentence, serious questions concerning the separation of powers arise. States that deny the power to suspend sentence in the absence of statute often reason that this is judicial infringement upon the executive's power to pardon.[30] However, in practice the courts usually suspend sentence only for minor offenses, reserving more serious crimes for the governor's pardon.[31] Also, the trial judge who observed all the evidence, the witnesses' demeanor, and testimony regarding the defendant's character will be in a better position to decide upon the appropriate punishment, imprisonment or probation. Arguably, the executive power to pardon affects the

---

[26]IDAHO CONST. art. 5, § 13. For a very similar provision *see* N.C. CONST. art. IV, § 1.

[27]In State v. Steelworkers Local 5760, 172 Ohio St. 75, 80, 173 N.E.2d 331, 336 (1961), the Supreme Court of Ohio declared the general rule: "That a court inherently, and quite apart from any statutory authority or express constitutional grant, possesses such contempt power has been the rule from time immemorial."

[28]The inherent common law powers of the attorney general in regard to nolle prosequi are extensively set out in People *ex rel.* Elliott v. Covelli, 415 Ill. 79, 83-89, 112 N.E.2d 156, 158-61 (1953). The general rule is that in the absence of statute, the power to enter a nolle prosequi is vested in the attorney general or in the several public prosecutors. 22A C.J.S. *Criminal Law* § 457 (1961).

[29]"In the absence of statute, the determination whether two sentences to the same penal institution shall run concurrently or consecutively is an incident to the judicial function of imposing sentences upon a convict and is a matter for the determination of the court." Redway v. Walker, 132 Conn. 300, 306, 43 A.2d 748, 751 (1945). *See also* 24B C.J.S. *Criminal Law* § 1994 (1962).

[30]*See, e.g.*, State v. Sturgis, 110 Me. 96, 101, 85 A. 474, 477 (1912); Rightnour v. Gladden, 219 Ore. 342, 355, 347 P.2d 103, 110 (1959). Apparently, the many states that require legislation before the courts can suspend sentence reason that when two branches of government, the legislature and the judiciary, combine to infringe the executive's power to pardon the infringement is more palatable.

[31]2 N.C.L. REV. 50, 52 (1923).

punishment and perhaps even the defendant's guilt.[32] Under a suspended sentence with the condition of defendant's good behavior, the conviction and the civil disabilities remain;[33] eventually, the defendant may have to suffer the punishment.

Perhaps the greatest friction in the separation of powers arises between the judicial and legislative branches. The particular role of the legislative body in regard to the criminal law is to list and delineate the offenses forbidden and to set the maximum and minimum penalties.[34] Thus, these elected representatives seek to embody the will of the people by setting penalties which expressly gauge the degree of society's disapproval of the proscribed conduct.[35] Certainly, the aims of the Idaho legislature were meritorious in seeking to deter intoxicated drivers by imposing a mandatory ten-day sentence.[36] Accordingly, once the court had discharged its duties by finding the facts and ascertaining the defendant's guilt, the legislature sought to impose a sentence without the interference of the trial judge's discretion. Unbridled judicial discretion has long been criticized for its arbitrary nature, lack of adequate standards, and the glaring disparity of sentences within the maximum and minimum range of penalties for virtually the same criminal acts. As one legal writer explained:

> Disparity without a rational basis not only offends principles of justice, but may have an inhibiting effect on the treatment phase of criminal administration as well. Prisoner morale bears a vital relationship to prisoner response to the rehabilitative process and may be adversely affected if the offender believes that his sentence is the product of the

---

[32]30 HARV. L. REV. 369, 371 (1917).

[33]In discussing the lot of a petitioner who had been convicted of mail fraud and placed on probation for two years, the United States Supreme Court noted:

> Petitioner stands a convicted felon and unless the judgment against him is vacated or reversed he is subject to all the disabilities flowing from such a judgment. The record discloses that petitioner is a lawyer and by reason of his conviction his license was subject to revocation (and petitioner says that he has been disbarred) without inquiry into his guilt or innocence.

Berman v. United States, 302 U.S. 211, 213 (1937). *See also* People *ex rel.* Forsyth v. Court of Sessions, 141 N.Y. 288, 294-95, 36 N.E. 386, 388 (1894).

[34]*See, e.g., Ex parte* United States, 242 U.S. 27, 42 (1916); Mack v. State, 203 Ind. 355, 368, 180 N.E. 279, 283 (1932); State v. Meyer, 228 Minn. 286, 37 N.W.2d 3 (1949); Woods v. State, 130 Tenn. 100, 169 S.W. 558 (1914).

[35]ALI-ABA JOINT COMM. ON CONTINUING LEGAL EDUC., *supra* note 14, at 61.

[36]Furthermore, the statute provided that the ten-day sentence could be served over a six-week period in one-day segments. IDAHO CODE § 49-1102(d) (Supp. 1971).

prejudices or idiosyncrasies of a particular judge.[37]

However, the court noted that the specific wording of the statute in effect deprived the court, an equal branch of government, of adequately pperforming its function—the administration of justice.[38]

Whenever a court invalidates a state statute, it must exercise great caution in overruling the collective will of the legislature and upsetting the system of law enforcement.[39] The power to interpret statutes and to declare acts unconstitutional is in effect the ultimate veto power.[40] The very core of the separation of powers is that the legislature should not have the power to determine the conclusiveness of its own decisions.[41] Clearly, a state needs independent courts as a check upon usurped or arbitrary power. In trying to set the automatic sentence without ever hearing the merits of the controversy, the legislature is not acting impartially as a judge but is seeking a declared purpose.[42] Moreover, many leading authorities consider complete separation of powers too impractical for the efficient day-to-day operation of government.[43] The argument that the suspended sentence infringes upon the executive pardon and the legislative right to affix maximum and minimum penalties overlooks the necessary and desirable results of friction between the different branches of government. As Justice Brandeis commented concerning the separation of powers in the federal system,

> The doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy.[44]

---

[37]Comment, *Appellate Review of Primary Sentencing Decisions: A Connecticut Case Study*, 69 YALE L.J. 1453, 1459 (1960). *See also* ALI-ABA JOINT COMM. ON CONTINUING LEGAL EDUC., *supra* note 14, at 64-77 for an engrossing discussion of the disparities of sentencing and the wide divergence in penalties meted out by judges within the same state.

[38]94 Idaho at ___, 486 P.2d at 251-52.

[39]As dissenting Justice McFadden points out, all reasonable doubts are resolved in favor of the act's constitutionality, and if the statute is subject to two interpretations, the one upholding its validity should be adopted. *Id.* at ___, 486 P.2d at 252.

[40]Fairlie, *The Separation of Powers*, 21 MICH. L. REV. 393, 403 (1923).

[41]Pound, *The Judicial Power*, 35 HARV. L. REV. 787, 791 (1922).

[42]*Cf. id.* at 792.

[43]These are extensively noted in Fairlie, *supra* note 40, at 405-31.

[44]Myers v. United States, 272 U.S. 52, 293 (1926) (dissenting opinion).

Furthermore, the legislature necessarily rules by fiat in broad, sweeping terms, while the courts are particularly suited for case-by-case adjudication. In deciding that identical sentences are not constitutionally required for punishing two persons convicted of the same offense, the United States Supreme Court acknowledged the role of judicial discretion in our system: "Sentencing judges are vested with a wide discretion in the exceedingly difficult task of determining the appropriate punishment in the countless variety of situations that appear."[45] Considering the large number of offenders he deals with, a judge familiar with the aims of penology is a professional sentencer.[46] Rather than being the blind dispenser of justice, the judge is in a position to weigh the interests of society and the merits of the particular offender. He should be free to view each crime as unique and to weigh factors like the defendant's prior history, the nature of the crime (whether physical harm was involved), the likelihood of his committing other crimes, whether he can compensate the state or victim, and the probable effect of prison on this defendant.[47] Conversely, the judge is also well-suited to deny suspended sentence when society's interest requires it or when reformation and rehabilitation seem remote. Also, the judge must be free to exercise discretion in the case with extenuating circumstances; for example, the Idaho drunk-driving statute makes no exception for the situation in which an emergency compels an inebriated person to drive.[48]

Unlike the Idaho situation, the North Carolina legislature has not attempted to curtail the courts' power to suspend sentences by a mandatory sentence without regard to judicial discretion. Moreover, despite some very early rulings against the practice,[49] the North Carolina Supreme Court has long upheld the suspended sentence as valid.[50] The power to delay imposing sentence as well as the power to suspend execution of a sentence already pronounced are considered inherent powers of the North Carolina judiciary.[51] Also, the practice has been expressly

---

[45]Williams v. Illinois, 399 U.S. 235, 243 (1970).

[46]*See* Note, *Criminal Procedure—Capital Sentencing by a Standardless Jury*, 50 N.C.L. REV. 118, 121 & n.22 (1971).

[47]*See* ALI-ABA JOINT COMM. ON CONTINUING LEGAL EDUC., *supra* note 14, at 61-62.

[48]94 Idaho at ___, 486 P.2d at 251.

[49]*E.g.*, State v. Bennett, 20 N.C. 170 (1838).

[50]State v. Crook, 115 N.C. 760, 20 S.E. 513 (1894). *See also* Coates, *Punishment for Crime in North Carolina*, 17 N.C.L. REV. 205, 215 (1939).

[51]2 N.C.L. REV. 50 (1923). For an invaluable survey of the particulars and peculiarities of North Carolina's suspended sentence powers, *see* Note, *Criminal Law—Suspension of Sentence*, 31 N.C.L. REV. 195 (1953).

recognized by statute except where the crime is punishable by death or life imprisonment.[52] Ordinarily, the defendant's express or implied consent is required, but if he accepts the conditions of suspension, he waives the right to appeal the issue of his guilt or innocence, although he can appeal the reasonableness of the conditions.[53] The reasoning here is that suspending the imposition of sentence is in the defendant's own behalf, and if the fails to object, he tacitly agrees to the conditions of the suspension.[54]

One reasonable limitation recognized by North Carolina statute and case law is that the terms of suspension can run no longer than five years.[55] The most common condition is suspension upon good behavior or conduct conforming to the law.[56] Although the statute sets out some guidelines for conditions—such as avoiding disreputable persons, reporting to the probation officer, and supporting one's dependents—it expressly permits "any other."[57] Furthermore, the North Carolina Supreme Court has ruled that the probation statute and its procedures are not binding upon the court's inherent power but rather are concurrent with the court's power.[58]

In practice, North Carolina's system is quite laudable. The judge is given broad discretion in deciding whether to grant suspension and in choosing the appropriate conditions. Exercised with prudence, the judge has a valuable corrective device to give minor offenders an opportunity at rehabilitation and reformation. Arguably, the relative leniency of a suspended sentence may give offenders the mistaken impression that criminal sanctions are easily averted, thereby lessening any hopes of rehabilitation. But this is precisely where the judge's discretion should operate. As a professional sentencer who has dealt with many different offenders, the judge is in the ideal position to weigh all of the factors of this particular crime with its own circumstances and the possibility of its recurrence. In effect, the suspended sentence can be an incentive toward defendant's good behavior in the future.[59]

---

[52]N.C. GEN. STAT. § 15-197 (1965).

[53]State v. Griffin, 246 N.C. 680, 682, 100 S.E.2d 49, 51 (1957).

[54]State v. Miller, 225 N.C. 213, 215, 34 S.E.2d 143, 145 (1945).

[55]N.C. GEN. STAT. § 15-200 (Supp. 1971).

[56]Note, 31 N.C.L. REV., *supra* note 51, at 200.

[57]N.C. GEN. STAT. § 15-199 (1965).

[58]State v. Simmington, 235 N.C. 612, 614, 70 S.E.2d 842, 844 (1952).

[59]30 HARV. L. REV. 369, 371 (1917). The suspended sentence is especially useful where the minimum penalty under the statute is disproportionate to the criminality involved.

Perhaps the whole issue appears moot since most state legislatures have either expressly given their courts the power by statute or impliedly given it under a probation system.[60] On the contrary, if the power to suspend sentence upon good behavior or to place the defendant on pprobation depends upon the legislature, then the legislature can summarily take it away. If the legislature is allowed to set automatic, mandatory sentences without regard to judicial discretion or extenuating circumstances, then the judge is reduced to the machine-like state of reading out carbon copy sentences based not upon the merits of the particular case but upon a bare minimal finding of facts. The Idaho Supreme Court surmised, "A judge is more than just a finder of fact or an executioner of the inexorable rule of law. Ideally, he is also the keeper of the conscience of the law."[61]

THOMAS JOSEPH FARRIS

---

[60] J. WAITE, *supra* note 14, at 95-105.

[61] 94 Idaho at ____, 486 P.2d at 251.